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Case Number 8,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHRISTOPHER CLAY, Defendant Below- Appellant,	:	
v.	:	No. 8, 2016
STATE OF DELAWARE, Plaintiff Below- Appellee.	:	

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

APPELLANT'S OPENING BRIEF

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DATED: October 17, 2016

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NATURE AND STAGE OF THE PROCEEDINGS

Appellant, Christopher Clay ("Clay"), was arrested on August 9, 2014, for charges relating to an alleged robbery of the Dollar General convenience store located in Georgetown, Delaware. On November 10, 2014, the State of Delaware filed an Indictment charging Clay as an accomplice, along with two other co-defendants, Booker T. Martin ("Martin"), and Maurice C. Land ("Land"), with Robbery in the First Degree, Possession of a Firearm During the Commission of a Felony, Aggravated Menacing, Possession of a Firearm During the Commission of a Felony, Conspiracy in the Second Degree, Possession of a Firearm by a Person Prohibited, Possession of Ammunition by a Person Prohibited, Receiving a Stolen Firearm, and Tampering with Physical Evidence.[1] Additionally, Clay was charged in the Indictment with misdemeanor level resisting arrest. (A14-23)

Clay and his co-defendant, Martin, filed separate pre-trial motions to suppress for lack of reasonable articulable suspicion for their stops and lack of probable cause for their arrests. (A24-32, 85-92) The trial court denied the motions after holding joint evidentiary hearings. (*Exhibits A* and *C*) Additionally, Clay filed a pre-trial motion to sever the charges relating to his status as a person

[1] The counts of possession of a firearm by a person prohibited and possession of ammunition by a person prohibited were severed out of the indictment prior to trial, and later conditionally dismissed by the State. The State elected not to proceed on the count of aggravated menacing, nor the accompanying offense for possession of a firearm during the commission of a felony. The State also chose not to proceed on the count for receiving a stolen firearm.

prohibited and to sever his trial from his co-defendants. (A78-84) The trial court granted the motion for severance with respect to the charges relating to his being a person prohibited, but denied severance of the co-defendants. (*Exhibit B*)

Thereafter, on July 27, 2015, the State filed an amended Indictment charging Clay, with Robbery in the First Degree, Possession of a Firearm During the Commission of a Felony, Conspiracy in the Second Degree, Tampering with Physical Evidence, and misdemeanor Resisting Arrest. (A97-100)

Clay and the two co-defendants, Martin and Land, proceeded to a jury trial that occurred between October 12, 2015 and October 15, 2015. At the conclusion of the State's evidence, Clay moved for a judgment of acquittal based on insufficient evidence presented against Clay as an accomplice. (A175-177) Martin and Land also moved for judgment of acquittal on their charges. The trial court denied all motions for judgment of acquittal. (*Exhibit D*)

The jury found Clay guilty of all charged offenses. Co-defendants, Martin and Land, were similarly convicted; however, Martin was later successful on a renewed motion for acquittal. (A254-280)

On December 11, 2015, Clay was sentenced to a total of 40 years and 6 months of incarceration, followed by probation. (A248-253) The Notice of Appeal was timely filed to this Court. This is Clay's Opening Brief on appeal.

SUMMARY OF THE ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SEVER CO-DEFENDANTS BECAUSE REASONABLE AND SUBSTANTIAL PREJUDICE RESULTED FROM THE JOINT TRIAL.

II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL.

III. THE TRIAL COURT ERRED IN FINDING THE POLICE OFFICER POSSESSED A REASONABLE ARTICULABLE SUSPICION TO SEIZE AND PROBABLE CAUSE TO ARREST APPELLANT.

STATEMENT OF FACTS

On the night of August 9, 2014, Laurie Brown was working at the Dollar General Store in Georgetown, Delaware. (A125) Brown was engaged in her duties of employment by assisting customers and collecting money from cash registers as her shift was ending. (A125-128) She removed the register till and walked back to her office located in the rear of the store, where she was confronted by an individual. (A129) She described the individual as a black male, wearing a black hat, a black t-shirt with the word "Security" written across the front, and holding a black handgun. (A133-134) At trial, Brown identified co-defendant Land, as this individual, and stated that Land ordered her to hand over money from the drawer and lay on the floor at gunpoint. (*Id.*) Brown does not implicate any other individual as participating in this offense.

The State's primary evidence was the video recording from the Dollar General surveillance system. The video shows Land enter the Dollar General and proceed directly to the back aisle of the store, where he paces up and down the aisle. (A144-148) Land enters the back office, removes money from a purse, then exits the back office into the store. (*Id.*) Next, Land is viewed following Brown into the back office, takes out a gun, points it at her, and demands that she remove the money from the register tills. (*Id.*) Land gestures for Brown to get on to the floor, then leaves the back office and proceeds directly to the front exit of the store.

(A148) At trial, Detective Cordrey testified that Land is the person on the video, dressed in a black shirt with "Security" written on it, holding a gun, and robbing Brown in the back office of the store. (A144-148) After Land exited the store, Brown called 911 to report the incident. (A135)

Clay is also on the Dollar General surveillance video. (A141) Clay is wearing a grey shirt and is viewed on the video entering and exiting the store within seconds of Land. (A141-145) However, upon entering the store, Clay walks over and opens a cooler containing beverages that is located at the front of the store. (A157) Clay is viewed looking at merchandise at the front of the store and asks the store manager where a particular bag of potato chips can be found. (A139-140) After pointing Clay in the right direction, Clay walks to that display, picks up the bag of potato chips and does not communicate with the employee again. (*Id.*) Further, Detective Cordrey testified that Clay remained in the front of the store for the entire time that Clay is present in the store. (A157-159) Specifically, Clay is viewed at the opposite end of the store, when Land is in the back office possessing a gun and committing the robbery. (*Id.*)

Officer Joel Diaz was on duty with the Georgetown Police Department on the night of August 9, 2014. At trial, Diaz testified that while he was traveling in a marked SUV patrol vehicle, he observed three black male pedestrians cross the road and continued on the sidewalk. (A106-107) At this point, Officer Diaz was

able to ascertain the color of clothing that three men were wearing and did not observe anything in their possession. (A107) The three black males were later identified as Defendant Clay wearing light colored clothing, and his two co-defendants, Martin and Land wearing blue and black clothing, respectively. (A112-114) Officer Diaz did not observe the individuals coming out of the Dollar General store or in the parking lot on the property, and he did not observe what direction the individuals were coming from. (A122-123)

Officer Diaz thought the three black males crossing the road were suspicious, so he began to follow them. (A108-109) Specifically, the males crossed the road and continued walking, while Officer Diaz kept an eye on them by traveling on a parallel street and extinguishing the headlights on his vehicle. (A109) While following the group, Officer Diaz received notification of the robbery at the Dollar General store, which is in the general vicinity of where he first noticed the three individuals. (A110) The information broadcasted indicated that there was one suspect, who was a black male, dressed in all black, and armed with a gun. (*Id.*)

Officer Diaz noted that one of the black males in the group that he was following was wearing black clothing, and decided to stop and detain all three males. (A110) As he was driving up beside them, Clay was walking in front of the other two men on the sidewalk. (A112) Officer Diaz stopped his vehicle and

put down his passenger side window ordering them to "stop". (A113-115) After giving his command for the group to stop, he exited his patrol vehicle and Clay ran straight ahead, away from the other two men. (A115) Officer Diaz radioed other officers to pursue Clay and remained with the other two men. (*Id.*)

Officer Wilson responded to Officer Diaz's radio call and activated his emergency equipment. (A160) Officer Wilson contacted Clay a short distance from the location where Officer Diaz had the two co-defendants detained and observed Clay running, as one of Clay's arm extended into the air. (A165-166) Officer Wilson exited his vehicle, drew his firearm, and ordered Clay to exit a vehicle that Clay had entered during the pursuit. (A165) Subsequently, the police officers on scene searched the surrounding area and recovered a silver and black handgun in a fenced backyard near where Clay was contacted by Officer Wilson. (A166-167) During the course of Officer Wilson's pursuit of Clay, the in-car camera recording system in Wilson's patrol car depicts an object going over a fence at the location where Wilson observed Clay's arm go into the air. (A163-166)

Additional officers responded to Officer Diaz's location with the two co-defendants, Land and Martin. Land was ordered to the ground and remained on the ground until being taken into custody. (A116-121) Officer Diaz described Land as wearing a black shirt with the word "Security" written across the back at

the time of his arrest. (A120-121) Further, Diaz indicated that Land attempted to remove this shirt while being ordered to the ground. (A121)

Officer Diaz believed that Martin was going to run, so he deployed a Taser, which struck Martin in the back. (A117-120) Officer Derrick Calloway responded to assist Officer Diaz and helped take Martin into custody. (A171-173) Upon searching Martin's pockets, Officer Calloway located a large quantity of U.S. currency folded in half. (A174)

Clay, Martin, and Land, were jointly indicted for the robbery of the Dollar General store, alleging that Land was the principal actor, while Clay and Martin acted as accomplices. (A97-100) Clay filed a Motion to Suppress for lack of reasonable articulable suspicion to stop and detain Clay. (A24-32) Martin also filed a Motion to Suppress for lack of reasonable articulable suspicion. On June 9, 2015, a hearing on Clay's and Martin's motions was held where Officer Diaz testified as to what he observed on the date of the arrest.

