EFiled: Oct 15 2018 12:28PM EDT
Filing ID 62558840
Case Number 312,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	
Plaintiff – Below,	)	
Appellant,	)	
	)	
v.	)	**No. 312, 2018**
	)	
BAKR DILLARD,	)	
	)	
Defendant – Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S SECOND CORRECTED OPENING BRIEF

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DATE: October 15, 2018

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NATURE AND STAGE OF THE PROCEEDINGS

On October 16, 2017, a New Castle County Grand Jury returned an indictment against Bakr Dillard ("Dillard") alleging Drug Dealing, Possession of a Firearm During the Commission of a Felony ("PFDCF"), two counts of Possession of a Firearm By a Person Prohibited ("PFBPP"), Possession of a Firearm With an Obliterated or Removed Serial Number, and Carrying a Concealed Deadly Weapon ("CCDW"). A-1. Dillard filed a Motion to Suppress on January 22, 2018. A-4. After a hearing, the Superior Court granted Dillard's motion on March 22, 2018. A-6. On March 23, 2018, the State moved for reargument of the suppression motion. A-6. In a written order, the Superior Court denied the State's motion for reargument on May 17, 2018. On June 18, 2018, upon certification by the State that the prosecution could not go forward on the drug and firearm charges without the suppressed evidence, the Superior Court entered an order dismissing those charges pursuant to 10 *Del. C.* § 9902(b). A-8. The State filed its timely notice of appeal on July 31, 2018. This is the State's Opening Brief.

SUMMARY OF THE ARGUMENT

I. The Superior Court abused its discretion when it granted Dillard's Suppression Motion. Officers from the Wilmington Police Department did not measurably extend the length of an otherwise lawful traffic stop when they called for a K-9 unit to perform an exterior search of the car driven by Dillard. Police are permitted to conduct a K-9 search of the exterior of a car simultaneous to a lawful traffic stop, provided the K-9 search does not measurably extend the length of the traffic stop, as was the case here.

STATEMENT OF FACTS

On October 6, 2017, Wilmington Police Officer Joshua Wilkers ("Wilkers"), and his partner, Officer Daniel Vignola ("Vignola") were in a patrol car on the east side of the City of Wilmington assisting another patrol unit with a traffic stop at the intersection of 5th and Church Street. A-47. At the conclusion of the traffic stop, Wilkers and Vignola departed and observed a minivan with heavily tinted windows being driven near the intersection of 5th and Spruce Streets. A-50. Wilkers conducted a check to determine whether there was a valid window-tint waiver on file and ran the minivan's tag number. A-50. The minivan was registered to Rubin Harper and did not have a waiver for the tinted windows. A-50; A-52. As a result, Wilkers initiated a traffic stop of the minivan at the intersection of 4th and Lombard Streets. A-52.

After pulling over the minivan, Wilkers and Vignola got out of their police vehicle and approached the minivan. A-54. Bakr Dillard was seated in the driver's seat and there was a female in the passenger seat. A-54. Wilkers recognized Dillard, as he had previously arrested him for engaging in an illegal dice game, which yielded a $25,000 seizure of cash – approximately $5,000 of which was Dillard's. A-56; A-77; A-85. Wilkers was also familiar with Dillard's criminal history, which included arrests and convictions for drug and firearm offenses and Manslaughter. A-87-88. Wilkers requested Dillard's license as well

as the minivan's registration, and insurance information. A-54. Wilkers noted that the registered owner of the minivan was not present and he returned to the patrol vehicle to run a check on the information Dillard provided. A-55. After running the check, Wilkers returned to the minivan and asked Dillard to step out of the car to speak with him about the window-tint and the minivan's registered owner. A-56.

Wilkers and Dillard walked to the rear of the minivan; Dillard told Wilkers he was coming from 7th Street. A-56. Wilkers asked Dillard whether there was anything illegal in the car. A-56. Dillard told him there was nothing illegal in the car and the police could not search it. A-56. Wilkers asked Dillard to have a seat on the curb while he returned to the patrol vehicle to write a ticket for the window-tint violation. A-57. While he was logging into the E-Ticket system in the patrol car, Wilkers requested a K-9 unit over his police radio. A-57.

Officer Jesus Caez ("Caez") was leaving a nearby K-9 obstacle course with his K-9 partner, Storm, when he received Wilkers' radio transmission. A-111. Caez advised Wilkers it would take two to three minutes to travel to the traffic stop. A-112; State's Hearing Exhibit. The radio communication between Wilkers and Caez occurred while Wilkers was logging into the E-ticket system, and lasted 22 seconds. A-79; State's Hearing Exhibit 1. According to Caez, he arrived at the scene within two minutes of Wilkers' call. A-101; A-112. Wilkers testified that

Caez arrived while he was still logging into the E-ticket system. A-60. Wilkers also testified that there was no delay in his traffic investigation between the initiation of the stop and the arrival of the K-9 unit. A-90.

Upon the K-9 unit's arrival at the traffic stop, Caez spoke with Wilkers, who requested that Caez have Storm conduct a sniff of the exterior of the minivan. A-112. During the K-9 sniff, Storm gave a positive indication on the passenger door. A-112-113. At that point, Caez alerted Wilkers to the positive indication and directed him to the front passenger door, where Wilkers observed a small amount of marijuana near the interior door handle. As a result of his discovery, Wilkers obtained a search warrant for the minivan. A-11; A-62. When he searched the car, Wilkers discovered a loaded nine-millimeter handgun, three bags of marijuana, and $11,000 in cash. A-11.

ARGUMENT

I. THE SUPERIOR COURT ABUSED ITS DISCRETION WHEN IT GRANTED DILLARD'S MOTION TO SUPPRESS.

Question Presented

Whether the Superior Court abused its discretion when it granted Dillard's suppression motion.

