EFiled: Oct 12 2018 02:36PM EDT
Filing ID 62555556
Case Number 414,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellant,	)	No. 414, 2018
	)	
v.	)	On Appeal from the
	)	Superior Court of the
ANDRE MURRAY,	)	State of Delaware
	)	
Defendant-Below,	)	
Appellee.	)	

STATE'S THIRD CORRECTED OPENING BRIEF

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

Martin B. O'Connor (No. 3528)
Deputy Attorney General
820 North French Street, 7th Floor
Wilmington, DE 19801
(302) 577-8500

Dated: October 12, 2018

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NATURE AND STAGE OF THE PROCEEDINGS

Andre Murray ("Murray") was arrested on October 13, 2017. (A1 at DI 1[1]). On November 27, 2017, a New Castle County grand jury indicted Murray for Possession of a Firearm by a Person Prohibited ("PFBPP"), Possession of Firearm Ammunition by a Person Prohibited ("PFABPP"), and Carrying a Concealed Deadly Weapon ("CCDW"). (A1 at DI 2). On February 2, 2018, Murray filed a Motion to Suppress, and on March 2, 2018, the State responded to the motion. (A2 at DI 9, 10). On March 29, 2018, the Superior Court held a suppression hearing, reserving decision. (A3 at DI 13). On April 2, 2018, the Superior Court issued a Memorandum Opinion granting Murray's suppression motion.[2]

On April 9, 2018, the State filed a motion for re-argument. (A4 at DI 19). On May 15, 2018, Murray filed a response to the State's motion. (A5 at DI 23). On July 26, 2018, the Superior Court denied the State's motion for re-argument.[3] On July 30, 2018, the State certified that the evidence suppressed by the Superior Court was material and essential to its prosecution of the case against Murray, and requested the Superior Court dismiss the Indictment pursuant to 11 *Del. C.* § 9902(b). (A5 at DI 25). On July 31, 2018, the Superior Court dismissed the

[1] "DI" refers to docket items in Superior Court case *State v. Andre Murray*, Case No. 1710007866.

[2] *State v. Murray*, 2018 WL 1611268 (Del. Super. April 2, 2018).

[3] *State v. Murray*, 2018 WL 3629150 (Del. Super. July 26, 2018).

Indictment. (A5 at DI 26). On August 16, 2018 the State filed a timely notice of appeal to this Court. (A5 at DI 27). This is the State's Opening Brief.

SUMMARY OF THE ARGUMENT

I. The Superior Court abused its discretion when it did not consider the totality of the facts and circumstances surrounding Murray's detention, by misapplying Delaware Rule of Evidence 701, improperly limiting the record.

II. The Superior Court abused its discretion when it granted Murray's suppression motion. Sergeant Matthew Rosaio of the Wilmington Police Department possessed reasonable suspicion that Murray was in possession of a concealed deadly weapon. The totality of the circumstances, as viewed through the eyes of a reasonable, trained police officer in the same or similar circumstances, combining objective facts with an officer's subjective interpretation of those facts, demonstrated Murray possessed a concealed deadly weapon.

STATEMENT OF FACTS

At approximately 11:00 p.m. on October 13, 2017, Sgt. Matthew Rosaio ("Rosaio") of the Wilmington Police Department ("WPD") was driving an unmarked tan Chevrolet Tahoe, conducting proactive mobile patrol in the area of the 200 block of South Franklin Street, a "well-known, high crime, high drug area. . . subject to numerous shootings [and] drug activity."[4] In this specific area of Wilmington, Rosaio has made numerous arrests for concealment and possession of firearms.[5] Rosaio is an 8-year veteran of the Wilmington Police Department, who has received training in identifying the characteristics of an armed gunman from the Wilmington Police Department, the federal Bureau of Alcohol, Tobacco and Firearms, and the United States Department of Justice.[6] For the past four years, Sgt. Rosaio instructed other police officers on the characteristics of armed gunmen.[7] Considerations in determining the characteristics of an armed gunman include, but are not limited to, "people's behavior and the geographical locations they are in."[8]

[4] A27-28.

[5] *Id.*

[6] A25-26.

[7] *Id.*

[8] A27.

Rosario developed an expertise with specific elements that "people display when they are attempting to conceal firearms from the police and the public."[9]

While in the 200 block of South Franklin Street, approaching Chestnut Street, Rosaio observed two male subjects, Murray and Lenwood Murray-Stokes ("Murray-Stokes"), walking southbound on the eastern most sidewalk of the 100 block of South Franklin Street, towards him.[10] Murray was "walking with his right arm canted and pinned against the right side of his body, specifically the right front portion of his body, which is one of the telltale signs of the characteristic of somebody who is armed with a handgun."[11] Rosaio explained people "often carry firearms in their waistband unsecured by any type of holster and in a way that they can control that firearm and adjust it, if need be, as they are walking so it doesn't fall down through their pants or so it doesn't reveal itself to the public."[12]

Murray's left arm was "swinging more freely, in a more natural manner alongside his body," while his right arm remained pinned against the right portion of his body.[13] In contrast, Murray-Stokes was walking with both arms swinging, in

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[9] *Id.*

[10] The block was "well-lit," by residential and street lighting, as well as Rosaio's Tahoe's headlights. Rosaio had an unobstructed view of Murray. A32-33.

[11] A31.

[12] A31-32.

[13] *Id.*

a "natural way" with a "natural gait."[14] Rosaio saw Murray hold his hand to his side for approximately 20 seconds.[15] When Murray was 15 feet north of the intersection, Rosaio saw Murray look in his direction, and when Murray saw the Tahoe, he took a "stutter step, where he kind of stopped in his tracks."[16] Murray then "looked around,"[17] and slowly walked forward while looking at the Tahoe. Murray continued to scan the area and look behind him, exhibiting suspicious, nervous behavior, with his right arm pinned to his side.[18]

Rosaio drove the Tahoe up next to Murray, and he parked and exited the vehicle.[19] Murray then "stopped and began positioning himself behind Lenwood Murray-Stokes."[20] Murray then turned the right side of his body, which is the side that he had his arm pinned against his body, to blade it from Rosaio, another known characteristic "of someone who's placing the side that the gun was on in a position where the police or the public can't see it."[21] Murray then moved completely behind

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[14] *Id.*

[15] *Id.*

[16] A34.

[17] *Id.*

[18] A35.

[19] A35-36.

[20] *Id.*

[21] A36.

Murray-Stokes, positioning Murray-Stokes between himself and Rosaio.[22] Murray-Stokes stopped.[23] Rosaio, considering the totality of the circumstances, including his training and experience, concluded Murray "had a handgun on his right side."[24] Murray began reaching for his waistband area as Rosaio drew his weapon and ordered him to stop and show him his hands.[25] Rosaio then told Murray: "Don't reach for your waistband, get on the ground."[26] Murray complied, and Rosaio recovered a loaded handgun.[27]

[22] *Id.*

[23] A37.

[24] *Id.*

[25] A37-38.

[26] A38.