At the evidentiary hearing, Officer Diaz provided his account of the events of August 9, 2014. He was on patrol duty for the Town of Georgetown when he observed three black male pedestrians cross East Market Street, and begin walking on Albury Avenue, which is in close proximity to the Dollar General store. (A35-36) Officer Diaz did not observe the men walking out of the store, or in the store's parking lot or walking down the street away from the store. (A62-63) The three

black males were later identified as Appellant Clay, and the two co-defendants, Martin and Land, who were wearing light clothing, blue clothing and all black clothing, respectively. (A36)

Despite not observing any violations of law, Officer Diaz deemed their crossing the street to be suspicious and decided to follow them. (A48-49) Officer Diaz traveled on Barr Lane, a parallel street to Albury Avenue, where the men were walking, and turned off all headlights on his vehicle as to not draw attention to his presence. (A41) He noted that the group slowed their gait to a brisk walk, and one individual turned around to look backwards towards the officer's direction. (A48-49) Officer Diaz indicated that from the time he first spotted the group, until the time they began walking, he did not observe anyone commit a criminal offense, but he radioed other officers at this time that he was pursuing three black males on Albury Avenue. (*Id.*)

As Officer Diaz approached the end of Barr Lane, he received notification from SUSCOM that a black male, dressed in all black robbed the Dollar General. (A52-53) One of the black males that Officer Diaz was watching was wearing black clothing. (A53) Upon hearing the dispatch of the robbery, he turned the vehicle's headlights on and approached the group from behind. (A45-47) He did not activate his emergency equipment. (A46)

At this point, co-defendants Martin and Land are walking side by side, with Clay a short distance in front of them. (A47) Officer Diaz testified that Martin and Land were pointing at Clay, but the officer admitted that observation was not documented in his report. (A69-70) Officer Diaz pulled up beside the men and angled his vehicle towards them, as they were walking on the sidewalk. (A60-61) He addressed the group, through the passenger side window of his patrol vehicle, and ordered them to stop. (A64-68) By Officer Diaz's own account, the men were not free to leave at this point. (A67-68)

At the conclusion of the hearing, the State conceded during argument that probable cause, with respect to Clay and Martin, did not exist at the time that Officer Diaz ordered the men to stop. (A74-76) On June 12, 2015, the trial court found sufficient reasonable articulable suspicion and denied both Clay and Martin's motions to suppress. (*Exhibit A*)

On July 15, 2015, Clay filed a Motion to Sever the two charges relating to possession of a firearm and ammunition by a person prohibited from the Indictment and to sever the three defendants' cases from being tried jointly together. (A78-84) Martin also moved to sever with respect to the same two issues and were heard jointly in the trial court. On both Clay's and Martin's motions, the trial court granted the severance of the two charges regarding the

person prohibited charges, but denied the severance of the trials for the co-defendants. (*Exhibit B*)

Clay and Martin each filed an additional Motion to Suppress arguing that the officer lacked sufficient probable cause for their arrest. (A85-92) A hearing was held on July 24, 2015, where Officer Diaz and Officer Wilson testified regarding their observations and events that occurred that led to the arrest. After testimony was presented, the State argued that probable cause existed when Clay ran from Officer Diaz, because Clay had committed the new crime of resisting arrest. (A93-96) At the conclusion of the hearing, the trial court found probable cause and denied the motions to suppress. (*Exhibit C*)

Accordingly, the Superior Court held a joint trial of Clay, Martin and Land from October 12th thru 15th, 2015. At the conclusion of the State's evidence, Clay moved for a judgment of acquittal based on insufficient evidence presented against Clay as an accomplice. (A175-177) Martin also moved for acquittal based on insufficiency of evidence. (A178-181) The trial court denied those Motions, and the case proceeded to the jury without further evidence. (*Exhibit D* and A182-185) The trial court read the instructions to the jury and the jury began deliberations. (A187-247)

The jury found Clay and his co-defendants guilty of the charged offenses. Clay was sentenced to forty (40) and one-half years incarceration on December 11,

2015. (A248-253) Post-trial, Martin renewed his Motion for judgment of acquittal for all of the charges, except resisting arrest. (A254-259) The trial court granted the Motion on March 21, 2016. (A260-280)

I. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SEVER CO-DEFENDANTS BECAUSE REASONABLE AND SUBSTANTIAL PREJUDICE RESULTED FROM THE JOINT TRIAL.

A. Question Presented

Whether the trial court erred in denying Appellant Clay's pretrial motion to sever Clay's trial from the co-defendants, based on a reasonable probability of substantial prejudice resulting from a joint trial of the co-defendants. This issue was set forth in the Appellant's Motion to Sever filed in the trial court. (A78-84)

B. Scope of Review

The decision to grant or deny a motion for severance rests within the sound discretion of the trial court. *Jenkins v. State*, 230 A.2d 262, 272 (Del. 1967). As a general rule, it may be said that discretion has been abused by denial when there is a reasonable probability that substantial prejudice may result from a joint trial. *Bates v. State*, 386 A.2d 1139, 1141 (Del. 1978).

C. Merits of Argument

Under Superior Court Criminal Rule 8(b), two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Super.Ct.Crim.R. 8(b). If,

however, the trial court finds that a joinder of defendants for trial will prejudice any of the parties, it may sever the charges. Super.Ct.Crim.R. 14. Defendants that are jointly indicted are ordinarily tried together in the interest of judicial economy, but if justice requires it, defendants should have separate trials. *Jenkins v. State*, 230 A.2d at 272.

Severance should be granted "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Manley v. State*, 709 A.2d 643, 653 (Del. 1998) (citations omitted). Nonetheless, "if the defendants can show a reasonable and not hypothetical probability that substantial prejudice may result from a joint trial, the trial court may grant separate trials." *Fluodiotis v. State*, 726 A.2d 1196, 1210 (Del. 1999).

In order to evaluate prejudice, the Supreme Court of Delaware has set forth the following factors:

> (1) Problems involving a co-defendant's extra-judicial statements;
> (2) An absence of substantial independent competent evidence of the movant's guilt;
> (3) Antagonistic defenses between the co-defendant and the movant; and
> (4) Difficulty in segregating the State's evidence as between the co-defendant and the movant.

Manley, 709 A.2d at 652 (Del. 1998) (citations omitted). The factors set forth in *Manley* that are applicable to this case are factors two (2) and four (4): the absence

of substantial, independent, competent evidence of a co-defendant's guilt and difficulty for a jury to segregate the State's evidence as between the co-defendants. *Manley*, 709 A.2d at 652.

1. The State did not offer substantial, independent, competent evidence of Clay's guilt.

In the matter at bar, Appellant Christopher Clay, Booker Martin ("Martin") and Maurice Land ("Land"), were charged under the same Indictment and tried together. (A97-100) The State's theory of the case was that co-defendant Land, acted as the principal for the two charges of robbery in the first degree and possession of a firearm during commission of a felony. The State prosecuted Clay and Martin, as accomplices to Land for those two offenses, pursuant to 11 *Del. C.* § 271(2)(b).

The State presented several forms of direct evidence against Maurice Land at trial. Its primary evidence was a video recording of Land committing the robbery, as recorded by the Dollar General's surveillance cameras. The video was played for the jury during the direct examination of Detective Cordrey, who identified Land as the person that is on video, dressed in a black shirt with "Security" written on it, holding a gun, and robbing the store manager in the back office of the store. The video shows Land enter the Dollar General store and proceed to the back aisles, where he paces for several minutes. Land enters the

back office, removes money from a purse, then exits the back office into the store. Next, Land follows the female employee into the same back office, takes out a gun, points it at her, and demands that she remove money from the register tills and give it to him. Land gestures for her to get onto the floor, then leaves the back office and proceeds directly to the front exit of the store. The State also presented a video recording of Land being taken into custody a few minutes later. In the video, Land is attempting to remove the shirt with the word "Security" written on it, while being directed to the ground at gun point.

Additionally, the State presented the testimony of the Dollar General store employee and victim, Laurie Brown. During very emotional testimony, Brown testified about the robbery and through tears, spontaneously points to Land at defense table and identifies him as the person that held the gun to her head and made her get on the floor. Despite this evidence, Land denied committing the robbery and defended the case by arguing that the person on the video was not him.

To the contrary, the State's evidence against Clay is not substantial, independent or competent. Clay is on the Dollar General surveillance video entering and exiting the store within seconds of Land. However, at no point after entry are Clay and Land in proximity to one another in the store during the offense. Clay does not enter the back office at any time. Clay does not participate or assist

during the robbery in any way. Clay does not encounter or communicate with Land while in the store. Further, there is no testimony that Clay participated or played any role in the robbery.

There is a significant disparity in the quality and amount of evidence against Clay and Land. Consequently, amid the overwhelming evidence against Land, there was not substantial, independent evidence that Clay was guilty.