The State preserved this question below when it opposed Dillard's suppression motion and filed a motion for reargument.[1]

Standard and Scope of Review

"This Court reviews the trial court's factual findings in granting of a motion to suppress, after an evidentiary hearing, under an abuse of discretion standard. The trial judge's decision can be reversed only if this court finds the decision below to be clearly erroneous."[2]

Merits of the Argument

The Fourth Amendment to the United States Constitution provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[3] The "ultimate

[1] A-36-40; A-164-172.
[2] *State v. Henderson*, 892 A.2d 1061, 1066 (Del. 2006) (citing *Woody v. State*, 765 A.2d 1257, 1261 (Del. 2001)).
[3] U.S. Const. Amend. IV.

touchstone of the Fourth Amendment is reasonableness."[4] The Fourth Amendment "does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable."[5]

A traffic stop constitutes a seizure of the vehicle's occupants and implicates the Fourth Amendment's prohibition against unreasonable searches and seizures.[6] "But it is only those searches and seizures that are 'unreasonable' that run afoul of the Fourth Amendment."[7] "The permissible duration of a traffic stop depends on the reason the police officer pulls the car over. 'The duration and execution of a traffic stop is necessarily limited by the initial purpose of the stop.'"[8] The authority for a seizure incident to a traffic stop ends when the tasks related to the reason for the stop are, or reasonably should have been, completed.[9] Such tasks include ordinary inquiries associated with a traffic stop, such as checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance.[10]

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[4] *Riley v. California*, 134 S. Ct. 2473, 2482 (2014) (other citations omitted)).
[5] *Florida v. Jimeno*, 500 U.S. 248, 250 (1991).
[6] *Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *West v. State*, 143 A.3d 712, 716 (Del. 2016).
[7] *West*, 143 A.3d at 716.
[8] *Murray v. State*, 45 A.3d 670, 673 (Del. 2012) (quoting *Caldwell v. State*, 780 A.2d 1037, 1047 (Del. 2001)).
[9] *Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015); *Illinois v. Caballes*, 543 U.S. 405, 407 (2005).
[10] *Rodriguez*, 135 S. Ct. at 1615; *see also Arizona v. Johnson*, 555 U.S. 323, 333 (2009).

Removing a driver and their passenger(s) from a car is also within scope of permissible police action during a traffic stop.[11]

Although a K-9 sniff is not characterized as part of an officer's traffic mission, it is well established that a K-9 sniff conducted during a lawful traffic stop is constitutionally permissible if it is executed in a reasonable manner and does not itself infringe upon a constitutionally protected privacy interest.[12] Conversely, a drug-dog sniff conducted after an otherwise-completed traffic stop is unconstitutional absent independent reasonable suspicion for the sniff.[13]

In *Illinois v. Caballes*, the United States Supreme Court considered a ten-minute traffic stop for a speeding violation where one officer led a narcotics-detection dog around the stopped car while a second officer simultaneously "was in the process of writing a warning ticket."[14] The dog alerted to the presence of marijuana, and the driver was arrested and subsequently convicted of a state narcotics offense.[15] Noting that "[a] seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission," the Court found that the state court had "carefully reviewed" the details of the officer's

[11] *Maryland v. Wilson*, 519 U.S. 408 (1997); *Loper v. State*, 8 A.3d 1169, 1174 (Del. 2010).
[12] *Caballes*, 543 U.S. at 409-10.
[13] *Rodriguez*, 135 S. Ct. at 1614.
[14] *Caballes*, 543 U.S. at 406.
[15] *Id.* at 406.

conversations with the driver and the radio transmissions "to determine whether he had improperly extended the duration of the stop to enable the dog sniff to occur."[16] The Court affirmed the Illinois Supreme Court's "conclusion that the duration of the stop ... was entirely justified by the traffic offense and the ordinary inquiries incident to such a stop," and held that no Fourth Amendment violation occurred.[17] Thus, under *Caballes*, a seizure justified only by a police-observed traffic violation "become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission" of issuing a ticket for the violation.[18] In *Muehler v. Mena*,[19] the United States Supreme Court explained its holding in *Caballes* stating:

> Our recent opinion in *Illinois v. Caballes* . . . is instructive. There, we held that a dog sniff performed during a traffic stop does not violate the Fourth Amendment. We noted that a lawful seizure "can become unlawful if it is prolonged beyond the time reasonably required to complete that mission," but accepted the state court's determination that the duration of the stop was not extended by the dog sniff. Because we held that a dog sniff was not a search subject to the Fourth Amendment, we rejected the notion that "the shift in purpose" "from a lawful traffic stop into a drug investigation" was unlawful because it "was not supported by any reasonable suspicion."[20]

Four years later, in *Arizona v. Johnson*, the United States Supreme Court further considered "[a]n officer's inquiries into matters unrelated to the

[16] *Id.* at 407-08.
[17] *Id.*
[18] *Id.* at 407
[19] 544 U.S. 93 (2005).
[20] *Id.* at 101(citations omitted).

justification for the traffic stop," and explained that a stop remains lawful so long as such inquiries do not "*measurably extend* the duration of the stop."[21] In *Johnson*, during the time necessary for an officer to complete the processing of a traffic stop for a suspended vehicle registration, a different officer on the scene acquired reasonable suspicion that a passenger in the back seat was armed and dangerous.[22] The officer frisked the passenger and found a handgun.[23] The passenger moved to suppress the handgun in the resulting criminal prosecution, but the Court concluded that no Fourth Amendment violation occurred, noting, "[a]n officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop."[24]

By contrast, in *Rodriguez v. United States*, the United States Supreme Court considered "whether the Fourth Amendment tolerates a dog sniff after the completion of a traffic stop.[25] In *Rodriguez*, a police officer issued Rodriguez a warning ticket for driving on the shoulder after observing his car veer out of the

[21] *Johnson*, 555 U.S. at 333.
[22] *Id.* at 328.
[23] *Id.*
[24] *Id.* at 333.
[25] *Rodriguez*, 135 S. Ct. at 1612.

lane of traffic onto the shoulder of the road.[26] After issuing the warning, the officer asked permission to walk his dog around the vehicle.[27] When Rodriguez refused, the officer detained him until a second officer arrived.[28] After the second officer arrived, the officer who initiated the traffic stop retrieved his dog, who alerted to the presence of drugs in the vehicle.[29] Seven or eight minutes elapsed between Rodriguez's receipt of the warning ticket and the K-9 alert.[30] During the subsequent search of the vehicle, police discovered over fifty grams of amphetamine.[31]

The Court addressed the permissible scope of police activity during a traffic stop, stating: "[a]n officer . . . may conduct certain unrelated checks during an otherwise lawful traffic stop. But, . . . he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual."[32] The Court ultimately held "that a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures."[33]

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[26] *Id.* at 1612–13.
[27] *Id.* at 1613.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.* at 1615.
[33] *Id*. at 1612.