[27] *Id.*

ARGUMENT

I. THE SUPERIOR COURT ERRED WHEN IT EXCLUDED EVIDENCE UNDER DELAWARE RULE OF EVIDENCE 701.

QUESTION PRESENTED

Whether the Superior Court abused its discretion in granting Murray's Motion to Suppress and failing to consider evidence that Murray was armed with a handgun because it erred in applying Delaware Rule of Evidence ("DRE") 701.

The State preserved this question below when it opposed Murray's suppression motion.[28]

STANDARD AND SCOPE OF REVIEW

This Court reviews a trial court's evidentiary rulings under an abuse of discretion standard.[29] "An abuse of discretion occurs when a court has ... exceeded the bounds of reason in view of the circumstances, [or] ... so ignored recognized rules of law or practice ... to produce injustice."[30]

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[28] DI 10; A14-22.

[29] *Smith v. State*, 913 A.2d 1197, 1228 (Del. 2006) (citing *State v. Dollard*, 838 A.2d 264, 266 (Del. 2003), *Chapman v. State*, 821 A.2d 867, 869 (Del. 2003)); *See also U.S. v. Farrington*, 58 F. App'x 919, 924 (3d Cir. 2003) (reviewing a trial judge's decision to exclude reverse 404(b) evidence for an abuse of discretion).

[30] *Parker v. State*, 85 A.3d 682, 684 (Del. 2014) (citing *Culp v. State*, 766 A.2d 486, 489 (Del. 2001) (quoting *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994)).

MERITS OF THE ARGUMENT

The issue raised by Murray's motion to suppress evidence was whether Rosaio did not possess reasonable articulable suspicion to stop Murray for carrying a concealed deadly weapon. To make that determination, the Superior Court was to defer to the experience and training of the law enforcement officer,[31] focusing upon the totality of the circumstances as viewed through the eyes of a reasonable, trained police officer in the same or similar circumstances, combining objective facts with such an officer's subjective interpretation of those facts.[32] In this case, the Superior Court did not defer to the experience of the officer and did not evaluate the totality of the circumstances. Thus, the court erred in excluding relevant evidence. The Superior Court also erroneously applied DRE 701, limiting the evidence it would consider when deciding the motion to suppress.

Sergeant Rosaio, the lone suppression hearing witness, described the neighborhood in which Murray was arrested as a "well-known, high crime, high drug area,"[33] a place where Rosaio had made numerous prior arrests for weapons concealment. Rosaio received training in identifying armed gunmen from the

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[31] See *Woody v. State*, 765 A.2d 1257, 1262 (Del. 2001).

[32] See *State v. Henderson*, 892 A.2d 1061, 1064-65 (Del. 2006) (quoting *Jones v. State*, 745 A.2d 856, 861 (Del. 1999) (citing *United States v. Ortiz*, 449 U.S. 411, 417-18 (1981)) (accord *Quarles v. State*, 696 A.2d 1334, 1337 (Del. 1997)).

[33] A28.

Wilmington Police Department, the federal Bureau of Alcohol, Tobacco and Firearms, and the United States Department of Justice. For four years, Rosaio has instructed other officers on the characteristics of an armed gunman. Those specific characteristics of an armed gunman, while possibly benign behaviors if seen by an ordinary citizen, inform a police officer that people are attempting to conceal firearms from the police and public.

Rosaio observed Murray's right arm was "canted and pinned against his body"[34] which, based on Rosaio's significant training and experience, is "one of the telltale signs of the characteristics of somebody who is armed with a handgun."[35] His left arm was swinging freely, in a more natural manner, as were both arms of his companion. When Murray saw Rosaio's Tahoe, he immediately reacted, "taking a stutter step, where he kind of stopped in his tracks."[36] Murray then looked around, scanning the area, exhibiting further suspicious, nervous behavior, while his right arm remained pinned to his side. Rosaio did not turn on the emergency lights to his vehicle, did not engage the siren, and did not block Murray's path of direction.[37] He pulled up parallel to Murray as Murray walked on the street.[38] As Rosaio exited the

[34] A31.

[35] *Id.*

[36] A34.

[37] A18.

[38] A19.

Tahoe and approached Murray, Murray began to conceal himself behind Murray-Stokes, in an obvious attempt to prevent Rosaio from seeing him.[39] Murray then "bladed" his body, another characteristic of "someone who is placing the side that the gun was on in a position where the police or the public can't see it." Murray's physical response to Rosaio's presence was an "unnatural movement." Based on his training and observations, Rosaio believed Murray possessed "a handgun on his right side." As Rosaio approached, Murray began reaching for his waistband, which also supported Rosaio's observations and conclusion that Murray was armed.

The Superior Court granted Murray's motion to suppress, concluding the State relied "almost exclusively on two objective facts: 1) the defendant swinging of one arm while holding the other close to his side, and 2) his "blading" or moving his body sideways when he and his walking partner stopped."[40] The court noted the 'other factors include the high crime neighborhood, the apparent "stutter step" and his "looking around" as the officer was getting out of the car, but immediately dismissed these factors as "chaff" – "thrown off by the essential facts that the officer advises his training and experience teach that the defendant was carrying a concealed weapon."[41]

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[39] *Id*.

[40] *Murray*, 2018 WL 1611268, at * 2.

[41] *Id.*

Although Murray did not argue Rosaio's testimony and observations was inadmissible, and did not object to his testimony at the suppression hearing, the Superior Court *sua sponte* concluded Rosaio's testimony was expert opinion testimony, as that term applies to DRE 702, and the State did not provide "scientific support" for Rosaio's opinion, concluding the State failed to provide support for Rosaio's opinions.[42] The court explained the State failed to provide evidence of the "percentage of armed gunmen walk swinging one arm but not the other," how these percentages may change depending "upon the time of day or the fact that it is a high crime neighborhood," or, in the case of a police encounter with a citizen, "what percentage of the citizens turn their bodies away from the policeman."[43] The court further mused, of those citizens that turn their bodies away from policemen, "what percentage are hiding something? and of those that are hiding something, what percentage are hiding firearms?"[44]

The Superior Court held that "'armed gunman' testimony in which we are asked to have faith is certainly not a "lay opinion" under D.R.E. 701 as it is professed to be based on 'scientific, technical or other specialized knowledge' and therefore,

[42] *Id.* at * 3.

[43] *Id.* at * 3.

[44] *Id.*

it is within the scope of D.R.E. 702."[45] The Superior Court further concluded that the evidence did not meet the "criteria" required by D.R.E. 702 – because it was not based on "sufficient facts or data," or the "product of reliable principles and methods" that have been readily applied to the facts.[46] In the court's view, the officer's opinion was not "science," and, as a result, the court did not "assign it the weight it was obviously accorded by the officer on the night in question."[47] The court concluded the officer's determination was nothing more than a "hunch that turned out to be correct," and the State was asking the court to "accord it a wide path and backfill the logic leading to the capture of the weapon."[48] The Superior Court's evidentiary ruling was erroneous, and Rosaio's testimony was admissible pursuant to DRE 701, which addresses witness testimony.

DRE 701 provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.[49]

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[45] *Id.*

[46] *Id.*

[47] *Id.* at * 3.