2. The substantial evidence against co-defendant Land caused the jury difficulty in segregating the evidence as between co-defendants.

The evidence in this case includes a video recording of a man with a gun committing a robbery of a woman. It is not unreasonable to think that the jury, seeing this emotional event, would assign blame to a man and those associated with him. Further, the fact that the man on video committing the crime, denied committing the crime at the trial, would make it much easier for a jury to dismiss the co-defendant's denials of involvement in the crime. These facts outline the reasonable probability of prejudice that Clay faced in being tried with Land. There was a high likelihood that the jury would not be able to determine whether Clay was guilty or innocent based on his actual conduct, versus assuming Clay's guilt based on the evidence of guilt presented against co-defendant Land.

But, the clearest confirmation that the State's case against Land caused substantial prejudice to his co-defendants, was the jury verdict in this case. When

the State rested, all three co-defendants moved for judgment of acquittal. (A175-181) The Motions were denied and the defense for all three co-defendants rested.

After approximately three hours, the jury returned verdicts of "guilty as charged" on all three co-defendants for all of the robbery related charges. The next day, Martin renewed his motion for judgment of acquittal, or alternatively requested a new trial. (A254-259) On March 21, 2016, the trial court granted the motion and reversed the jury verdict. (A260-280). In its decision, the trial court acknowledged that the jury could not have fairly applied the law to the evidence against Martin in the joint trial:

> I've concluded that no rational jury, when viewing the evidence in the light most favorable to the State, could have found that Martin committed the offenses of robbery in the first degree, possession of a firearm during the commission of a felony and conspiracy in the second degree because there simply was no evidence supporting those charges against him.
>
> I've concluded further that Martin's conduct did not bring him within the scope of 11 *Del. C.* § 1269, tampering with physical evidence and that he should not have been convicted of that offense, as well.

(A273-274) By setting aside the jury verdict, the trial court essentially found that the jury did not act rationally in evaluating the evidence separately amongst the co-defendants.

As a result, evidence that supported Land's guilt, and his defense denying involvement, prejudiced the trial so much that the jury also found Martin guilty

beyond a reasonable doubt where the court acknowledged that the State, "simply presented no evidence supporting those charges." (A274) It would be illogical to believe that the same jury that acted irrationally in finding Martin guilty as an accomplice, somehow acted rationally to find Clay guilty as an accomplice. The three guilty as charged verdicts for Martin are the manifestation of the jury's difficultly in segregating the evidence for separate co-defendants. Therefore, the reasonable probability of substantial prejudice materialized in the trial, and prevented the jury from making a reliable determination as to Martin's and Clay's guilt or innocence.

Further, the timing of Martin's judgment of acquittal prejudiced Clay. Had the trial court acquitted Martin at the close of the State's case, the court could have issued a curative instruction, directing the jury to disregard any facts that the jury believed implicated Martin's involvement from their evaluation of the evidence against Clay. In the Indictment, the State alleged that Clay was responsible, under an accomplice liability theory pursuant to 11 *Del. C.* § 271(2)(b), for robbery in the first degree and possession of a firearm during the commission of a felony, and as a co-conspirator for the offense of conspiracy in the second degree. All three offenses have a distinct commonality within the specific allegations of the Indictment. The first three charges appearing in the Indictment all begin by alleging the names of all three co-defendants, "CHRISTOPHER CLAY, BOOKER

T. MARTIN and MAURICE C. LAND [...]" (A97-100) When deliberating, the jury should not have considered any facts pertaining to Martin's involvement in its determination of Clay's guilt or innocence. The fundamental unfairness associated with the jury's improper consideration of evidence against Martin, results in substantial prejudice with respect to Clay and requires reversal.

II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL.

A. Question Presented

Whether the trial court erred in denying Appellant Clay's motion for judgment of acquittal, because the State produced insufficient evidence at trial to establish the required elements of each offense for a rational trier of fact to find Appellant guilty beyond a reasonable doubt. This issue was set forth on the record by moving for a judgment of acquittal after the conclusion of the State's evidence at trial. (A113-115).

B. Scope of Review

A trial court's denial of a motion for a judgment of acquittal is reviewed *de novo* to determine "whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the defendant guilty beyond a reasonable doubt of all the elements of a crime." *Winer v. State*, 950 A.2d 642, 646 (Del. 2008). "For purposes of this inquiry, this Court does not distinguish between direct and circumstantial evidence of defendant's guilt." *Hardin v. State*, 844 A.2d 982, 989 (Del. 2004) (quoting *Cline v. State*, 720 A.2d 891, 892 (Del. 1998)).

C. Merits of Argument

After the presentation of the State's evidence, Clay made a motion for a judgment of acquittal. Thereafter, the trial court denied the motion for judgment of acquittal for each offense. (*Exhibit D*) The first four counts in the Indictment are: (1) robbery in the first degree; (2) possession of a firearm during the commission of a felony; (3) conspiracy in the second degree; and (4) tampering with physical evidence. (A97-100) Pursuant to 11 *Del. C.* § 271(2)(b), the State elected to prosecute Clay, as an accomplice for the charges of robbery first and possession of a firearm during commission of a felony.

1. Robbery in the first degree

First, in order to find Clay guilty of robbery in the first degree as an accomplice, pursuant to 11 *Del. C.* § 832, the State would have to prove beyond a reasonable doubt the following elements: (1) that co-defendant Land committed the offense of robbery in the first degree; (2) that Clay, intending to promote or facilitate the commission of the offense of robbery in the first degree, aided counseled, agreed or attempted to aid co-defendant Land in planning or committing the offense of robbery in the first degree; and (3) robbery in the first degree was within the scope of the agreed upon activity between Land and Clay or was to be reasonably expected as incidental to or a consequence of that activity. The State alleged that the "agreed upon activity" between Land and Clay was to rob the Dollar General store on August 9, 2014. (A206-208)

In the matter at bar, the State failed to establish elements two (2) and three (3) of the offense of robbery. First, the State did not produce the existence of any prior or on-going relationship between Clay or any of the co-defendants. There was no evidence that the co-defendants were related, resided together, communicated with each other at any point in time prior or during the robbery, or even knew one another.

Second, the State did not produce evidence of Clay and Land coming together at any point in time, prior to being seen at the Dollar General. Furthermore, during reconsideration of Martin's motion for judgment of acquittal, the trial court stated the absence of evidence that is damaging to the State's case was that, "[...] there was no evidence whatsoever putting Land, Clay and Martin together in any fashion at any time before the robbery." (A265) Similarly, the State failed to present evidence that Clay knew Land, communicated with Land, or aided Land in any fashion prior to the offense.

Third, the State's theory that Clay acted as an accomplice during the robbery is based on the evidence that Clay was present inside the store as a "lookout" when the offense took place. In order to be liable as an accomplice, "it must affirmatively appear that the defendant in some way actively encouraged the principal to commit the crime; mere presence at the scene of the crime is not sufficient." *Dalton v. State*, 252 A.2d 104, 105 (Del. 1969). Consequently, Clay's

mere presence inside the store during business hours is insufficient alone to establish liability for the crime committed by Land.

The State relied upon Clay's appearance on the surveillance video of Dollar General as inferential evidence of the existence of a plan between co-defendants for Land to commit a robbery. The surveillance video shows that Clay walks through the front entrance of the Dollar General moments before Land, looks at merchandise and remains in the front of the store the entire time. Further, the video shows that they do not exchange any items or communications and go their separate ways upon entering the store. Land and Clay are at opposite ends of the store for the entirety of time that the offense occurs.

Additionally, Land's actions and conduct in the store are separate and distinct from Clay. Upon entering the store, Land immediately and without hesitation walks to the rear of the store where he is seen nervously pacing up and down the rear aisle. Land enters the back office and removes money from a purse. When the store manager with the cash drawer in hand comes into the back office, Land presents a gun and robs the manager at gunpoint. There is no communication between Land and Clay for the entirety of the time that Land commits this offense. Land does not use a cell phone to make contact with anyone, he does not verbally speak to Clay, and they are not within a distance or sight line that communications would even be possible. After Land robs the clerk in the back office, he walks the

length of the store and exits the store through the front entrance while Clay exits a short time thereafter.

The State failed to offer any evidence of planning by the co-defendants at any time prior to Land committing the robbery. The State failed to offer any evidence that Clay counseled, aided or agreed with Land to commit a robbery. What the State did offer was evidence of two individuals entering and exiting the store at close proximities in time. This evidence, when viewed in a light most favorable to the State, does not permit a rational trier of fact to find Clay guilty beyond a reasonable doubt, as an accomplice for the robbery.