In this case, the Superior Court determined that Dillard was entitled to suppression because Wilkers "detoured" from the purpose of the traffic stop when he called for the K-9 unit.[34] The court found that "the purpose for the traffic stop ended when Officer Wilkers decided to call for a Title 16 dog to conduct an open air sniff of the vehicle. This call, as the officer conceded, was no longer related to the task of issuing a citation for improper window tint and the request for an open air sniff obviously changed the scope of his investigation from a traffic stop into a drug investigation."[35] As a result, the court reasoned, Wilkers' request for a K-9 amounted to a second detention requiring a showing of facts to support a finding of reasonable suspicion for the second detention, which the court found were not present in Dillard's case.[36] In its Order denying the State's Motion for Reargument, the court determined that Wilkers' actions measurably and impermissibly extended the length of the traffic stop, stating:

> The Court considered that these independent acts occurred at the command of Officer Wilkers and were wholly unrelated to issuing a ticket for the lawful reason for the stop—improper window tint. That the acts were done prior to the issuing of the ticket does not mean that the stop was not prolonged. The State maintains these acts were constitutionally permissible because wh[ile] the computer program E–Ticket was still loading, the officer had ample time to pursue other tasks. The excuse of slow technology cannot convert an otherwise unconstitutional, extended detention into a constitutional traffic stop and drug investigation. Thus, this Court found the existence of a

[34] *State v. Dillard*, 2018 WL 1382394, at *6 (Del. Super. Mar. 16, 2018).
[35] *Id.*
[36] *Id.* at *6-8.

> measurable extension of the stop. Thus, the Court did not misapprehend the facts.[37]

The Superior Court abused its discretion when it made this determination. The evidence in this case demonstrated that Wilkers' request for a K-9 unit and the subsequent open-air sniff of the minivan did not extend the length of Dillard's detention because those actions occurred *during* the traffic investigation without prolonging it. The United States Superme Court decisions in *Johnson* and *Caballes* support the conclusion that the evidence in this case shows no "measurable extension" of the stop.

Dillard does not dispute that the reason for the traffic stop was valid. After stopping Dillard for a window tint violation, Wilkers retrieved Dillard's driving information and checked it.[38] Wilkers returned to the minivan and asked Dillard to step out of the car to talk with him about the registered owner and the window tint violation.[39] After Wilkers spoke with Dillard out of the minivan, Wilkers returned to his patrol car, began logging into the E-ticket system to write a ticket for the window tint violation, and called for the K-9 unit.[40] Caez arrived at the scene in

[37] *State v. Dillard*, 2018 WL 2264414, at *3 (Del. Super., May 17, 2018).
[38] A-55.
[39] A-55.
[40] A-57.

under two minutes;[41] before Wilkers could even complete logging into the E-ticket system.[42] Upon the K-9 unit's arrival, Wilkers directed Caez and his K-9 partner to the minivan.[43] The entire stop took between five and ten minutes.[44]

The court's determination that Wilkers abandoned the purpose of the stop when he called for the K-9 is not supported by the evidence presented at the suppression hearing. Contrary to the court's findings, Wilkers had not concluded his investigation into the window tint violation when he called for the K-9 unit because he had not yet written the ticket for the window tint violation. Wilkers continued to pursue the traffic investigation after calling for the K-9 by continuing the login process for the E-ticket system.[45] As Wilkers explained:

> I walked back to my police vehicle, and I started to bring up an E-ticket with the system to write the ticket. I contacted K-9 Officer

[41] A-102; A-112. In its Order denying the State's Motion for Reargument, the Superior Court misapprehends the record, stating: "It took three to five minutes for the K-9 Unit to arrive." *Dillard*, 2018 WL 2264414, at *3.

[42] A-60. Wilkers described the E-ticket system as follows:

> The [E-ticket] system is a statewide system. You have to manually log into that with your user name and password, select what you want to do, whether its writing a parking ticket, a traffic ticket, a tow form, those kinds of things, and then you have to go field by field and enter the registration number for the vehicle, the charges, the driver, where its located, pretty much everything about the stop. A-60.

[43] A-60.
[44] A-101.
[45] A-57.

> Caez, to see if he was in the area and if he could help respond to the assist.
>
> * * * *
>
> After I had Mr. Dillard sit on the curb, [I] responded back to my car. I began to log into E-ticket. As I was logging in is when he [Caez] pulled up. I never got to finish logging in.[46]

A K-9 sniff that occurs during a lawful traffic stop does not violate the Fourth Amendment.[47] The fact that a police officer is contemporaneously pursuing a matter unrelated to the reason for the traffic stop does not "render the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop."[48] "Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed."[49]

Here, it is clear that the purpose of the stop was not abandoned because the duties related to investigating a window tint violation, which included writing a citation by using the E-ticket system, had not been completed by Wilkers. The *Rodriguez* court explained that the reasonableness of a seizure "depends on what the police in fact do."[50] Once the purpose of the traffic stop has concluded, the seizure must end, and an officer cannot unreasonably prolong the stop for any

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[46] A-57; A-60.
[47] *See Caballes*, 543 U.S. at 410.
[48] *Johnson*, 555 U.S. at 333.
[49] *Rodriguez*, 135 S. Ct. at 1614.
[50] *Id.*

reason, including delaying the citation in an effort to extend the stop. But, this does not mean that anything a police officer does which is unrelated to the traffic stop "adds time"[51] to it, rendering the stop unreasonable or unconstitutional. Quite the contrary, *Rodriguez* reiterated that law enforcement may conduct inquiries unrelated to the traffic stop so long as those inquiries do not add time the duration of the stop.[52]

This case is distinguishable from *Rodriguez*, upon which the Superior Court relied. Unlike *Rodriguez*, the dog sniff in this case did not occur after the traffic stop was complete; it occurred during the traffic stop. Thus, the dog sniff did not "add time" to the stop in the way the K-9 sniff did in *Rodriguez*. And, Wilkers did not delay his investigation when he called for the K-9 unit. In other words, Wilkers did not extend the duration of the stop. The "adds time to" analysis from *Rodriguez* is intended to "allow for dog sniffs that do not add time to the stop (i.e., dog sniffs in which one officer continues to pursue the original objectives of the stop while a second officer conducts a dog sniff)."[53] Such was the case here.