[48] *Id.*

[49] DRE 701.

Rosaio was not testifying as an expert witness as that term is defined in DRE 702. His testimony recounted his observations of Murray and the inferences he drew from those observations, based on his police training and experience. Rosaio's testimony was not based on scientific or specialized knowledge, or based on sociology-based surveys identifying "percentages" of certain behavior of people in the community.

In *Bryant v. State*,[50] this Court has recently held that testimony regarding the characteristics of an armed gunman was admissible pursuant to DRE 701.[51] The defendant in *Bryant* was observed grabbing for his waistband by a police officer, after the officer exited his patrol vehicle.[52] On direct appeal, Bryant argued the State failed to declare the police officer an "expert witness" who impermissibly "'profiled' [Bryant] as an armed gunman" at trial."[53] This Court rejected Bryant's claim, concluding the officer's testimony that Bryant displayed the characteristics of an armed gunman "was relevant and based on his own impressions as a fact witness, and given the subject matter of the issue addressed by his testimony, would also be admissible under Delaware Rule of Evidence 701 as lay witness testimony."[54] Under

[50] *Bryant v. State*, 2017 WL 568345 (Del. Feb. 8, 2017).

[51] *Id.* at * 1.

[52] *Id.*

[53] *Id.*

[54] *Id.*

Bryant, the Superior Court's determination that Rosaio's testimony was not lay witness testimony, and the court's decision to afford it no weight, was an abuse of discretion.

ARGUMENT

II. THE SUPERIOR COURT ERRED IN GRANTING MURRAY'S MOTION TO SUPPRESS.

QUESTION PRESENTED

Whether the Superior Court abused its discretion in granting Murray's motion to suppress.

The State preserved this question below when it opposed Murray's suppression motion and filed a motion for reargument.[55]

STANDARD AND SCOPE OF REVIEW

This Court reviews a trial court's ruling on a motion to suppress, after an evidentiary hearing, for an abuse of discretion.[56] "An abuse of discretion occurs when a court has ... exceeded the bounds of reason in view of the circumstances, [or] ... so ignored recognized rules of law or practice ... to produce injustice."[57] To the extent the claim of error implicates questions of law; however, the standard of review

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[55] DI 10, 19; A14-22.

[56] *Loat v. State*, 2017 WL 712750 (Del. 2017) (citing *Lopez–Vazquez v. State*, 956 A.2d 1280, 1284 (Del. 2008)).

[57] *Parker v. State*, 85 A.3d 682, 684 (Del. 2014) (citing *Culp v. State*, 766 A.2d 486, 489 (Del. 2001) (quoting *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994)).

is *de novo*.[58] This Court reviews a trial judge's factual findings to determine whether there was sufficient evidence to support the findings and whether those findings were clearly erroneous.[59]

MERITS OF THE ARGUMENT

Murray's motion to suppress claimed the police lacked "a reasonable articulable suspicion that Murray had been, or was about to, partake in criminal activity."[60] Murray claimed Rosaio only seized him because his "arm was not swinging and because Murray turned away from the officer."[61] Murray argued that because the officer did not allege he saw Murray had a specific item or gun in his waistband, and was not seen adjusting an item in his waistband, the officer lacked a justification to seize him.[62] Murray claimed the officer "could have arguably engaged with Murray by asking a limited number of questions regarding their initial suspicion," but the officer unlawfully seized him.[63]

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[58] *Holden v. State*, 23 A.3d 843, 846 (Del. 2012) (citing *Lopez-Vazquez*, 956 A.2d at 1284-85).

[59] *Id.* (citing *Woody*, 765 A.2d at 1261).

[60] A7.

[61] A11.

[62] *Id.*

[63] *Id.*

The State argued the police officer had reasonable, articulable suspicion to stop Murray, because Rosaio "observed distinctive actions by [Murray] that led him to believe [Murray] was carrying a concealed handgun."[64] Because of Rosaio's observations, training and experience, he was able to identify specific characteristics of an armed gunman, characteristics which "may likely go unrecognized to most."[65] Rosaio's ability to articulate specific facts regarding Murray's conduct established reasonable articulable suspicion to detain Murray.[66]

At the conclusion of Rosaio's testimony at the suppression hearing, the Superior Court reserved decision. On April 2, 2018, the Superior Court issued a memorandum opinion granting Murray's motion to suppress.

The Superior Court noted:

> "there was perhaps a moment, as the officer was exiting his vehicle and before he drew his service revolver, where this was a *Terry* stop, requiring reasonable articulable suspicion that criminal activity is afoot and the subject is armed and dangerous. But upon seeing the defendant turn his body, and before any "real" contact was made, the officer candidly testified that he was convinced the defendant was indeed armed and may be reaching for his pistol and thus, an arrest was effectuated which, as we all know, must be preceded by probable cause to believe a crime is being committed and the suspect committed it."[67]

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[64] A17, 19.

[65] A19.

[66] A20.

[67] *Murray*, 2018 WL 1611268, at * 1.

Based on this conclusion, the Superior Court determined the State needed to demonstrate *probable cause* to justify Murray's detention, because the officer *subjectively* concluded Murray possessed a gun before he approached him.[68] That determination was incorrect. Rosaio's testimony, as a whole, demonstrated he possessed reasonable articulable suspicion to detain Murray, to dispel or confirm his belief that Murray possessed a concealed weapon.[69]

The Superior Court noted the absence of certain evidence at the hearing: "no 'tell-tale bulge,' no furtive movement, no flight or abandonment, no informant tip, corroborated or otherwise, [and] no 'hand-to-hand gestures." The Superior Court also dismissed Rosaio's training and experience in "armed gunman" profiling as the State simply telling the court – "trust me."[70] The court also dismissed Rosaio's personal observations and testimony which demonstrated reasonable articulable suspicion as "chaff" – Murray's presence in a high crime neighborhood; Murray

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[68] In denying the State's Motion for Re-argument (DI 24), the court applied the probable cause standard to Rosaio's conduct – "So the question was – and we suppose, remains – was there probable cause to point a gun at the suspect, order him to the ground, and take him into custody?" *Murray*, 2018 WL 3629150, at * 1.

[69] The State argued Rosaio possessed reasonable articulable suspicion to justify Murray's detention in its response to the motion to suppress and its motion for re-argument. In denying the State's Motion for Re-argument, the Superior Court mis-framed the State's argument as follows: "because the defendant fit the "armed gunman profile" known to the arresting officer, the defendant's conformity with the profile was enough probable cause to justify his arrest." *Murray*, 2018 WL 3629150, at* 2.