2. Possession of a firearm during the commission of a felony

The second offense challenged in the motion for judgment of acquittal, was the charge under 11 *Del. C.* §1447A, for possession of a firearm during the commission of a felony (PFDCF). In order to find Clay guilty of this offense as an accomplice, the State must establish the following elements: (1) Land committed the offense of possession of a firearm during the commission of a felony; (2) Clay knew that Land possessed a firearm; (3) that Clay intending to promote or facilitate the commission of the offense of possession of a firearm during the commission of a felony, aided, counseled, agreed or attempted to aid Land in planning or committing the offense of possession of a firearm during the commission of a felony; and (4) the offense of possession of a firearm during the commission of a

felony was within the scope of the agreed upon activity between Land and Clay or was reasonably expected to be incidental to or a consequence of that activity. 11 *Del. C.* §1447A. The State alleged that the "agreed upon activity" was to rob the Dollar General store. (A211-213)

With respect to element two (2) of PFDCF, the State did not produce any evidence to establish that Clay knew that co-defendant Land possessed a firearm during the robbery of the Dollar General store. As outlined in the recitation of facts for robbery in the first degree, there was no evidence that Clay had any knowledge of this element before or during the robbery. The first time Land is seen with the firearm is when he points it at the store employee in the back office. This is done outside of Clay's view, because he is located in the front of the store.

This information viewed in a light most favorable to the State, fails to establish sufficient evidence of any planning between Clay and Land to rob the store, including the more specific detail that Land would possess a firearm during a robbery. Without evidence of a plan, Land's possession of a gun during the robbery could not have been reasonably expected or a potential consequence within the scope of that activity. Therefore, the State failed to produce sufficient evidence to lead a rational juror to find Clay guilty beyond a reasonable doubt, as an accomplice, for possession of a firearm during the commission of a felony under 11 *Del. C.* §1447A.

3. Conspiracy in the second degree

The third charge addressed in Clay's motion for judgment of acquittal was conspiracy in the second degree. Specific to the allegations in this case, the pertinent portion of 11 *Del. C.* § 512 requires the State to establish the following elements: (1) that the co-defendants intended to promote or facilitate the commission of robbery in the first degree; and (2) that the co-defendants agreed with each other that they or one or more of them would engage in conduct constituting a robbery in the first degree. (A213-215)

Accordingly, the Indictment specifically requires the State to establish the elements of conspiracy second to commit a robbery in the first degree. (A97-100) In order to prove its theory of conspiracy, the State needed to offer evidence that the co-defendants came to the Dollar General that evening with the intention of robbing someone. This element required a showing that Clay and Land knew each other in the very least. *See Floudiotis v. State*, 726 A.2d 1196, 1207-1208 (Del. 1999). As detailed in earlier argument, there was no evidence offered to show any perceived plan to commit a robbery or that the co-defendants knew one another. The State relied simply on Clay's entry and exit in proximity to Land, and presence on the video surveillance inside the store at the time of the robbery to establish a conspiracy.

Even assuming arguendo that Clay's mere presence combined with circumstantial evidence does establish a plan to commit a crime, there is no evidence of what crime would be committed. The "plan" could have been that Land had told Clay he was going in the store to purchase a soda, or the plan could have been for Land to shoplift a soda. In either hypothetical, there was no evidence presented of any plan or, more specifically, that it would include a robbery with a firearm. Therefore, even viewing the evidence in the light most favorable to the State, a rational jury could not find Clay guilty beyond a reasonable doubt of conspiracy in the second degree, pursuant to 11 *Del. C.* § 512.

4. Tampering with physical evidence

The fourth charge alleged by the State is tampering with physical evidence. In order to establish Clay's guilt of tampering with physical evidence under 11 *Del. C.* § 1269, the State must prove: (1) Clay believed that physical evidence was about to be produced or used in an official proceeding or prospective official proceeding; and (2) that Clay intended to prevent the physical evidence's production or use by suppressing it through an act of concealment or by employing deception against any person. The specific physical evidence the State alleged that Clay tampered with was the handgun that was recovered when Clay was arrested. (A215-218)

The Supreme Court addressed the scope of 11 *Del. C.* § 1269, in *Harris v. State*, 991 A.2d 1135 (Del. 2010). In *Harris*, the Court examined whether a defendant, who placed a plastic baggie containing contraband in his mouth, constituted a commission of tampering with physical evidence. *Id.* In conducting the analysis, the Court reviewed precedent from, *Pennewell v. State*, 977 A.2d 800 (Del. 2009). "In *Pennewell v. State*, we held that the defendant did not tamper with evidence, because the drugs were 'visible and immediately retrievable.'" *Harris*, 991 A.2d at 1139. "As *Pennewell* explains, briefly hiding contraband until the police take the contraband and the defendant into custody, does not constitute 'suppress[ion] by an act of concealment.' At best, that constitutes 'delay by an act of concealment.'" *Harris* at 1140. Moreover, the Court explained that whether a defendant hides the evidence on a rooftop or in his mouth, "if the police perceive the act of concealment and could immediately retrieve the evidence, the defendant has failed to 'suppress' evidence under § 1269." *Id.*

In the matter at bar, Officer Wilson of the Georgetown Police was the responding officer that pursued Clay and placed him under arrest. During the trial, Wilson testified that during the pursuit, "I saw his [Clay's] hand go into the air. And I wasn't sure what he was doing. In my experience, that would be the kind of movement of somebody throwing something. I wasn't sure if he was throwing something or losing his balance." (A165-166) After Clay was secured in Wilson's

patrol vehicle and while still at the scene, Wilson and Sergeant Tyndall conducted a search of the area, based on Wilson's observation of Clay's actions. Specifically, officers searched the area on the opposite side of a fence, where Wilson observed Clay's hand go into the air, and discovered a handgun in that location. The recovery of the gun was both visible and immediately retrievable, because Officer Wilson observed Clays action of his hand going into the air and immediately searched for and recovered the gun.

The facts in this case are analogous to *Harris*, in that the defendant's actions did not constitute tampering, because the "police officers saw the defendant attempt to suppress evidence, and they could 'immediately' retrieve that evidence, thus frustrating the defendant's attempt to prevent its use again him in an official proceeding." *Harris v. State*, 991 A.2d at 1139. Here, Officer Wilson saw Clay's hand go into the air, which prompted an immediate search of the area resulting in the discovery of the handgun. Similarly, the Court has previously reversed a tampering conviction, where a police officer saw drugs fall, although he did not see the defendant make a throwing motion. *Harris v. State*, 991 A.2d 1135 at 1141, (citing *Pennewell*, 977 A.2d at 801). "Whether the police perceived the evidence or perceived the defendant's movement during the act of suppression did not affect either the police's recovery of the evidence or the court's decision." *Harris*, 991 A.2d at 1141. Moreover, the Court states in *Harris* that, "Section 1269 does not

punish 'attempted suppression of evidence,' nor does it punish 'attempted concealment, alteration or destruction of evidence.'" *Harris v. State*, 991 A.2d at 1139. Consequently, the evidence presented by the State to establish Clay's guilt for tampering with physical evidence was insufficient based on 11 *Del. C.* § 1269, and relevant legal precedent.

In viewing the evidence in a light most favorable to the State, no rational trier of fact could find Appellant Clay guilty beyond a reasonable doubt as to robbery in the first degree, possession of a firearm during the commission of a felony, conspiracy in the second degree, and tampering with physical evidence. Therefore, the trial court erred in denying Appellant's motion for judgment of acquittal, and Appellant's convictions should be reversed.

III. THE TRIAL COURT ERRED IN FINDING THE POLICE OFFICER POSSESSED A REASONABLE ARTICULABE SUSPICION TO SEIZE AND PROBABLE CAUSE TO ARREST APPELLANT.

A. Question presented

Whether the trial court erred in finding that Officer Diaz had reasonable articulable suspicion to detain Appellant Clay, and probable cause to arrest Appellant Clay where the state conceded it did not have probable cause to arrest at that time. This issue was set forth in Appellant's Motion to Suppress for lack of reasonable articulable suspicion and Appellant's Motion to Suppress for probable cause filed in the trial court below. (A24-32 and A85-92)

B. Scope of Review

A trial court's denial of a motion to suppress is reviewed for an abuse of discretion. *Lopez-Vasquez v. State*, 956 A.2d 1280, 1284-1286 (Del. 2008). To the extent the claim of error implicates questions of law; however, the standard of review is *de novo*. *Id.* at 1284-85.

C. Merits of Argument

1. Lack of Reasonable Articulable Suspicion

Appellant Clay filed a pre-trial Motion to Suppress challenging the legality of the police officer's stop and seizure of Appellant Clay. (A24-32) The trial court

held an evidentiary hearing on whether a reasonable articulable suspicion was established prior to the officer's interaction with Clay. After the hearing, the trial court found the officer possessed a reasonable articulable suspicion and the motion to suppress was denied. (*Exhibit A*)

An individual's right to be free from unreasonable governmental searches and seizures is secured by the Fourth Amendment of the United States Constitution. *See Terry v. Ohio*, 392 U.S. 1, 8 (1968); *Quarles v. State,* 696 A.2d 1334, 1336 (Del. 1967). This protection applies to the states through the Fourteenth Amendment. *See Mapp v. Ohio*, 367 U.S. 643, 655 (1961). The right of the citizens of Delaware to be free from such governmental intrusion is further secured by Article I, § 6 of the Delaware Constitution.