This case more closely resembles *Caballes*. Here, as in *Caballes*, Wilkers continued to pursue the original objectives of the stop *while* Caez conducted the K-9 sniff. While the Superior Court gave great weight to Wilkers intent when he

[51] *Id.*
[52] *Id.* at 1614-15.
[53] *State v. Linze*, 389 P.3d 150, 154, n.1 (Idaho 2016).

called for the K-9 unit, his intent in pursuing a matter unrelated to the original purpose of the stop was of no moment as long as the duration of the stop was not extended.[54] It was not. The Superior Court erroneously concluded otherwise, holding:

> That the acts were done prior to the issuing of the ticket does not mean that the stop was not prolonged. The State maintains these acts were constitutionally permissible because where the computer program E–Ticket was still loading, the officer had ample time to pursue other tasks. The excuse of slow technology cannot convert an otherwise unconstitutional, extended detention into a constitutional traffic stop and drug investigation.[55]

The Fourth Amendment does not preclude one officer from pursuing the purpose of a stop while another officer conducts a K-9 sniff.[56] The Superior Court dismissed the fact that Wilkers was pursuing the purpose of the stop by logging into the E-ticket system while he called Caez, characterizing it as "an excuse of slow technology" that extended the detention.[57] The court's finding was clearly erroneous.

In *United States v. Baxter*, the United States District Court for the Eastern District of Tennessee addressed the issue of a K-9 sniff occurring during a traffic

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[54] *Whren v. United States*, 517 U.S. 806, 813 (1996) (constitutional reasonableness of a traffic stops does not depend "on the actual motivations of the individual officers involved").
[55] *Dillard*, 2018 WL 2264414, at *3.
[56] *Caballes*, 543 U.S. at 410.
[57] *Dillard*, 2018 WL 2264414, at *3. *Cf. State v. Palmer*, 2018 WL 3853532, at *3 (Del. Super. Aug. 13, 2018) (holding computer difficulties in retrieving necessary information did not unlawfully prolong a traffic stop).

stop while a police officer was waiting for a response to a records check.[58] In that case, a Tennessee Highway Patrol State Trooper stopped Baxter for a suspected window tint violation and driver cellphone violation.[59] The officer ordered Baxter from the car, patted him down, and spoke with him in front of the patrol car.[60] After speaking with the sole passenger in the car, the officer returned to his patrol car to review Baxter's documentation.[61] While in his patrol car, the officer called the stop into a police dispatcher and requested a registration tag check, backup, and a K-9 unit.[62] The officer also began writing a warning ticket for the window tint and texting violations.[63] As the officer wrote the warning ticket, Baxter, who was still at the front of the patrol car, asked to speak with him, and accused the officer of racial profiling.[64] During the conversation, the officer asked for permission to search Baxter's car, and Baxter declined to give consent.[65]

The officer returned to the patrol car and contacted the police dispatcher to request a check on Baxter's driver's license.[66] The officer "also used his cell phone to request a background check on [Baxter] from a law enforcement service

[58] 2018 WL 1598950, at *2 (E.D.Tenn. Mar. 13, 2018).
[59] *Id.* at *1.
[60] *Id.* at *2.
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*

known as the Blue Lighting Operations Center ('BLOC')."[67] While the officer waited for information from BLOC and the dispatcher on Baxter's vehicle registration, the K-9 unit arrived and alerted on Baxter's car.[68] Shortly after the K-9 alerted on the car, the officer received the requested information from BLOC, but the officer did not recall whether he received the car registration information that he had requested from the dispatcher.[69] As a result of the K-9 alert, police officers searched the car and discovered a large quantity of methamphetamine in the trunk of Baxter's car.[70]

Baxter moved to suppress the evidence claiming, "law enforcement unreasonably extended his uncompleted traffic stop by requesting a records check from the BLOC."[71] The District Court framed the issue as follows: "(1) was the purpose of the traffic stop completed prior to the deployment of the canine; and, if not, (2) was the yet-to-be-completed traffic stop unreasonably and measurably extended beyond the time necessary to conclude the stop."[72] The court distinguished *Rodriguez*, noting that Baxter's reliance on the case was misplaced:

> In arguing for the application of *Rodriguez*, Defendant fails to acknowledge the meaningful, factual distinctions between his detention and that described in *Rodriguez.* For instance, unlike

[67] *Id.*
[68] *Id.* at *3.
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id. at* *4.

> in *Rodriguez* where the officers extended the traffic stop—without any individualized suspicion—after all tasks tied to the traffic infraction had been completed and refused to allow Rodriguez to leave . . . the stop in this case was neither completed nor unreasonably prolonged.[73]

Denying Baxter's suppression motion, the court found:

> The evidence overwhelmingly demonstrates that [the officer] properly sought information from the . . . dispatcher and from the BLOC and then reasonably waited a reasonable amount of time for the requested information from the BLOC prior to concluding the traffic stop. Accordingly, under the totality of the circumstances, I find that [the officer's] actions were diligent, reasonable, and proper and they did not unreasonably or unconstitutionally prolong the not-yet-completed stop.[74]

The facts of this case should not yield a different result.

The Fourth Amendment requires police to work diligently in pursuit of the purpose of a traffic stop.[75] It does not require an officer to continuously write a citation without ever having to reasonably wait for a computer program to load or anything less than an immediate response to a radio inquiry (i.e. warrant check, etc. . .). Indeed, the United States Supreme Court cases recognize that inquiries unrelated to the purpose of a traffic stop do not convert the stop into an unlawful detention, so long as those inquiries do not measurably extend the duration of the

[73] *Id*. at *8 (citing *Rodriguez*, 135 S. Ct. at 1613-14).
[74] *Id*. at *7 (citing *Carter v. Hamaoui*, 699 Fed. Appx. 519, 532 (6th Cir. 2017)).
[75] *Rodriguez*, 135 S. Ct. at 1616.

stop.[76] The Superior Court's holding in this case is contrary to the Fourth Amendment's reasonableness requirement and to United States Supreme Court precedent.

In this case, Wilkers diligently pursued the purpose of the traffic stop and his call for a K-9 unit in this case did not violate the Fourth Amendment. The Superior Court abused its discretion in granting Dillard's motion to suppress.