[70] *Murray*, 2018 WL 1611268, at * 1-2.

walking with his right arm pressed against his side while swinging his left arm freely; Murray's evasive and nervous behavior, taking a "stutter step" and "looking around" as Rosaio exited his vehicle, and "blading" his body sideways as the officer approached.[71] And, as was previously argued, the court misapplied DRE 701, failing to give any weight to circumstances and evidence normally considered by the court in reasonable articulable suspicion analysis.[72]

To stop and detain a suspect, police officers must have reasonable grounds to suspect that the person is committing, has committed or is about to commit a crime.[73] Police officers may forcibly stop and detain a person if they have reasonable suspicion of criminal activity on part of that person.[74] Reasonable articulable suspicion is defined as an officer's ability to "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant

[71] The Superior Court focused on Murray "swinging his left arm freely," and did not credit Rosaio's observations of Murray's right arm. It was Murray's right arm, "canted and pinned against the right side of his body, specifically the right front portion of his body, which [was] one of the telltale signs of the characteristic of someone who is armed with a handgun." A31.

[72] *Murray*, 2018 WL 1611268, at * 3.

[73] 11 *Del. C.* § 1902; *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

[74] *Coleman v. State*, 532 A.2d 1171, 1174 (Del. 1989), *cert. denied*, 493 U.S. 1027 (1990). *See also United States v. Place*, 462 U.S. 696, 702 (1983); *Terry*, 392 U.S. at 22.

the intrusion."[75] A reasonable articulable suspicion determination "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."[76] Included in that determination are "inferences and deductions that a trained officer could make that might well elude an untrained person."[77] "Reasonable articulable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence."[78]

The Superior Court erred in applying a probable cause analysis to the motion to suppress. It also erred by not considering Rosaio's testimony through the eyes of a "reasonable, trained police officer." The Superior Court did not "defer[] to the experience and training of law enforcement officers," and openly questioned why the court needed to do so here.[79]

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[75] *Henderson*, 892 A.2d at 1064; *Coleman,* 562 A.2d at 1174 (citing *Terry,* 392 U.S. at 21).

[76] *Henderson*, 892 A.2d at 1064-65 (quoting *Jones v. State*, 745 A.2d 856, 861 (Del. 1999) (citing *United States v. Cortez,* 449 U.S. 411, 417–18 (1981)); *accord Quarles,* 696 A.2d at 1337;

[77] *Harris v. State*, 806 A.2d 119, 127 (Del. 2002).

[78] *Woody*, 765 A.2d at 1263 (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000).

[79] *Id.* at 1263.

This Court has previously addressed the types of errors that the Superior Court made in the reasonable articulable suspicion analysis in this case. In *State v. Brady*, this Court held:

> [W]e think that the Superior Court did not give adequate weight to the principle that reasonable suspicion should be evaluated in the context of the totality of the circumstances as viewed through the eyes of a reasonable officer with the same knowledge and experience as [the detective] and [the probation officer], combining objective facts with the officer's subjective interpretation of those facts.[80]

The evidence presented at the suppression hearing demonstrated Rosaio developed reasonable articulable suspicion to detain Murray and investigate whether he possessed a concealed deadly weapon. Murray was walking, at night, in a "well-known, high crime, high drug area,"[81] which was subject to numerous shootings and drug activity. Rosaio had made numerous prior arrests in this specific area for concealment and possession of firearms. Rosaio received training in the characteristics of an armed gunman from at least three law enforcement agencies, and for four years he instructed other law enforcement officers on the characteristics of an armed gunman. Familiar with specific characteristics armed gunmen demonstrate when they are attempting to conceal weapons from law enforcement and the public, Rosaio observed several specific characteristics Murray exhibited as

[80] *State v. Brady*, 2016 WL 7103408, at * 2 (Del. Dec. 5, 2016).

[81] A28.

he walked down the block. First, Murray walked with his right arm "canted and pinned against the right side of his body, specifically the right front portion of his body."[82] To Rosaio, this was a "tell-tale sign of the characteristics of somebody who is armed with a handgun."[83] Rosaio continued to watch Murray, and after about 20 seconds, as Murray continued to hold his right arm at his side, Rosaio saw Murray look in his direction and see the Tahoe he was driving.[84] Murray then stutter-stepped and scanned the area, "exhibiting suspicious, nervous behavior."[85] Rosaio then parked the vehicle and exited it, without turning on his vehicle's emergency equipment, announcing his presence, or addressing Murray in any way. As Rosaio approached, Murray stopped walking and positioned himself behind Murray-Stokes, so Rosaio might not see him.[86] Rosaio then saw Murray turn, or "blade," the right side of his body from Rosaio's view, another known characteristic of an armed gunman, "placing the side that the gun was on in a position where the police or the public can't see it."[87] As Rosaio continued to approach and ultimately drew his weapon, Murray began reaching for his waistband area, an additional indication he

[82] A31.

[83] A31.

[84] A34.

[85] A35.

[86] A35-36.

[87] A36.

was concealing a weapon.[88] After seeing Murray reach for his waistband, Rosaio ordered him to stop and get on the ground.[89]

The circumstances of Murray's detention are almost identical to those this Court addressed in *Lum v. State*.[90] In *Lum*, the defendant claimed the Superior Court erred by denying a motion to suppress a handgun seized as the product of an "illegal" search.[91] WPD Detective Rosaio, working alongside a probation officer, observed Malcolm Lum ("Lum") "walking in a circuitous route, seeming to avoid [the police officer's] patrol car with a 'nervous demeanor' and 'constantly checking [the car's] whereabouts.[92] Rosaio also saw Lum exhibiting 'canting' behavior of an armed gunman by appearing to secure a gun in his waistband.[93] Rosaio and his partner then exited their car to detain Lum and search his companion.[94] This Court concluded the State established reasonable articulable suspicion, finding that "evidence in the record, including the fact that Lum was acting suspiciously in a high crime area and

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[88] A37-38.

[89] A38.

[90] 2018 WL 4039898 (Del. Aug. 22, 2018).

[91] *Id.* at * 1.

[92] *Id.* The "Detective Rosaio" in *Lum* is the same officer who observed Murray here.

[93] *Id.*

[94] *Id.*

appeared to be armed and avoiding the officer's patrol car, supports the Superior Court's finding that the officers had a reasonable suspicion to stop Lum."[95]

In *Cropper v. State*,[96] WPD officers stopped a vehicle for a registration violation.[97] Cropper was in the front passenger seat of the car.[98] As the police officer spoke to Cropper, he noticed Cropper's responses to questions were very "clipped," he was short of breath, he had a hard time making eye contact with the officer, and his hands were slightly shaking.[99] The officer knew Cropper, and his demeanor was inconsistent as compared to several prior interactions with him.[100]

Cropper was asked to exit the car, as the police were going to have it towed.[101] When he exited the car, the officer noted Cropper "kept his hands facing away from his body."[102] The officer asked Cropper if he was carrying something, and, with some difficulty, Cropper responded "no."[103] At that point, the officer directed

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[95] *Id.*

[96] 123 A.3d 940, 943 (Del. 2015).