Generally, police officers can stop an individual for investigatory purposes, if they have a reasonable articulable suspicion that the person is committing, has committed, or is about to commit a crime. 11 *Del. C.* § 1902; see also *State v. Henderson*, 892 A.2d 1061, 1064 (Del. 2006). The Delaware Supreme Court has held that "reasonable grounds" as used in Section 1902(a) has the same meaning as reasonable and articulable suspicion. *Jones v. State*, 745 A.2d 856, 861 (Del. 1999). In determining whether reasonable articulable suspicion exists, the Court "must examine the totality of the circumstances surrounding the situation as viewed through the eyes of a reasonable, trained police officer in the same or

similar circumstances, combining objective facts with such an officer's subjective interpretation of those facts." *Jones v. State*, 745 A.2d at 861.

At the evidentiary hearing, Officer Diaz provided his account of the events of August 9, 2014. He was on patrol duty for the Town of Georgetown when he observed three black male pedestrians cross East Market Street, and begin walking on Albury Avenue, which is in close proximity to the Dollar General store. Officer Diaz did not observe the men walking out of the store, or in the store's parking lot or walking down the street away from the store. The three black males were later identified as Appellant Clay, and the two co-defendants, Martin and Land, who were wearing light clothing, blue clothing and all black clothing, respectively.

Despite not observing any violations of law, Officer Diaz deemed their crossing the street to be suspicious and decided to follow them. Officer Diaz traveled on Barr Lane, a parallel street to Albury Avenue, where the men were walking, and turned off all headlights on his vehicle as to not draw attention to his presence. He noted that the group slowed their gait to a brisk walk, and one individual turned around to look backwards towards the officer's direction. Officer Diaz indicated that from the time he first spotted the group, until the time they began walking, he did not observe anyone commit a criminal offense, but he radioed other officers at this time that he was pursuing three black males on Albury Avenue.

As Officer Diaz approached the end of Barr Lane, he received notification from SUSCOM that a black male, dressed in all black robbed the Dollar General. One of the black males that Officer Diaz was watching was wearing black clothing. Upon hearing the dispatch of the robbery, he turned the vehicle's headlights on and approached the group from behind. He did not activate his emergency equipment.

At this point, co-defendants Martin and Land are walking side by side, with Clay a short distance in front of them. Officer Diaz pulled up beside the men and angled his vehicle towards them, as they were walking on the sidewalk. He addressed the group, through the passenger side window of his patrol vehicle, and asked them to "stop." (A64-68) By Officer Diaz's own account, the men were not free to leave at this point.

For purposes of determining whether Officer Diaz had a reasonable articulable suspicion to stop Clay, the analysis of the evidence and testimony ends at this point, because a seizure occurred at the moment Officer Diaz instructs the group to stop. (*Exhibit A* at 6) By ordering the group of individuals, including Clay, to stop, Officer Diaz engaged in conduct that would communicate to a reasonable person that he or she was not free to ignore police presence. The reasonableness of Diaz's suspicion must rest on the facts known to him at the time he ordered Clay to stop.

The trial court abused its discretion by finding these facts constituted reasonable articulable suspicion. Under a totality of the circumstances analysis, Diaz did not have sufficient reasonable articulable suspicion at the time of the detention. The Fourth Amendment "does not allow the law enforcement official to simply assert that apparently innocent conduct was suspicious to him or her; rather the officer must offer the factual basis upon which he or she bases the conclusion." *Harris v. State*, 806 A.2d 119, 128-129 (Del. 2002). Officer Diaz relied solely upon a hunch that Clay was engaged in criminal activity, due to his observations of Clay running across the street in close proximity to another person matching a general description of a suspect in a robbery. Moreover, Clay did not match the suspect's description, because he was wearing light colored clothing. At the time of the seizure, the only facts known to the officer were that a robbery had occurred at a nearby store moments earlier, and a black male wearing black clothing was the suspect.

Further, Clay's flight at the time he was seized by Officer Diaz cannot be considered in determining authority for the detention. Where a seizure precedes an attempt to flee, "that attempt or any information derived therefrom, is not a proper factor in assessing the validity of the seizure." *Jones v. State*, 745 A.2d 856, 861-862 (Del. 1999). It follows that Clay's flight and evidence recovered upon his arrest cannot be considered in evaluating the officer's justification for the initial

stop. Therefore, the police officer did not establish a reasonable articulable suspicion prior to the seizure and any evidence seized as a result of the events following must be suppressed.

2. Lack of Probable Cause

A warrantless arrest is valid under the Fourth Amendment if there is probable cause to believe the person to be arrested as committed a felony. *Coleman v. State*, 562 A.2d 1171, 1177 (Del. 1989). This standard has been codified in 11 *Del. C.* § 1904(b)(1), which provides in pertinent part that: "An arrest by a peace officer without a warrant for a felony [...] is lawful whenever: (1) the officer has reasonable ground to believe that the person to be arrested has committed a felony [...]" The phrase "reasonable ground to believe" has been interpreted to be the equivalent of "probable cause." *Coleman*, 562 A.2d at 1177. In determining whether probable cause exists, this Court looks at the "totality of the circumstances." *Coleman*, 562 A.2d at 1177 (citing *Illinois v. Gates*, 462 U.S. 213, 231 (1983).

In the matter at bar, the trial court erred as a matter of law that the State established probable cause. Clay filed a motion to suppress challenging lack of probable cause for Clay's arrest. (A85-92) During the prior evidentiary hearing that was held for reasonable articulable suspicion, the State conceded that Officer

Diaz lacked probable cause at the time that he ordered the men to stop though the passenger window of his patrol vehicle. (A72-76)

> THE COURT: All right. So it seems that the State has conceded the field with respect to probable cause, is that correct, as to that point in time?
>
> MS. EWART: At the --well--
>
> THE COURT: When the window was rolled down in the initial encounter.
>
> MS. EWART: Not with respect to the third defendant [Land] who's, obviously, not here who matched the description, but, yes, with the other two, strictly at the time--

(A74-75) At the evidentiary hearing for lack of probable cause; however, the State argued that probable cause existed when Clay ran from Officer Diaz, because Clay had committed the new crime of resisting arrest. (A93-95) Following the evidentiary hearing regarding the motion to suppress on lack of probable cause, the trial court stated in its ruling:

> The issue in this case, as I see it, is probable cause. My view of it is, probable cause for the crimes of robbery and conspiracy. The State argues that there was probable cause for resisting arrest. And it's hard to see how that could occur without an arrest having been effectuated.

(*Exhibit C* at 61) Consequently, the trial court erred in finding that probable cause existed for Clay's arrest, where the State had previously conceded that probable cause did not exist at that time. The point in time to make a probable cause analysis for the specific crime alleged to have been committed is at the time of the

arrest. *Brown v. State*, 897 A.2d 748 (Del. 2006). The Delaware Superior Court has previously held that if probable cause was not established for a particular offense at the time of the arrest, then evidence obtained pursuant to further investigation after that time period must be suppressed. *State v. Trager*, 2006 WL 2194764 *7 (Del. Super. Ct. July 28, 2006). Similarly, if there was not probable cause to make the arrest of Clay for charges related to the robbery, then the evidence coming after his arrest for resisting arrest must be suppressed.

Clay's position is that under a totality of the circumstances analysis, probable cause to arrest Clay for the offenses relating to the robbery charges was not established at the time of his arrest. The law does not permit the State to bootstrap evidence obtained pursuant to an arrest for resisting arrest, to be used against Clay for additional crimes. Accordingly, the trial court erred as a matter of law, in determining that probable cause was established at the point in time where the State conceded that probable cause did not exist. As a result, the evidence obtained from the moment following the seizure of Clay should be suppressed.

CONCLUSION

For the reasons set forth herein, Appellant contends that the decision of the trial court in denying Appellant's motion for judgment of acquittal on the aforementioned charges and denying Appellant's motions to suppress for lack of reasonable articulable suspicion and probable cause, should be reversed and remanded accordingly.

Alternatively, if the Court finds that the trial court erred in the denial of Appellant's motion to sever the co-defendants from a joint trial, then Appellant respectfully requests that Appellant's convictions be reversed and remanded for purposes of a new trial.

MOONEY & ANDREW, P.A.

/s/ Michael W. Andrew
Michael W. Andrew, Esquire
Bar I.D. #5451
Mooney & Andrew, P.A.
11 South Race Street
Georgetown, DE 19947

Attorney for Appellant

DATED: October 17, 2016

EXHIBIT A

Transcript of Decision on Motion to Suppress for lack of Reasonable Articulable Suspicion, June 12, 2015

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE	ID Nos. 1408007714A 1408007717A
v.	
CHRISTOPHER CLAY and BOOKER T. MARTIN,	
Defendants.	

T R A N S C R I P T
O F
P R O C E E D I N G S

Sussex County Courthouse
Georgetown, Delaware
Friday, June 12, 2015

The above-entitled matter was scheduled for hearing in Judge's Chambers at 11:30 o'clock a.m.

BEFORE:

THE HONORABLE RICHARD F. STOKES, Judge.

APPEARANCES VIA TELECONFERENCE:

CASEY L. EWART, Deputy Attorney General, appearing on behalf of the State of Delaware.

TASHA M. STEVENS, Esquire, appearing on behalf of the Defendant, Booker Martin.