[76] *See Rodriguez*, 135 S. Ct. at 1616. *Johnson*, 555 U.S. at 333; *Caballes*, 543 U.S. at 408-09.

CONCLUSION

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

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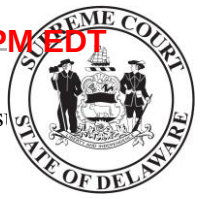
DATE: October 15, 2018



2018 WL 1382394
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware.

STATE of Delaware
v.
Bakr DILLARD, Defendant.

Submitted: February 22, 2018
|
Decided: March 16, 2018

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

Attorneys and Law Firms

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OPINION

MEDINILLA, J.

INTRODUCTION

***1** Defendant Bakr Dillard ("Defendant") filed this Motion to Suppress after he was pulled over in a minivan for operating a vehicle with improper window tint. During the course of this routine traffic stop, an officer called for a K–9 Unit to perform a drug sniff and the canine alerted to the presence of drugs. Defendant argues that the officer conducted a second detention unsupported by reasonable articulable suspicion in violation of the Fourth and Fourteenth Amendments of the United States Constitution, Article I, Section 6 of the Delaware Constitution, and Delaware statutory law. For the reasons that follow, the Court finds that the State failed to meet its burden by a preponderance of the evidence to establish that the officer had sufficient reasonable articulable suspicion to justify the seizure. As such, Defendant's Motion to Suppress is **GRANTED.**

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND [1]

1 The Court's recitation is based on the testimony of the State's witnesses and/or exhibits presented at the suppression hearing on February 22, 2018.

On October 6, 2017, Officer Wilkers and Officer Vignola of the Wilmington Police Department/Operation DISRUPT [2] were traveling in their patrol car and noted a minivan with improper window tint traveling on the 500 block of North Spruce Street. Before pulling the vehicle over, Officer Wilkers ran a check on the vehicle and saw that it was registered to a person named Rubin Harper of Wilmington. The vehicle did not have a valid window tint waiver so the officer decided to pull the vehicle over to issue a traffic citation. Upon signaling the vehicle to stop, Defendant pulled over immediately at 4th and Lombard. Upon request, Defendant produced a license and registration. A female adult passenger also produced valid identification. Officer Wilkers testified that Defendant's responses and presentation of documents were appropriate. A DELJIS check yielded no issues and Defendant's license also proved valid.

2 None of the witnesses for the State recalled what the acronym stood for even after Defense Counsel cross-examined them that it stood for "Dealing with Issues of Stabilization through Respect, Understanding, and Promoting Trust." This is no longer the name of the unit.

Officer Wilkers asked Defendant to step out of the vehicle so that the officer could ask him additional questions "about the vehicle." Defendant was not handcuffed nor patted-down and instead was asked three questions. First, he was asked who owned the vehicle and Defendant corroborated what was already known to the officer about ownership. Second, when asked where he was coming from, Defendant stated "from around 7th Street." Lastly, Officer Wilkers asked if there was "anything illegal" in the vehicle. Defendant responded "no," and that he would not consent to a search of the vehicle.

Officer Wilkers then ordered Defendant away from the vehicle and directed Defendant to remain on a curb. At this time, another DISRUPT unit, Officers Rosado and Petrucci, showed up "to assist." [3] Officer Wilkers then returned to his vehicle to write the citation for improper window tint.

3 The State did not establish why two more officers were needed to assist for the write-up of a traffic ticket, except to suggest it was DISRUPT protocol.

***2** At the hearing, the State introduced the audiotape exchange between Officer Wilkers and Officer Caez of the K–9 Unit that took place while Defendant was on the curb and Officer Wilkers was in his vehicle issuing the ticket. The exchange was initiated by Officer Wilkers for assistance from Officer Caez's "partner" to perform an open air sniff and asks, "how fast can you get here?" Officer Caez responded that he was approximately three to five minutes away. Officer Caez arrived with the dog to perform the open air sniff, and the K–9 alerted to the passenger door handle.

Officer Wilkers returned to the minivan and opened that passenger door. There was a green plant substance in the interior of the door handle area. Officer Wilkers then opened the center console and observed additional marijuana and a large amount of money. The police stopped the search, transported the vehicle, and obtained a search warrant. In the console, upon execution of the search warrant, police found a firearm, marijuana, a sports lottery ticket, and $11,000 in cash. The police also found forms and documents with Defendant's name on them. Defendant contends that the $11,000 in cash was not his and that he did not sign a property receipt for it. Defendant did sign a property receipt for $472 found on his person.

Defendant is charged with Drug Dealing Marijuana; Possession of a Firearm During the Commission of a Felony; Possession of a Firearm by a Person Prohibited; Possession of Ammunition by a Person Prohibited; Possession of a Deadly Weapon with a Removed, Obliterated, or Altered Serial Number; Carrying a Concealed Deadly Weapon; Operating a Vehicle with Improper Window Tinting; and Unauthorized Use of a Motor Vehicle.

Defendant filed this Motion to Suppress on January 22, 2018. The State responded on February 16, 2018 and the hearing took place on February 22, 2018. Having considered all submissions and the arguments of counsel, the matter is ripe for review.

STANDARD OF REVIEW

On a motion to suppress, as a general rule, "the defendant bears the burden of establishing that the challenged search or seizure violated his rights under the United States Constitution, the Delaware Constitution, or the Delaware Code." [4] "However, once the defendant has established a basis for his motion, *i.e.,* the search or seizure was conducted without a warrant, the burden shifts to the government to show that the search or seizure was reasonable." [5] As is the case here, the burden is on the State to establish the reasonableness of the seizure by a preponderance of the evidence. [6]

4 *State v. Nyala,* 2014 WL 3565989, at *5 (Del. Super. July 17, 2014).

5 *United States v. Johnson,* 63 F.3d 242, 245 (3d Cir. 1995). *See also State v. Chandler,* 132 A.3d 133, 139 (Del. Super. 2015), *as corrected* (Del. Super. Apr. 14, 2015) ("On a motion to suppress evidence seized during a warrantless search or seizure, the State bears the burden of establishing that the challenged search or seizure comported with the rights guaranteed by the United States Constitution, the Delaware Constitution, and Delaware statutory law.").

6 *State v. Abel,* 2011 WL 5221276, at *2 (Del. Super. 2011), *aff'd,* 68 A.3d 1228 (Del. 2012), *as amended* (Jan. 22, 2013).