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.*

Cropper to put his hands on the car so he could pat him down.[104] During the pat-down, the officer recovered a handgun from Cropper's pants waistband.[105]

Cropper moved to suppress the handgun, arguing the officer did not possess a reasonable, articulable suspicion to pat him down.[106] The officer testified he knew Cropper and Cropper's demeanor was markedly different than his demeanor on several prior occasions, and based on his training in identifying characteristics of an armed gunman, the officer concluded "the behaviors exhibited by Cropper were indicative of a person armed with a firearm."[107] In affirming the Superior Court's denial of Cropper's motion to suppress, this Court concluded "based upon the combination of [the officer's] specialized objective training and subjective familiarity with Cropper's normal behavior, [the officer] had a reasonable believe Cropper was armed and presently dangerous."[108]

A similar outcome was reached in *Loat v. State*.[109] The defendant in *Loat* and his co-defendant, Vaughn Rowe, were walking in the 500 block of Maryland

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[104] *Id.*

[105] *Id.*

[106] *Id.* at 942.

[107] *Id.* at 945.

[108] *Id.* at 946.

[109] 2017 WL 712750 (Del. Feb. 22, 2017).

Avenue.[110] As Rowe walked, he kept "reaching for his waistband, leading detectives [conducting surveillance] to believe he was carrying a gun."[111] The undercover police officers who observed Loat and Rowe requested assistance from uniformed officers to assist them in approaching the two men.[112] When the police approached Loat and asked to speak with him, Loat took off running.[113] Loat was eventually captured, and the police found a handgun 10 feet from where he was apprehended.[114] Loat filed a motion to suppress, claiming the police lacked reasonable articulable suspicion to detain him. The Superior Court denied the motion, concluding the police had reasonable suspicion to believe Loat was carrying a concealed weapon, because Loat was observed in a high crime area, and one of the detectives on scene knew Loat had access to firearms because the detective had recently executed a search warrant at Loat's home that yielded weapons.[115] The Superior Court also concluded that when Loat fled, there was reasonable suspicion that Loat was armed.[116]

---

[110] *Id.* at * 1.

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.* at 2.

[116] *Id.*

This Court affirmed the Superior Court's decision, concluding the State demonstrated reasonable articulable suspicion on several independent bases to detain Loat. This Court has long held "[p]resence in a high crime area and unprovoked headlong flight are factors that can be considered in the reasonable suspicion analysis."[117] When Loat fled, the police knew he had access to weapons because they had previously executed a search warrant at Loat's house and found guns.[118] These three facts (presence in a high crime area, unprovoked flight and knowledge of possible access to weapons) established reasonable articulable suspicion. Additionally, this Court also noted "[A]s Loat was running, he grabbed at his waistband, leading Corporal Moore to believe he was reaching for a gun. Thus, Corporal Moore had reasonable suspicion to stop him."[119]

In *Flowers v. State*,[120] this Court again considered whether law enforcement possessed reasonable articulable suspicion when they detained Ron Flowers ("Flowers"). The police officer observed Flowers "blading" his body – showing the narrower side of his body, while one officer observed a rectangular object under clothing on the right side of his body, in his waistband. Based upon his training and

[117] *Id.* at 3.

[118] *Id.*

[119] *Id.*

[120] *Flowers v. State*, 2018 WL 4659227 (Del. Sept. 27, 2018).

experience, the officer concluded Flower's actions were consistent with a person attempting to conceal a weapon – committing the crime of CCDW.[121] The officer exited his vehicle and ordered Flowers and his associates to the ground.[122] The Superior Court concluded the quantum of suspicion that the officer possessed constituted reasonable articulable suspicion.[123]

This Court affirmed, noting:

> In this case, Corporal Lynch testified that he had made many arrests based upon the "blading" movement and had received training in the police academy and from courses on street crime as to how to recognize the characteristics of an armed person. Lynch ordered Flowers to the ground because he believed Flowers was armed after seeing Flowers grab a rectangular object protruding from Flower's waistband. The trial court had also noted that the location of Flowers' stop was in a high-crime area and it occurred late at night. Based upon this record, the evidence supports a finding of reasonable articulable suspicion.[124]

The Superior Court erred in granting Murray's motion to suppress. In light of prevailing case law and based on the totality of the circumstances, viewing the incident through the eyes of a reasonable, trained police officer in the same or similar circumstances, combining objective facts with that officer's subjective interpretation of those facts, the Superior Court erred in granting Murray's motion to suppress.

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[121] *Id.* at *5.

[122] *Id.*

[123] *Id.*

[124] *Id.* at *6.

Sgt. Rosaio possessed reasonable articulable suspicion to approach Murray and detain him.

CONCLUSION

The Superior Court abused its discretion in granting Murray's motion to suppress. For the foregoing reasons, the judgment of the Superior Court should be reversed.

/s/ Martin B. O'Connor
Martin B. O'Connor, ID # 3528
Deputy Attorney General
Department of Justice
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801
(302) 577-8500

Date: October 11, 2018

2018 WL 1611268
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware.

STATE OF DELAWARE,
v.
ANDRE MURRAY, Defendant.

Submitted: March 29, 2018
|
Decided: April 2, 2018

Upon Consideration of Defendant's Motion to Suppress. **GRANTED.**

Attorneys and Law Firms

Erika R. Flaschner, Esquire, DEPARTMENT OF JUSTICE, Wilmington, Delaware. Attorney for the State.

Ross A. Flockerzie, Esquire, OFFICE OF DEFENSE SERVICES, Wilmington, Delaware. Attorney for the Defendant.

Opinion

MEMORANDUM OPINION

Judge Charles E. Butler

***1 BUTLER, J.**

This is a pedestrian stop resulting in the seizure of a handgun. The defendant has moved to suppress the handgun. The Court will grant the motion with the following findings and observations.

FACTS

In the late evening hours of October 13, 2017, four members of the Wilmington Safe Streets squad were on "proactive patrol" in a single unmarked vehicle. They were northbound on South Franklin Street and stopped at a stop sign at the comer of South Franklin and Chestnut Street—a neighborhood described by the officer as a "high crime" neighborhood.

While so stopped at said stop sign, Officer Rosaio, who was the driver and sole witness for the State, saw two men walking towards them, southbound on the sidewalk of South Franklin Street, headed toward the intersection with Chestnut Street. Officer Rosaio told the Court that one of the two men was swinging his left arm naturally but holding his right arm close to his body which behavior, the officer testified from his "training and experience," was consistent with an armed gunman. We will have more to say about this momentarily. But there is very little left to the story so let us finish first.

As the two continued toward them, Officer Rosaio suspected the "one arm swinging man" was armed. Officer Rosaio waited, watching— for "6 to 7 seconds." He testified that as they got closer, the defendant appeared to notice them and he took a "stutter step" as he was reaching the curb. He then slowed his gate. Officer Rosaio opened the driver's side door and the defendant appeared to move behind his walking partner, but made no sudden move and was still plainly visible to Officer Rosaio, who was only about five feet away. The defendant did, however, turn his body somewhat, a behavior Officer Rosaio characterized as "blading," a move he testified, from his training and experience, was another characteristic of an armed gunman.

Convinced the defendant was armed, Officer Rosaio drew his revolver and told the defendant not to move his hands towards his waist. Exactly how it all went from there is unclear, but we know that the defendant was taken to the ground and when he was rolled over, a firearm was indeed recovered from his right side.