MICHAEL W. ANDREW, Esquire, appearing on behalf of the Defendant, Christopher Clay.

TIMOTHY R. MILLER, RPR, CRR
OFFICIAL COURT REPORTER

PROCEEDINGS

THE COURT: Good morning. How are you?

MS. STEVENS: Good morning. How are you?

MS. EWART: Good, Your Honor.

MR. ANDREW: Good, Your Honor.

THE COURT: I'm well. Thank you very much for asking.

This is the matter of State v. Clay and Martin. Can you hear me okay?

MS. STEVENS: Yes.

MS. EWART: Yes, Your Honor.

MR. ANDREW: Yes, sir.

THE COURT: This is the decision arising out of a suppression hearing in the case of State of Delaware v. Christopher Clay and Booker Martin. The following findings of fact and conclusions of law are made:

A robbery was reported to the Communications Section of the Delaware State Police SUSCOM about 2055 hours on the evening of August 9th, 2014. At that time, the Assistant Manager of the Georgetown Dollar General store

located at 432 East Market Street called SUSCOM about the incident. SUSCOM immediately dispatched information to police officers in the field. The dispatch stated a robbery just occurred at the Dollar General store at 432 East Market Street; that the robbery involved a black male who was dressed in black clothing; further, the man had a black handgun and ran on foot through the front door and took off.

Officer Diaz of the Georgetown Police Department was on patrol on East Market Street and was doing a community-safety check in the area of the patrol. There had been reported robberies in the area. Diaz was in a white-colored Chevrolet Tahoe that had "police" written in black letters on its side. Although the time was in the early evening, there was enough visibility for the lettering and police nature of the Tahoe to be observed.

Diaz was driving east on East Market Street toward the intersection with Albury Street. Dollar General is within eyesight of this intersection. As Diaz approached the

intersection, he observed three black males running together from East Market on to Albury. They were about 20 feet in front of him. The headlights of the vehicle were on, but not any emergency equipment. One of the black males was dressed in black clothing. This person was later identified as Maurice Land. The other two males were later identified as Clay and Martin.

As the three were running across East Market to Albury, Martin looked at Diaz's vehicle. Again, Diaz's vehicle was about 20 feet from the three. The three stopped running and began to walk briskly on Albury. Martin was side by side with Land and Clay was slightly ahead. As Diaz was crossing the intersection and driving to nearby Barr Lane, the three looked over their left shoulders toward the position of Diaz's vehicle.

Diaz turned on to Barr Lane. Barr Lane and Albury Street are parallel to each other in a northerly direction. Although there is foliage along Barr Lane, there are gaps. Diaz saw the three males continue walking together on

Albury. While on Barr Lane, Diaz turned his headlights off because he wanted to observe them unidentified. While on Barr Lane, Diaz heard the dispatch from SUSCOM. The dispatch was radioed within two minutes of the 911 call. Diaz identified the defendant in black clothing with a description of the robber provided in the dispatch.

Diaz turned his headlights on and proceeded from Barr Lane, turning left on East Laurel Street. East Laurel Street parallels East Market. At that time, Diaz had probable cause to believe the person dressed in black -- Land -- committed the robbery matching the description with the details in the dispatch that the robbery just occurred with a person running out the front door taking off from the store.

Land was armed with a handgun. As Diaz approached the intersection of East Laurel and Albury Streets, he did not activate his emergency lights. He did not want to be outnumbered in an encounter, especially

considering the presence of a gun.

As Diaz turned from East Laurel on to Albury Street, he continued to observe Clay, Martin and Land. All were close, with Clay slightly in front. Diaz followed them for a short distance. He drove the Tahoe beside them and lowered the passenger window. Diaz told them to stop because he wanted to talk with them. Before stopping them, Land and Martin made a hand gesture toward Clay.

All parties agree that a seizure occurred at the moment of the stop. While there was probable cause to arrest Land for the robbery, the question remains whether or not there was reasonable, articulable suspicion to justify an investigatory detention for Clay and Martin. The State acknowledges that while probable cause may not exist to arrest Clay and Martin, nonetheless, there was reasonable, articulable suspicion under the totality of the circumstances for an investigatory detention. The common defense position is that Diaz had nothing to connect Clay and Martin with the

crime and Clay and Martin were merely Land's companions, if not strangers to one another.

As the dispatch pointed to one person -- Land -- Land was the solo target and Martin and Clay were intertwined in a general sweep. The pertinent principles of law have been stated by our Supreme Court. I'm quoting from the Lopez-Vazquez case.

At Footnote 4, Page 9, "'The threshold of "reasonable and articulable suspicion" under either constitutional or statutory standards requires the officer to point to specific facts which, viewed in their entirety, accompanied by rational inferences, support the suspicion that the person sought to be detained was in the process of violating the law. The totality of circumstances, as viewed through the eyes of a reasonable, trained police officer in the same or similar circumstances, must be examined to determine if reasonable suspicion has been properly formulated.

"'In determining whether reasonable suspicion exists, we must examine the totality

of the circumstances surrounding the situation 'as viewed through the eyes of a reasonable, trained police officer in the same or similar circumstances, combining objective facts with such an officer's subjective interpretation of those facts.'"

At Page 10, "'Under the Fourth Amendment to the United States Constitution, a seizure requires either physical force or submission to assertion of authority.'" And, of course, all parties agree that we have a seizure under Delaware law.

At Page 11, "The 'quantum of evidence necessary for reasonable suspicion is less than that which is required for probable cause to arrest.'" That's at Footnote 8.

At Page 12, "This Court has consistently explained that a determination of reasonable suspicion must be evaluated in the context of the totality of the circumstances to assess whether the detaining officer had a particularized and objective basis to suspect criminal activity."

At Page 13, "A finding of reasonable suspicion is both 'somewhat abstract' and 'fact specific' and depends on the 'concrete factual circumstances of individual cases.' 'While the police may properly employ hunches to investigate, more is required to detain a citizen in a public place.' Put another way, standing alone, an officer's 'subjective impressions or hunches' are insufficient for a stop. Similarly, activity such as 'leaving the scene upon the approach or the sighting of a police officer' or the 'refusal to cooperate with an officer who initiates an encounter' cannot be the sole grounds constituting reasonable suspicion. These events, however, may be considered as part of the totality of the circumstances. Other circumstances may also be considered, such as the presence of a defendant in a high-crime area; the defendant's 'unprovoked, headlong flight'; a defendant 'holding a bulge in his pocket that appeared to be either a gun or a large quantity of drugs'; a 'focused' warning shout of police presence; or a

furtive gesture after the officer's approach or display of authority. The officer's subjective interpretations and explanations of why these activities, based on experience and training, may have given him a reasonable suspicion to investigate further are also important, as is the trial judge's evaluation of the officer's credibility."

Applying the law to the facts, Diaz had a reasonable, articulable suspicion from his training and experience that Clay and Martin were criminally involved in the robbery. The robbery had just occurred. The robber had run out the door, taking off. When Diaz observed the three at the intersection of Albury and East Market, a reasonable officer could infer that they were running together not for exercise or other innocent kind of purposes but from fleeing from the store. The store, again, was in eyesight of the intersection. The three looked back toward the police vehicle. Given the markings and visibility, Martin, Land and Clay knew the police were near them. When their gait

changed from running to a brisk walk, a reasonable police officer could see this as an attempt to evade or avoid further police interest, again, because of their involvement in the robbery. This behavior is reasonably seen as furtive. Further, there were no other people observed in the area. Martin, Land and Clay were running from an area of East Market that contained a Little League field. There was no activity there. Their concerted activity can be seen, again, as arising from a robbery almost immediately before the 911 call was made.

On the present record, a sufficient tie-in was made to connect Clay and Martin with the reported criminal activity of Land. Diaz is a credible witness. And, again, of course, the law is clear that reasonable, articulable suspicion is a lesser standard than one for probable cause. For all of these reasons, the motion to suppress, therefore, is denied.

I want to thank counsel for their presence today and wish them a good weekend.

MS. EWART: Thank you very much, Your

Honor.

MS. STEVENS: Thank you, Your Honor. Have a good weekend.

MR. ANDREW: Thank you, Your Honor.

THE COURT: Bye-bye.

(Whereupon, the proceedings in the above-entitled matter were concluded.)

TIMOTHY R. MILLER, RPR, CRR
OFFICIAL COURT REPORTER

C E R T I F I C A T E

I, TIMOTHY R. MILLER, RPR, CRR, an Official Court Reporter of the Superior Court of the State of Delaware, do hereby certify the above and foregoing Pages 2 to 12 to be a true and accurate transcript of the proceedings therein indicated on June 12, 2015, as was stenographically reported by me and reduced to typewriting under my direct supervision, as the same remains of record in the Sussex County Courthouse at Georgetown, Delaware.

This certification shall be considered null and void if this transcript is disassembled in any manner by any party without authorization of the signatory below.