CONTENTIONS OF THE PARTIES

Defendant argues he was subjected to an impermissible seizure that fits squarely within the holding of the 2001 Delaware Supreme Court decision in *Caldwell v. State,* [7] and aligns on point with the more recent 2015 decisions of this Court in *State v. Stanley* [8] and *State v. Chandler*. [9] Specifically, Defendant argues that Officer Wilkers extended the traffic stop to conduct a drug investigation without reasonable articulable suspicion to support a second detention.

7 780 A.2d 1037 (Del. 2001).

8 2015 WL 9010669 (Del. Super. Dec. 9, 2015).

9 132 A.3d 133 (Del. Super. Apr. 2, 2015, revised Apr. 14, 2015).

***3** The State counters that there was no second detention. It argues that, unlike *Stanley* and *Chandler* where the traffic ticket had already been issued, here, the officer was still in the middle of conducting the traffic stop when the K–9 Unit arrived to perform the canine sniff. The State thus argues that since the officer was still writing up the ticket, he did not require reasonable articulable suspicion because there was no measurable extension of the duration of the stop. In the alternative, the State argues that if the Court finds there was a measurable extension of the duration of the stop, the window tint makes this case different from the other vehicle equipment or traffic violations considered in *Stanley* or *Chandler,* and that this combined with other factors, formed the basis for reasonable articulable suspicion.

DISCUSSION

The Fourth and Fourteenth Amendments of the United State Constitution and Article I, Section 6 of the Delaware Constitution protect citizens from illegal searches and seizures. A traffic stop constitutes such a seizure on a vehicle and those within the vehicle.[10] As such, the State is required to "demonstrate that the stop and any subsequent police investigation were reasonable in the circumstances."[11] A traffic stop is reasonable under the Fourth Amendment if it is supported by reasonable suspicion or probable cause that a traffic violation has occurred.[12] A traffic stop must be "justified at its inception by reasonable suspicion of criminal activity."[13]

10 *Caldwell,* 780 A.2d at 1045.

11 *Id.* at 1045–16.

12 *State v. Rickards,* 2 A.3d 147, 151 (Del. Super. 2010), *aff'd,* 30 A.3d 782 (Del. 2011). *See also Holden v. State,* 23 A.3d 843, 847 (Del. 2011) ("A police officer who observes a traffic violation has probable cause to stop the vehicle and its driver."); *Whren v. United States,* 517 U.S. 806, 810 (1996). Further, "[t]he case law in Delaware is clear that while probable cause will serve as the basis for a traffic stop, only a reasonable articulable suspicion of criminal activity is required." *State v. Ellerbe,* 2014 WL 605481, at *3 (Del. Super. Jan. 27, 2014).

13 *Caldwell,* 780 A.2d at 1046.

A police officer who observes a traffic violation therefore has probable cause to stop the vehicle and detain the driver. However, once stopped, "[t]he scope and duration of the detention must be reasonably related to the initial justification for the stop."[14] The detention must not extend beyond the time reasonably necessary to effectuate the purpose of the stop—i.e. the point at which the legitimate investigative purpose of the stop is completed.[15] Any additional investigation "beyond that required to complete the purpose of the traffic stop constitutes a separate seizure that must be supported by independent facts sufficient to justify the additional intrusion."[16] If police prolongs a traffic stop in order to investigate other possible crimes beyond the original traffic offense, the stop becomes a second detention.[17]

14 *Holden,* 23 A.3d at 847.

15 *Caldwell,* 780 A.2d at 1046–47.

16 *Id.* at 1047.

17 *Id.*

Since the State argues there was no second detention, the Court will consider this issue first.

Duration and Scope of the Traffic Stop

Delaware law provides that the duration and scope of the traffic stop must last only as long as reasonably necessary to effectuate the purpose of the stop, at which point the legitimate investigative purpose of the traffic stop is completed.[18] Here, there is no dispute that the stop for improper window tint was proper since the officer knew even before he pulled the vehicle over that it did not have a valid tint waiver.

18 *Caldwell*, 780 A.2d at 1046–50.

Under 11 *Del. C.* § 1902, the officer was also permitted to ask the driver for his name, where he was coming from, his destination, and the reason for his trip. These questions

are appropriate within a reasonable investigation of the traffic stop. The officer was well within his authority to conduct the routine checks associated with a traffic stop, including to check Defendant's license and conduct the appropriate background checks through DELJIS. The responses from Defendant were appropriate and his DELJIS check was valid.

***4** The officer then asks Defendant to step out of the vehicle to ask him three questions. Under *Loper,* it was also well within legal bounds to request that Defendant step out of the vehicle. [19] Furthermore, under *Arizona v. Johnson*, the United States Supreme Court held that "[a]n officer's inquiries into matters unrelated to the justification for the traffic stop ... do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop." [20] The officer's questions regarding the vehicle ownership and where Defendant was coming from were also appropriate. However, under *Caldwell*, "[t]he duration and execution of a traffic stop is necessarily limited by the initial purpose of the stop" [21] and that "any investigation of the vehicle or its occupants beyond that required to complete the purpose of the traffic stop constitutes a separate seizure that must be supported by independent facts sufficient to justify the additional intrusion." [22]

19 *See Loper v. State,* 8 A.3d 1169, 1173 (Del. 2010) (holding that asking a passenger to exit the vehicle were not beyond the scope of a routine traffic stop).

20 *Arizona v. Johnson,* 555 U.S. 323, 325 (2009).

21 *Caldwell,* 780 A.2d at 1047 (citing *Florida v. Royer,* 460 U.S. 491, 498 (1983)).

22 *Id.* (citing *Ferris v. State,* 735 A.2d 491, 499 (Md. 1999)).

The State argues that Officer Wilkers' last inquiry whether there was "anything illegal" in the vehicle is commonplace and routinely asked by police officers, and should be treated no differently than when a person is asked to step out of a vehicle. An exit command from a vehicle has been considered lawful under *Loper* and other cases that have addressed officer safety during traffic stops, and considered a *de minimis* intrusion. [23] Yet the justification found in cases such as *Mimms* and *Loper* contemplate the officer's ability to ask questions regarding officer safety. Defendant was not patted down for weapons when he stepped out of the vehicle such that officer safety was of concern.