ANALYSIS

A. Facts vs. Hunches

To be sure, there was perhaps a moment, as the officer was exiting his vehicle and before he drew his service revolver, where this was a "*Terry*" stop, requiring reasonable articulable suspicion that criminal activity is afoot and the subject is armed and dangerous.[1] But upon seeing the defendant turn his body, and before any "real" contact was made, the officer candidly testified that he was convinced the defendant was indeed armed and may be

Ex. A

reaching for his pistol and thus, an arrest was effectuated which, as we all know, must be preceded by probable cause to believe a crime is being committed and the suspect committed it.

Alas, neither side parsed its arguments so neatly into "reasonable articulable suspicion" or "probable cause." The defense takes the position that the officer had neither, at any time, while the State argues that deference is owed to the skills and training of the officer who determined the existence of either or both.

*2 From the record, there is no "tell-tale bulge," no "furtive movement," no flight or abandonment, no informant tip, corroborated or otherwise, no "hand-to-hand" gestures. The State argues that none of this is needed because of the officer's training in "armed gunman" profiling. Indeed, he now trains others in this "science." Based upon his training and his experience—which while we assume is real but for which there is no further record—we are cssentially told to "trust me."

There are many articulations of the standards the State must meet in sustaining its burden of proving the lawfulness of a stop. Justice Ridgely engaged the subject at some length in *Lopez-Vazquez* v. *State.* While the Court will dispense with a longer quote, it is worth reading. Most significantly, he said, "we think it impossible for a combination of wholly innocent factors to combine into a suspicious conglomeration unless there are concrete reasons for such an interpretation." [2]

This is not an isolated refrain. *Terry* itself said, "in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." [3] Thus, it cannot be, as the State urges, that the Courts are required to simply "trust" the training and experience of a police officer to make findings as to the appropriate balance between individual liberties and legitimate law enforcement. The logical ends of the State's argument would effectively vitiate judicial oversight of law enforcement's behavior towards citizens. Any officer could justify any stop, interrogation or detention on grounds that his "training and experience" led him to reasonably believe the subject is engaging in criminal conduct, leaving the judiciary with little to do but trust the officer's training and experience and sanction the intrusion. Thankfully, that is not the law. Subjective impressions or hunches are insufficient. [4] The officer must be able to point to objective facts which, taken together with reasonable inferences, justify the government intrusion into the citizen's right to move about freely.

B. The Armed Gunman Testimony

Here, the State relies almost exclusively on two objective facts: 1) the defendant's swinging of one arm while holding the other close to his side and 2) his "blading" or moving his body sideways when he and his walking partner stopped. The other factors include the high crime neighborhood, the apparent "stutter step" and his "looking around" as the officer was getting out of the car. These latter factors are, however, essentially chaff, thrown off by the essential facts that the officer advises his training and experience teach that the defendant was carrying a concealed weapon.

Does walking while swinging one arm and holding the other close to one's body appear suspicious? Probably not to the lay observer, but we are told that in the eyes of one trained to look for "armed gunmen," it is indeed indicative of just that.

*3 What we are not told, however, is the basis for this belief. The record is bereft of any scientific support for the proposition. What percentage of armed gunmen walk swinging one arm but not the other? What percentage of citizens who walk swinging one arm but not the other are armed gunmen? How, if at all, do these percentages change based upon the time of day or the fact that it is a high crime neighborhood? Similarly, in a police encounter with a citizen, what percentage of the citizens turn their bodies away from the policeman? And of those that do, what percentage are hiding something? And of those that are hiding something, what percentage of them are hiding firearms?

The Court recognizes that the rules of evidence do not apply to "preliminary question[s] of fact governing admissibility", [5] but is nonetheless constrained to note that the "armed gunman" testimony in which we are asked to have faith is certainly not a "lay opinion" under D.R.E. 701 as it is professed to be based on "scientific, technical, or other specialized knowledge" and therefore,

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it is within the scope of D.R.E. 702. In order to qualify for admissibility under Rule 702, however, such testimony would necessarily be "based on sufficient facts or data" and "the product of reliable principles and methods" that have been "reliably applied" to the facts. [6]

None of these criteria have been met here. While the officer had some sort of "training," it cannot be said to have qualified as "science"—junk or otherwise. On this record, the Court cannot assign it the weight it was obviously accorded by the officer on the night in question.

CONCLUSION

One supposes there is always a temptation to engage in *post hoc* reasoning that, since an officer's hunch turned out to be correct, we should accord it a wide path and backfill the logic leading to the capture of the weapon. We decline to do so in this case. The Court certainly understands the challenges facing police officers engaged in the "often competitive enterprise of ferreting out crime." [7] But we are bound to adhere to the greater value that under our Constitution, citizens are entitled to be free from government intrusion except when the government can articulate a clear, objective basis upon which to believe the intrusion is justified. The handgun seized as a result of the stop/arrest of the defendant will be suppressed.

IT IS SO ORDERED.

All Citations

Not Reported in A.3d, 2018 WL 1611268

Footnotes

1 *Terry v. Ohio,* 392 U.S. 1, 30 (1968).

2 *Lopez-Vazquez v. State*, 956 A.2d 1280, 1288 (Del. 2008) (citing *Karnes* v. *Skrutski,* 62 F.3d 485, 496 (3d Cir. 1995), *distinguished on other grounds by Curley v. Klem,* 499 F.3d 199 (3d Cir. 2007)).

3 *Terry,* 392 U.S. at 27.

4 *Woody v. State,* 765 A.2d 1257, 1263 (Del. 2001) (citing *United States v. Sokolow,* 490 U.S. 1, 7 (1989)). *See also Quarles v. State,* 696 A.2d 1334, 1340 (Del. 1997) (Veasey, C.J. dissenting) (explaining that "[h]unches and subjective impressions of experienced police officers will not suffice" for reasonable suspicion).

5 D.R.E. 1101(b)(1).

6 D.R.E. 702.

7 *Johnson v. United States*, 333 U.S. 10, 14 (1948).

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EFiled: Aug 09 2018 10:12AM EDT
Filing ID 62328500
Case Number 424,2017

2018 WL 3629150
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware.

STATE OF DELAWARE,
v.
ANDRE MURRAY, Defendant.

Submitted: May 15, 2018
|
Decided: July 26, 2018

Upon Consideration of State's Motion for Reargument.

DENIED.

Attorneys and Law Firms

Erika R. Flaschner, Esquire, DEPARTMENT OF JUSTICE, Wilmington, Delaware. Attorney for the State.

Ross A. Flockerzie, Esquire, OFFICE OF DEFENSE SERVICES, Wilmington, Delaware. Attorney for the Defendant.