Timothy R. Miller

Timothy R. Miller, RPR, CRR

5-26-16

Date

TIMOTHY R. MILLER, RPR, CRR
OFFICIAL COURT REPORTER

EXHIBIT B

Transcript of Decision on Motion to Sever, July 17, 2015

COPY

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE	:	
v.	:	
CHRISTOPHER CLAY,	:	ID No. 1408007714A
BOOKER T. MARTIN,		ID No. 1408007717A
	:	
Defendants.	:	

T R A N S C R I P T
O F
P R O C E E D I N G S

Sussex County Courthouse
Georgetown, Delaware
Friday, July 17, 2015

The above-entitled matter was scheduled for a criminal motion in open court at 9:30 o'clock a.m.

BEFORE:
THE HONORABLE M. JANE BRADY, Judge.

APPEARANCES:

CASEY L. EWART, Deputy Attorney General, appearing on behalf of the State of Delaware.

MICHAEL W. ANDREW, Esquire, appearing on behalf of Defendant Clay.

TASHA M. STEVENS, Esquire, appearing on behalf of Defendant Martin.

KATHY R. HAYNES
OFFICIAL COURT REPORTER

P R O C E E D I N G S

THE COURT: Good morning, Counsel.

THE BAILIFF: Your Honor, we're going to go with the motions calendar.

THE COURT: All right.

THE BAILIFF: No. 2, motion to sever on Christopher Clay.

THE COURT: Okay. And there is a co-defendant's motion on this as well, that I'm aware of.

MS. STEVENS: Yes, Your Honor.

MR. ANDREW: Yes, Your Honor. Ms. Stevens and myself filed very similar motions for Mr. Clay and Mr. Martin, respectfully.

THE COURT: Let me talk to the State for a moment, because I read the motions.

MR. ANDREW: Yes, Your Honor.

THE COURT: Do you want to try Mr. Land for both robberies together?

MS. EWART: No, Your Honor.

THE COURT: You want to try Mr. Land with these two defendants on the one robbery?

MS. EWART: That's correct, Your Honor.

THE COURT: And so part of your argument was the second robbery would make him look bad?

MR. ANDREW: Yes, Your Honor.

THE COURT: So that's not going to be a part of the trial. I wanted to make sure of that.

So we have one incident and three co-defendants. The relative strength of the evidence as between them I have never considered a factor that should be used to determine severance. So if there are other basis apart from, well, the evidence is really strong because Mr. Land is seen with Mr. Clay, but not when he's committing the crime, and so it's only circumstantial as to Mr. Clay, that argument will not take the day.

Do you have another argument of any sort?

MR. ANDREW: Your Honor, I would just point out the *Wiest* factors that are outlined in *State v. Sierra*, and I would argue that the weight of the evidence is relevant in consideration of this, because in Factor No. 2, the jury may use evidence of one crime, not separate crimes, but crimes together, to infer a general criminal disposition of the defendant in order to find guilt of one of the other

crime or crimes.

THE COURT: Yeah. I do not think that would be the case because that's talking about convicting one person of additional crimes beyond the ones that the evidence is relevant to.

MR. ANDREW: And, Your Honor, at the end of the day, the common sense approach is that Mr. Clay is going to be seated at the defense table next to Mr. Land, and Mr. Land is on video committing a robbery with a gun. So the evidence is very prejudicial against Mr. Land. I understand what Your Honor just has stated on the record.

THE COURT: Well, are there any *Bruton* issues?

MS. EWART: No, Your Honor. I double-checked that.

THE COURT: None of the defendants made statements against the others?

MS. EWART: The only statement that we have is basically the defendants saying they don't know the other defendants.

THE COURT: Okay. So the fact that they are together would be relevant in Mr. Clay's trial,

whether he was tried separately or with Mr. Land.

You would seek to use the video of them going in together, because that refutes and proves they may have been misleading the police about denying the event, so he may be lying about other things?

MS. EWART: That's correct, Your Honor. And although only two of the defendants are shown on the initial surveillance video, the testimony from Officer Diaz will be that three of them were all walking together, running together, then slowing to a walk together, and by the time he approached them, they are grouped together. And basically each of the three defendants had a piece of the puzzle.

Mr. Land is the one who is seen on video actually committing the armed robbery; Mr. Martin I believe is the one who ended up with a bunch of cash in his pocket; and Mr. Clay is seen on in-car video tossing a gun over a fence as he's fleeing, and that gun was later recovered.

So all three of them have a piece of the robbery that the State would then put together in a joint trial.

THE COURT: Okay. Do I recall that both Mr. Clay and Mr. Mack have -- I'm sorry, not Mr. Mack. Let me get it here. Mr. Clay and Mr. Martin have prior convictions and person-prohibited charges?

MR. ANDREW: Yes, Your Honor.

MS. EWART: And, Your Honor, the State doesn't oppose severing those.

THE COURT: But the defendants will at least -- and I will hear from Ms. Stevens before I rule.

I will hear from you on your motion, too, if there is anything to distinguish your case.

MS. STEVENS: Yes, Your Honor.

THE COURT: Good morning.

MS. STEVENS: Good morning. I think my case is a little different in that the gentlemen, what you see on the video, the evidence video, is you do see Mr. Clay and Mr. Land together. You never see my client on that video. There is information outside of that video that shows they would have known each other, and my understanding is there was a report at prelim, there was a statement that the judge made,

that they both had the same parole officer for years.

We intend to present that and say they are saying they don't know each other and they came in the store together. And you don't see Mr. Martin, but they do have the same parole officer for a number of years. That could lead a jury to say, okay, they do know each other, but it also brings up their criminal history, and that's something that the State wouldn't be able to otherwise bring in against Mr. Land or Mr. Clay.

Additionally, just the quantum of the evidence, I think, gives relevant --

THE COURT: Well, I think how they knew each other can be sanitized in that they had appointments in the same building over a period of years. I don't know that that shows that they knew each other. I don't know that the trial judge would allow that testimony, because you have other testimony with the three of them together and the two of them together.

So I don't know that the Court would allow you at trial to introduce that testimony, or certainly maybe not that specific testimony. You may be able to sanitize it with they knew each other, but

we know that they had appointments in the same building over a period of five years, without saying what those appointments were for.

Or they met with the same individual in the same building for five years without saying what those appointments were for.

I do not know that you will get in that they were on parole for years. That will be up to the trial judge and that is not before me right now.

MS. STEVENS: I'm sorry. What I also think is different, though, is that Mr. Martin doesn't even come into play until sometime after the robbery is committed.

THE COURT: Right. I understand.

MS. STEVENS: So that's the difference. How does it go from a possible receiving stolen property scenario, if it's determined that that money is the money from the robbery -- which I'm not aware of any type of determination of that nature.

THE COURT: Right.

MS. STEVENS: All three parties have cash on them.

THE COURT: Right.

MS. STEVENS: And my concern then is that because the jury sees so much evidence against the first two people, which there is evidence of them being together before and after, that Mr. Martin would kind of just get lost in the mix as far as the jury is concerned. And I think that that's a real likelihood.

THE COURT: Yeah. I think you're too effective to let that happen. But I think also that the Court will give instruction to the jury specifically as to that individual. If the evidence supports a lesser-included that might not be appropriate to the other two offenders, then you may get a distinctive jury instruction.

I am satisfied, based on the circumstances the State has related that it intends to rely upon at trial, the fact that it is not at all certain that you would be able to introduce testimony relating to a parole status of the other offenders; and the fact that the evidence that the State would need to present in a separate trial is the same evidence it would be presenting in the one trial, and there is no body of evidence that wouldn't be admissible in one

trial that would be admissible in another.

I just find that the motion to sever would be denied as severing the defendants, but the possession by persons prohibited will be granted.

MS. STEVENS: Thank you, Your Honor.

MR. ANDREW: Thank you, Your Honor.

MS. EWART: Thank you, Your Honor.

MS. STEVENS: May I be excused, Your Honor?

THE COURT: You may.

MS. STEVENS: Thanks. Have a good day.

THE COURT: Thanks. You, too.

(Whereupon, the proceedings in the above-entitled matter were concluded.)

KATHY R. HAYNES
OFFICIAL COURT REPORTER

C E R T I F I C A T E

I, KATHY R. HAYNES, an Official Court Reporter of the Superior Court of the State of Delaware, do hereby certify the above and foregoing Pages 2 to 10 to be a true and accurate transcript of the proceedings therein indicated on July 17, 2015, as was stenographically reported by me and reduced to typewriting under my direct supervision, as the same remains of record in the Sussex County Courthouse at Georgetown, Delaware.

This certification shall be considered null and void if this transcript is disassembled in any manner by any party without authorization of the signatory below.

Kathy R. Haynes

Kathy R. Haynes

3-30-16

Date

KATHY R. HAYNES
OFFICIAL COURT REPORTER

EXHIBIT C

Excerpt of Transcript of Decision on Motion to Suppress
for lack of Probable Cause, July 24, 2015

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE	ID Nos. 1408007717 1408007714
v.	
CHRISTOPHER CLAY and BOOKER T. MARTIN,	
Defendants.	

T R A N S C R I P T
O F
P R O C E E D I N G S

Sussex County Courthouse
Georgetown, Delaware
Friday, July 24, 2015

The above-entitled matter was scheduled for hearing in open court at 9:00 o'clock a.m.