23 *See Pennsylvania v. Mimms,* 434 U.S. 106, 110–11 (1977) (holding that the order to get out of the car, issued after the respondent was lawfully detained, was reasonable, and thus permissible under the Fourth Amendment where the justification for such order—the officer's safety—is both legitimate and weighty, and the intrusion into respondent's personal liberty occasioned by the order, being, at most, a mere inconvenience, cannot prevail when balanced against legitimate concerns for the officer's safety).

Our Supreme Court addressed a similar question in *Pierce v. State* [24] to determine if the officer's questions regarding destination, origination, and weapons and contraband, rose to the level of a "second detention." There, the trial court had determined that after the officer observed nervous behavior on the part of both defendant and his passenger, the officer's inquiry if there were "any weapons, any illegal substances in the vehicle" was a routine question asked as part of an initial traffic stop, and therefore, *the question itself* did not constitute a "second detention." [25] The Supreme Court affirmed and held that Defendant could not demonstrate error in the trial court's factual finding that the question was considered part of a routine stop. [26] However, the Supreme Court interjected that even if the "contraband question" was not routine, there was sufficient reasonable articulable suspicion to ask the question where the Defendant and his passenger exhibited stuttered speech, nervous behavior, inconsistent statements regarding destination and origination and refused to make eye contact. [27] The officer in *Pierce* made initial observations of both Defendant and his passenger that gave rise to reasonable suspicion when he asked his question regarding contraband or weapons.

24 19 A.3d 302, 2011 WL 1631558, at *2 (Del. 2011) (TABLE) (an officer's question about whether there was any contraband in the vehicle during a traffic stop did not constitute a second investigative detention because it was a question the officer routinely asked as part of a traffic stop and was being done contemporaneous to routine traffic stop).

25 *Id.*

26 *Id.*

27 *Id.* at *2 n.14.

***5** Officer Wilker's question if there was "anything illegal" in the vehicle is broader than *Pierce* and the timing of when the question was asked is also distinguishable. Unlike a question regarding weapons, which would focus on the officer's safety, this question did not ask a narrow question about weapons or contraband. It asked about the universe of illegal things that may be contained in the vehicle. Asking whether there is something illegal in the vehicle invites a yes or no answer. If yes, then the admission of criminal wrongdoing would have likely led Defendant to voluntary consent to a search of the vehicle, as was obtained in *Pierce.* If the answer is no, as here, the officer conceded during his testimony that since he did not get consent, he took further steps and decided to call in the K–9 Unit.

Because of the events that followed, and for purposes of this analysis, this Court need not consider whether the third question amounted to a "second detention," but this decision should not be read as aligning with *Pierce* to suggest that the question is acceptable as part of a routine traffic stop. As noted, the facts in this case are different not only in the timing and the scope of the question, but also because here the officer decided to call in another police unit.

Calling the K–9

Under *Caldwell* "[e]ven where the traffic stop is *not formally terminated* by the issuance of a citation or warning, 'the legitimating *raison d'etre* [of the stop may] evaporate if the pursuit is unreasonably attenuated or allowed to lapse into a state of suspended animation.' " [28] Whether a detention is "unreasonably attenuated" requires a fact-intensive inquiry. [29] Although questions unrelated to the initial justification for the stop might not *per se* require reasonable suspicion or consent to further question, the Delaware Supreme Court has made clear that such inquiries must not measurably extend the duration of the stop. [30]

28 *Id.* at 1048 (quoting *Charity v. State,* 753 A.2d 556, 572 (Md. Ct. Spec. App. 2000))(emphasis added).

29 *Id.*

30 *Murray v. State*, 45 A.3d 670, 675 (Del. May 14, 2012, revised July 10, 2012) ("for something to be measurable it need not be large ....").

The State argues there was no second detention because there was no measurable extension of the duration of the stop where the officer was still issuing the citation when the dog showed up within minutes of his making the call to the K–9 Unit. The State argues that as long as the officer was working on his traffic-related task (issuance of the ticket), the contemporaneous exercise of the dog sniff that took place did not extend the original detention because it was related to the duration of the original stop.

In the 2015 decision of *Rodriguez v. United States*, [31] the Supreme Court of the United States reiterated that a traffic stop prolonged beyond the stop's "mission" is unlawful. [32] The Court identified the "[t]he critical question" as "not whether the dog sniff occurs before or after the officer issues a ticket... but whether conducting the sniff 'prolongs'—*i.e.,* adds time to—the stop.' " [33] This measure need not be large.

31 *Rodriguez v. United States,* 135 S.Ct. 1609 (2015) (holding that absent reasonable suspicion, police may not extend an otherwise-completed traffic stop in order to conduct a dog sniff because it violates the Constitution's shield against unreasonable seizures.)

32 *Id.* at 1616 (citing *Illinois v. Caballes,* 543 U.S. 405, 407 (2005)) (holding that a dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment). *See also, id.* at 1615 (quoting *Indianapolis v. Edmond,* 531 U. S. 32, 40–41 (2000)) ("A dog sniff, by contrast, is a measure aimed at 'detect[ing] evidence of ordinary criminal wrongdoing.' ").

33 *Id.*

***6** Here, while processing the ticket for this vehicle violation, this Court heard an audio recording where Officer Wilkers took the additional step—and time—to make a call to Officer Caez and call for K–9 assistance. He asks Officer Caez how fast he can get to his location and that he needs Caez's canine partner to conduct a sniff. Officer Caez responds that he is only several minutes away. This means that Officer Wilkers has to wait for the K–9 Unit. Further, unlike in *Illinois v. Caballes*, [34] where

the Supreme Court of the United States accepted that a K–9 Unit arrived unsolicited and as part of the routine highway stop, [35] here, the K–9 Unit was called to the scene by the officer. No evidence was presented by the State that this K–9 was part of this routine stop. Thus, Officer Wilkers detoured from his task of issuing the ticket to make the call to Officer Caez and wait for the K–9 Unit to arrive. This Court considers this a measurable extension of the initial stop.

34 543 U.S. 406 (2005).

35 *Id.* at 406.