MEMORANDUM OPINION

Judge Charles E. Butler

***1 BUTLER, J.**

The Court has before it a Motion for Reargument in which the State seeks reconsideration of the Court's earlier ruling suppressing evidence derived from a warrantless arrest of the Defendant for want of probable cause. The State's Motion for Reargument is devoid of any reference to any fact the Court may have overlooked or any point of law not addressed in the Court's previous ruling. Rather, the State appears convinced that the Court's conclusion that the officer lacked probable cause was simply wrong, and the State is here inviting the Court to recognize its error, repent and be forgiven. Because the Court does not believe its ruling was in error, the Court rejects the State's invitation. The State's Motion for Reargument is therefore **DENIED.**

FACTUAL BACKGROUND

To avoid the necessity of reading the Court's previous opinion for context, here is a brief review. In the late evening hours of October 13, 2017, three Wilmington police officers and one probation officer were on "proactive mobile patrol" in a single, unmarked vehicle. They were travelling northbound on South Franklin Street and were approaching a stop sign at the comer of South Franklin and Chestnut Street—a neighborhood described by the testifying officer as a "well-known high crime, high drug area." [1]

While approaching said stop sign, Sergeant Rosaio, who was the driver and sole witness for the State, observed two men walking towards him—southbound on the sidewalk of South Franklin Street. Sergeant Rosaio saw that one of the two men was swinging his left arm naturally while holding his right arm close to his body. Sergeant Rosaio told the Court that he recognized the way the man was holding his arm near his body as a "characteristic of somebody who is armed with a handgun" [2] which, the officer testified, he had learned about at training seminars and indeed taught to other officers. [3]

When Sergeant Rosaio stopped in the middle of the lane and began exiting the undercover vehicle, the suspect turned his body away from the officer, which behavior the officer termed "blading" and this was enough, based upon his training and experience, for the officer to be "confident" that the suspect was armed and the suspect was thereupon ordered to the ground at gunpoint and a gun was indeed recovered from his waist area. [4]

So, the question was—and we suppose, remains—was there probable cause to point a gun at the suspect, order him to the ground, and take him into custody? The State maintains that there was because the Court must give deference to the officer's training and experience and the "armed gunman profile" on which he has been trained. Thus, according to the State, facts that might have benign significance to the casual observer take on this new significance in the eyes of a trained law man and that ought to be all the further the Court looks in considering the existence of probable cause.

Ex. B

For whatever reason, the suppression hearing in this matter came up just days before the scheduled trial date and the Court's written decision was rendered with very short notice. The Court will therefore expand on its earlier remarks herein, although the Court's ultimate conclusion remains unchanged.

PARTIES' CONTENTIONS

*2 In moving for reargument on the Defendant's Motion to Suppress, the State argues that the Court "misapprehended the facts and incorrectly applied controlling precedent." [5] Moreover, the State argues that the "Court's decision to disregard Sgt. Rosaio's testimony, based on his training and experience, was erroneous." [6] Defendant argues that the State's Motion for Reargument must be denied because the Court has not overlooked a controlling precedent or legal principle, or misapprehended the law or the facts. [7]

STANDARD OF REVIEW

Superior Court Civil Rule 59(e), made applicable to criminal cases by Superior Court Criminal Rule 57(d), permits the Court to reconsider "its findings of fact, conclusions of law, or judgment. ..." [8] "Delaware law places a heavy burden on a [party] seeking relief pursuant to Rule 59." [9] To prevail on a motion for reargument, the movant must demonstrate that the Court "overlooked a controlling precedent or legal principle[ ], or the Court has misapprehended the law or facts such as would have changed the outcome of the underlying decision." [10] "A motion for reargument is not a device for raising new arguments," [11] nor is it "intended to rehash the arguments already decided by the court." [12] Instead, the movant must demonstrate "newly discovered evidence, a change in the law, or manifest injustice." [13]

ANALYSIS

In both its original arguments and its request for reargument, the State has been consistent. The argument is that because the defendant fit the "armed gunman profile" known to the arresting officer, the defendant's conformity with the profile was enough probable cause to justify his arrest. So it is useful to examine the subject of suspect profiles in the context of the Fourth Amendment.

In her book *Dangerous Instincts,* retired FBI profiling expert Mary Ellen O'Toole describes case after case of serial killers that avoided detection for years because they frequently present as friendly, harmless, and pleasant neighbors. It is a stark, if somewhat sensational, example of the dangers of drawing legal or forensic conclusions from little or no evidence but rather based upon our own suppositions and stereotypes.

The use of profiles in law enforcement may trace its origins to the FAA's effective efforts, in the 1960's, to curtail the problem of skyjacking. [14] The "drug courier profile" has received considerably more judicial scrutiny, and is worth considering in some detail.

To set the stage for the U.S. Supreme Court's treatment of the issue of drug courier profiles, we might first consider the following observations of the Maryland Court of Appeals in *Grant v. State*: [15]

> *3 It is a convenient descriptive term without a great deal of legal significance. Some lament the fact that the Supreme Court has not yet told us whether meeting the so-called "drug courier profile" is an adequate predicate to establish either articulable suspicion for a stop or probable cause for an arrest or search. Of course, the Supreme Court has not told us that and they never will. Indeed, they cannot, for there is no such thing as a single drug courier profile; there are infinite drug courier profiles. The very notion is protean, not monolithic. [16]

The U.S. Supreme Court has had "drug courier profile" cases before it over the years, but has managed each time to avoid making its holdings based exclusively on the profile without reference to other intervening facts. For instance, in *United States v. Mendenhall,* [17] the

defendant met the drug courier profile as employed by two DEA agents in the Detroit airport, but when she was approached, she consented to what happened next and the case therefore discusses what constitutes a "seizure" and whether her consent was freely given.

In *Reid v. Georgia*,[18] the Court reversed the Georgia Court of Appeals and reinstated the suppression of drug evidence seized from a late night airline passenger in the Atlanta airport. The DEA agent had testified that the defendant met a drug courier profile; the Court called such a profile "a somewhat informal compilation of characteristics believed to be typical of persons unlawfully carrying narcotics."[19] The Court concluded that suppression was appropriate. The agent's beliefs were little more than an "inchoate and unparticularized suspicion or 'hunch[.]' "[20] As to the profiled conduct of the suspected drug courier, the Court noted that "[t]he other circumstances describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure."[21]

In *United States v. Sokolow*,[22] the 25-year-old defendant went to the Honolulu airport and purchased a round trip ticket for himself and a woman to Miami, using an assumed name. He paid $2,100 in cash from a large roll of $20 bills. They returned to Honolulu three days later. Sokolow and his companion did not check any baggage. Upon his return, he was stopped by DEA agents as he was leaving the airport. A subsequent search of his luggage yielded cocaine.

The Supreme Court determined that the above facts gave rise to a reasonable suspicion to detain Sokolow briefly to determine whether their agents' suspicions were well founded. While we might call this "just another reasonable suspicion" case, it is significant in this respect: The Court ruled that the above facts gave rise to a reasonable articulable suspicion—standing alone. The Court specifically did not rely on the suppression hearing testimony that the defendant "had all the classic aspects of a drug courier."[23] Indeed, the Court repudiated the argument that its reasoning relied upon a "drug courier profile" at all.[24] The Court noted that "[a] court sitting to determine the existence of reasonable suspicion must require the agent to articulate the factors leading to that conclusion, but the fact that these factors may be set forth in a 'profile' does not somehow detract from their evidentiary significance as seen by a trained agent."[25]

***4** From these cases, it is clear that the Court has never adopted a position remotely like the one advocated by the State here. While profiles may assist law enforcement in deciding which of a large number of individuals they might focus on for more concerted attention, the mere fact that someone fits a profile gives law enforcement, at most, a basis to investigate further.[26] In *Sokolow,* a case rife with reasonable suspicion, the agents were even permitted to detain the suspect for a period. But that detention was only to investigate the reasonable suspicion further, and it was only the further investigation that justified the arrest. In no case the Court has found, or any to which the Court is directed by the State, has the Court held that merely fitting some profile suffices to engage in a full on arrest of a suspect.