BEFORE:

THE HONORABLE RICHARD F. STOKES, Judge.

APPEARANCES:

CASEY L. EWART, Deputy Attorney General, appearing on behalf of the State of Delaware.

TASHA M. STEVENS, Esquire, appearing on behalf of the Defendant, Booker Martin.

MICHAEL W. ANDREW, Esquire, appearing on behalf of the Defendant, Christopher Clay.

TIMOTHY R. MILLER, RPR, CRR
OFFICIAL COURT REPORTER

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THE COURT: All right. Thank you.

MS. STEVENS: Your Honor, can I address your -- you had given some testimony that Officer Diaz gave, but in the actual cross-examination, that's what I was referring to. We delve into those facts. Can I point that out to the Court?

THE COURT: You can make your record, but I resolve the factual consistencies and I've made my ruling. My ruling is the law of the case. And you go back and forth on what people say. And I know you've got cross-examination. I know what he said today. And I stand exactly what my ruling was. Thank you.

MS. STEVENS: Thank you, Your Honor.

THE BAILIFF: All rise. Superior Court stands in recess until the call of the Court.

(Whereupon, there was a brief recess taken.)

THE COURT: Now, I'm, of course, aware that there was cross-examination. Did you want to actually put those page references on the record? You may.

MS. STEVENS: Your Honor, I think I left the transcript downstairs in lockup and only had a rough draft. So it wouldn't match your draft.

THE COURT: I understand there was cross-examination and, again, as the fact-finder in these things who resolves and makes decisions which I've done.

All right. This is my thinking. I did go back and take another look at the Jones case. And, in my view, the Jones case is really not applicable here. Given the finding of reasonable, articulable suspicion, the encounter was lawful at the outset. The encounter in Jones was not lawful at the outset and because Jones took off, nothing could bootstrap and make good what was a bad encounter.

The issue in this case, as I see it, is probable cause. My view of it is, probable cause for the crimes of robbery and conspiracy. The State argues that there was probable cause for resisting arrest. And it's hard to see how that could occur without an arrest having been effectuated.

I'm finding in this case that under the totality of the circumstances, given what I have previously found and have incorporated into this hearing, that after the lawful encounter, Mr. Clay immediately ran. He ran and his flight was reported and he was ultimately brought into custody. And we have the video of him running; and we have the video of him running toward a white van; and we have a video of him which you can see after it was replayed of his hand and, apparently, it looks like dropping an object over a fence and he runs into a van. So you have the flight which is also supportive of consciousness of guilt. And you also have an indication of an object being gotten rid of over a fence. In light of the background with the armed robbery and weapon and, I think, for probable cause which is a practical determination based on the totality of the circumstances, that that would be sufficient for that purpose.

As to Mr. Booker, when the lawful encounter began, he said his family was

associated with the police; he had nothing to do with -- not doing anything wrong, words to that effect; and he began to run northbound on Albury, at which point in time, the officer used the Taser. Again, beginning to run and the refusal to obey orders supports the notion of flight, evasion and consciousness of guilt. I note the use of the Taser was reasonable. There was a situation which was dangerous. There was a weapon involved. This officer was faced with a situation where you have people running in different directions and Mr. Land's involved circling, as well. It's a dangerous situation with him being alone and the Taser itself was a reasonable use of force to effect an arrest which I'm finding, under the totality of the circumstances, is supported by probable cause for robbery and conspiracy.

So that's my ruling. Thank you.

THE BAILIFF: All rise. Superior Court stands in recess until the call of the Court.

(Whereupon, the proceedings in the above-entitled matter were concluded.)

C E R T I F I C A T E

I, TIMOTHY R. MILLER, RPR, CRR, an Official Court Reporter of the Superior Court of the State of Delaware, do hereby certify the above and foregoing Pages 2 to 63 to be a true and accurate transcript of the proceedings therein indicated on July 24, 2015, as was stenographically reported by me and reduced to typewriting under my direct supervision, as the same remains of record in the Sussex County Courthouse at Georgetown, Delaware.

This certification shall be considered null and void if this transcript is disassembled in any manner by any party without authorization of the signatory below.

/s/Timothy R. Miller
Timothy R. Miller, RPR, CRR

10-9-15
Date

TIMOTHY R. MILLER, RPR, CRR
OFFICIAL COURT REPORTER

C E R T I F I C A T E

I, TIMOTHY R. MILLER, RPR, CRR, an Official Court Reporter of the Superior Court of the State of Delaware, do hereby certify the above and foregoing Pages 2 to 63 to be a true and accurate transcript of the proceedings therein indicated on July 24, 2015, as was stenographically reported by me and reduced to typewriting under my direct supervision, as the same remains of record in the Sussex County Courthouse at Georgetown, Delaware.

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/s/Timothy R. Miller
Timothy R. Miller, RPR, CRR

10-9-15
Date

TIMOTHY R. MILLER, RPR, CRR
OFFICIAL COURT REPORTER

EXHIBIT D

Excerpt of Transcript of Decision on Motion for Judgment of Acquittal, October 14, 2015

COPY

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

THE STATE OF DELAWARE,

Plaintiff,

vs.

CHRISTOPHER CLAY, ID# 1408007714A
BOOKER T. MARTIN, ID# 1408007717A
MAURICE C. LAND, ID# 1408007675A

Defendants.

VOLUME C

T R A N S C R I P T
O F
P R O C E E D I N G S

Sussex County Courthouse
Georgetown, Delaware
Wednesday, October 14, 2015

BEFORE: THE HONORABLE E. SCOTT BRADLEY, Judge.

APPEARANCES:

CASEY L. EWART, Deputy Attorney General, appearing on behalf of the State.

MICHAEL ANDREW, Esquire, appearing on behalf of Defendant Clay.

TASHA M. STEVENS, Esquire, appearing on behalf of Defendant Martin.

STEPHEN W. WELSH, Esquire, appearing on behalf of Defendant Land.

NICOLE J. SESTA, RPR
OFFICIAL COURT REPORTER

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consider and as far as the robbery, the possession of the firearm, and the conspiracy, the State's theory of the case is that Mr. Clay was the inside the store lookout. He enters at the same time as the robber. He leaves at the same time as the robber. He meanders around the front of the store, picks things up, puts them on the counter, walks away, puts them on the counter again, never actually buys anything. There's sufficient evidence for the jury to find that he was the inside lookout for the robbery and he was involved.

THE COURT: Okay, I'll take them in pieces. Count one, robbery in the first degree, count two, possession of a firearm during the commission of a felony, count three, conspiracy in the second degree, like I said before, the State has a very powerful case against Mr. Land.

The video pretty much captures him committing the offense of robbery in the first degree and, again, arguably possession of a firearm during the commission of a felony. That certainly covers counts one and two. As to Mr.

Clay, like I said before, he's seen on the camera walking in the store almost at the same time as Mr. Land. He leaves the store about the same time as Mr. Land. It obviously looks like they are together. He does look like the in-store lookout.

He's keeping an eye on the front of the store. He's keeping an eye on the cash registers. And then, like I said, he left with Mr. Land. He's seen running across the street with Mr. Land. He's seen walking down the street with Mr. Land, and then ultimately he's found with a gun and with money and cash money was taken from the Dollar General. So I think all of that is enough to deny the first three counts. As to the tampering charge, I'm like you, Mr. Andrew, we don't typically see this charge. We've had a million cases where defendants have thrown drugs out of vehicles, out of the house, tried to flush them down the toilet, same thing with weapons, a variety of physical evidence, and you just never see those cases come with tampering charges.

I'm not really sure how broadly to read the tampering offense, but if you read it literally I think it's enough to ensnare the three defendants in this case or certainly your guy, Mr. Land, at this point having heard from Mr. Martin. So that covers that. Same thing on the resisting arrest. Mr. Clay takes off when Officer Diaz stops, tries to stop the three gentlemen and pretty much the same thing when Officer Wilson pulls up, Mr. Clay beats feet, runs along the fence, runs behind the vehicles, and is ultimately found in a vehicle that is apparently not his. So I think that's enough for resisting arrest. So I'll deny your motion.

MR. ANDREW: Thank you, Your Honor.

THE COURT: Ms. Stevens?

MS. STEVENS: Yes, Your Honor.

THE COURT: And I'm sorry, arguably trying to throw the gun over the fence, when you look at the video you can see something and not long thereafter the police find a pistol. I'm sorry, go ahead, Ms. Stevens.

MS. STEVENS: Your Honor, also pursuant

C E R T I F I C A T E

I, NICOLE SESTA, an Official Court Reporter of the Superior Court of the State of Delaware, do hereby certify the above and foregoing to be a true and accurate transcript of the proceedings therein indicated on October 14, 2015, as was stenographically reported by me and reduced to typewriting under my direct supervision, as the same remains of record in the Sussex County Courthouse at Georgetown, Delaware.

This certification shall be considered null and void if this transcript is disassembled in any manner by any party without authorization of the signatory below.

/s/ Nicole Sesta

Nicole Sesta, RPR

March 3, 2016

DATE

NICOLE J. SESTA, RPR
OFFICIAL COURT REPORTER