The drug courier profile has also been discussed by our own Supreme Court. Perhaps the best example for our purposes is *Harris v. State.*[27] Harris was an Amtrak train station stop by a Wilmington police officer who testified he had "trained extensively in the identification of couriers."[28] The officer also testified to initiating "an interdiction process in the city that [he] trained several people also to do that work."[29] The officer observed Harris get off a southbound Amtrak train from Philadelphia and, while exiting the platform, look back over his shoulder three times. Harris then went to the concourse and used a pay phone while talking to another person. From there he entered the back seat of a sedan and drove from the station, with police following. The police eventually blocked the vehicle from moving onto I-95 and arrested Harris at gunpoint, recovering cocaine from his backpack.

In considering the officer's drug courier profile testimony, the Delaware Supreme Court stated:

> Harris' behavior as described by the detaining officer, like that of the defendant in *Reid,* as consistent with "a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure." This

> is precisely what the constitutional prohibition against unreasonable searches and seizures was designed to prevent.[30]

Thus, it is clear enough that "profiles" may aid law enforcement in picking and choosing the targets of their attention, a profile will not serve as a proxy for reasonable articulable suspicion unless the profiled behaviors at issue independently raise reasonable articulable suspicion. The Delaware Supreme Court's adjudication on profiling has not broken new or different ground from the U.S. Supreme Court at all.

The dangers of overreliance on profiles are graphically illustrated in Justice Marshall's dissent in *Sokolow*. Justice Marshall, quoting the Ninth Circuit below, noted that profiles have a "chameleon-like way of adapting to any particular set of observations."[31] He then references a string of cases in which the suspect conformed to the "profile" at hand: being the first to deplane, the last to deplane, or even deplaning in the middle; purchasing a one-way ticket or purchasing a round-trip ticket; taking on a nonstop flight or changing planes; traveling alone or traveling with a companion; acting nervously or acting too calmly.

Thus, it seems to the Court, while the use of a profile as a tool to assist law enforcement in picking which citizens to focus on may have its place, the mere fact that one such citizen matches some amorphous profile does not equate to sufficient evidence to order the suspect to the ground at gunpoint and take him into custody. Rather, where, as here, the "profile" consists entirely of benign, lawful behaviors without much independent legal significance, law enforcement must next develop the additional data points that support their suspicions before subjecting the citizen to a full on search, seizure, and arrest. That did not happen here. Nothing like that happened here. The Court therefore adheres to its original conclusion that the handgun seized as a result of taking Defendant to the ground at gunpoint based solely upon his fitting some abstract armed gunman profile composed entirely of benign, legal behaviors must be suppressed. Nothing the State has presented in the instant motion suggests that the Court misapprehended the facts or made an error of law.

CONCLUSION

*5 Because the State has not demonstrated that the Court overlooked a controlling precedent or legal principle or that the Court has misapprehended the law or the facts such as would have changed the outcome of the underlying decision on Defendant's Motion to Suppress, the State's Motion for Reargument is hereby **DENIED.**

IT IS SO ORDERED.

All Citations

Not Reported in Atl. Rptr., 2018 WL 3629150

Footnotes

1 Tr. 6:14-15.
2 Tr. 9:17-18.
3 Tr. 4:3-5:9.
4 Tr. 14:9-16:14.
5 State's Mot. for Rearg., D.I. 19, at 2.
6 *Id.* at 10.
7 Def.'s Resp. to State's Mot. for Rearg., D.I. 23, at 1-4.
8 *Hessler, Inc. v. Farrell*, 260 A.2d 701, 702 (Del. 1969).
9 *Kostyshyn v. Comm'rs of Bellefonte*, 2007 WL 1241875, at *1 (Del. Super. Apr. 27, 2007).
10 *Bd. of Managers of Del. Criminal Justice Info. Sys. v. Gannett Co.*, 2003 WL 1579170, at *1 (Del. Super. Jan. 17, 2003), *aff'd in part*, 840 A.2d 1232 (Del. 2003).
11 *Id.*
12 *Kennedy v. Invacare Corp.*, 2006 WL 488590, at *1 (Del. Super. Jan. 31, 2006).
13 *E.I. du Pont de Nemours & Co. v. Admiral Ins. Co.*, 711 A.2d 45, 55 (Del. Super. 1995).

14 See generally, Thomas J. Andrews, *Screening Travellers at the Airport to Prevent Hijacking: A New Challenge to the Unconstitutional Conditions Doctrine,* 16 Ariz. L. Rev. 657, 712 (1974). See also, *U.S. v. Albarado,* 495 F.2d 799, 804 (2d Cir. 1974) (noting the dramatic drop in hijackings since the advent of the FAA profiling program).

15 461 A.2d 524 (Md. Ct. Spec. App. 1983).

16 *Id.* at 526.

17 446 U.S. 544 (1980).

18 448 U.S. 438 (1980).

19 *Id.* at 440.

20 *Id.* (quoting *Terry v. Ohio,* 392 U.S. 1, 27 (1968)).

21 *Reid,* 448 U.S. at 441.

22 490 U.S. 1 (1989).

23 *Id.* at 18 n.6.

24 *Id.* at 10.

25 *Id.*

26 Indeed, as Sergeant Rosaio explained to the Court at the suppression hearing in this matter, "[t]hey're just things that we're aware of and that we can use as a tool." Tr. 5:8-9.

27 806 A.2d 119 (Del. 2002).

28 *Id.* at 131 n.5.

29 *Id.*

30 *Id.* at 129.

31 *Sokolow,* 490 U.S. at 13 (Marshal, J., dissenting) (quoting *United States v. Sokolow,* 831 F.2d 1413, 1418 (9th Cir. 1987), *rev'd,* 490 U.S. 1 (1989)).

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IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	
	)	
v.	)	I.D. NO. 1710007866
	)	
ANDRE MURRAY	)	
Defendant,	)	

ORDER

It is so ordered that on this 31 day of July, 2018, the indictment in case 1710007866 is dismissed pursuant to 10 Del. Code § 9902(b), as the State has certified that the suppressed evidence is essential to the prosecution of the charged offenses.

The Honorable Charles E. Butler

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Ex. C

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellant,	)	No. 414, 2018
	)	
v.	)	On Appeal from the
	)	Superior Court of the
ANDRE MURRAY,	)	State of Delaware
	)	
Defendant-Below,	)	
Appellee.	)	

Appellee.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

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STATE OF DELAWARE
DEPARTMENT OF JUSTICE

/s/ Martin B. O'Connor
Martin B. O'Connor (No. 3528)
Deputy Attorney General

DATE: October 11, 2018