The State's argument that because the officer was expeditiously working on both at the same time and thus no reasonable articulable suspicion was required lacks merit, especially where the officer made his intent clear. Two other officers had already arrived on the scene when Officer Wilkers decided to call for Officer Caez. The purpose of the call was not to have four officers—and a dog—assist with issuing a traffic ticket. Officer Wilkers testified that he called for a "Title Dog," a reference to Title 16 of the Delaware Code, and that the intent was to have the canine sniff for drugs. He testified and acknowledged that this particular dog, "Storm," was not able to detect for weapons, but *only drugs.* In *Rodriguez,* the Supreme Court of the United States considered the distinction and significance of K–9 involvement and identified that unlike the safety concern identified in *Mimms,* "[h]ighway and officer safety are interests different in kind from the Government's endeavor to detect crime in general or drug trafficking in particular." [36] A dog sniff "is not an ordinary incident of a traffic stop .... Lacking the same close connection to roadway safety as the ordinary inquiries, a dog sniff is not fairly characterized as part of the officer's traffic mission." [37]

36 *Id.*

37 *Id.* at 1615.

On this record, this Court finds the purpose for the traffic stop ended when Officer Wilkers decided to call for a Title 16 dog to conduct an open air sniff of the vehicle. This call, as the officer conceded, was no longer related to the task of issuing a citation for improper window tint and the request for an open air sniff obviously changed the scope of his investigation from a traffic stop into a drug investigation. The State fails to meet its burden that the additional call for K–9 assistance was within the duration or scope of the initial stop. Because the officer prolonged the traffic stop solely to investigate drug related criminal activity, the traffic stop ended and became a second detention. That second detention was required to be based on specific and articulable facts which, taken together with all rational inferences, raise an objective suspicion of criminal behavior. [38] Therefore, the State needs to show that there were facts to support reasonable suspicion for the second detention/drug investigation to justify the calling of the K–9 Unit.

38 *Id.* at 1616–17 (since the canine sniff was beyond the time the officer needed to issue the written ticket, the Court then remanded the case to the Eighth Circuit to consider whether there was reasonable suspicion that justified detaining the driver beyond completion of the traffic infraction investigation).

No Reasonable Suspicion for the Extended Detention

The question is whether Officer Wilkers possessed a reasonable articulable suspicion that criminal activity was afoot to further extend the detention to call the K–9 Unit based on the facts presented. "Reasonable suspicion" is a less exacting standard than "probable cause." Officers must be able to identify "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the belief that a crime is being or has been committed." [39] Whether reasonable suspicion existed must be evaluated in light of "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." [40] A reviewing court should "defer to the experience and training of law enforcement officers." [41] However, the Court should not consider a police officer's subjective opinion regarding reasonable suspicion and must consider the facts under an objective standard. [42]

39 *Quarles v. State, 696* A.2d 1334, 1337 (Del. 1997). Delaware has codified this standard for investigatory stops and detentions in 11 *Del. C.* § 1902, which requires that a police officer have "reasonable ground to suspect a person is committing, has committed, or

about to commit a crime" before he may stop and detain a person.

40 *Jones v. State,* 745 A.2d 856, 861 (Del. 1999).

41 *Woody v. State,* 765 A. 2d 1257, 1262 (Del. 2001) (citing *Jones,* 745 A.2d at 861).

42 *State v. Chandler,* 132 A.3d 133,141 (Del. Super. Ct. 2015) (citing *State v. Miliany–Ojeda,* 2004 WL 343965, at *3 (Del. Super. Feb. 18, 2004)).

***7** Notably, Officer Wilkers testified that he did not form reasonable articulable suspicion until *after* the dog detected a "hit" on the vehicle's door.[43] Regardless, the test requires an objective analysis. The reasonableness of official suspicion must be measured by what the officer knew *before* he seized the defendant.[44] "An illegal stop cannot be justified by circumstances that arose after its initiation."[45]

43 The State suggested that Officer Wilkers was "being modest" in his testimony that he actually had probable cause at that point. Modesty or not, Officer Wilkers testified as he did.

44 *Id.* ("If an officer attempts to seize someone before possessing reasonable and articulable suspicion, that person's actions stemming from the attempted seizure may not be used to manufacture the suspicion the police lacked initially.").

45 *Woody,* 765 A.2d at 1263.

Defendant pulled over when directed without incident. His driving did not cause concern. He produced valid documents. A DELJIS check revealed no issues. Defendant did not exhibit any signs of nervousness or provide inconsistent or false answers to the officer.[46] There was no palpable odor of alcohol or drugs emanating from the vehicle, his person or passenger. When asked to step out of the vehicle, there were no issues of officer safety since he was not patted down. He answered the questions appropriately while outside of the vehicle. When instructed to sit on the curb, Defendant complied. Officer Wilkers stated he therefore relied on the facts that the Defendant was not the owner of a vehicle with improper window tint, that he was coming from "around 7 th Street," and the officer's knowledge of a prior unrelated arrest. Only those facts known to a police officer prior to a seizure may be part of the reasonable suspicion analysis.[47]

46 *Contra State v. Chandler,* 132 A.3d 133, 149 (Del. Super. 2015) (where court found officer did not have reasonable articulable suspicion to extend detention where defendant had multiple cell phones in plain view, gave inconsistent answers, was unable to provide details about his destination, was extremely nervous, had an alias, an extensive criminal history, and was driving a rental vehicle).

47 *Jones,* 745 A.2d at 874.

The officer's knowledge of Defendant's criminal history can be a factor of reasonable suspicion to detain an individual.[48] However, such history, by itself, is insufficient to establish reasonable suspicion.[49] Here, the Defendant's relevant "criminal history" was rather an *arrest* that this officer had made involving a high stakes crap game, and the arrest was not drug-related. An aggregate $25,000 was seized in connection to that arrest which involved several individuals, including Defendant. The officer suggests that even though the arrest was not drug-related and Defendant's portion was significantly less than the total amount, through his training and experience, this money amount is generally associated with drug-related activity. The State argues that the holding in *State v. Brady*[50] supports that this Court should give great weight and deference to the officer's knowledge and training in the totality of the circumstances analysis. *Brady* is distinguishable for different reasons.

48 *Monroe v. State,* 913 A.2d 570, 2006 WL 3482182, at *2 (TABLE).

49 *Id.*

50 152 A.3d 140, 2016 WL 7103408 (Del. 2016) (TABLE).

The *Brady* defendant was a probationer with a history and familiarity with the officer, such that various known violations of his probation were observed by the officer to establish the facts he relied upon for reasonable articulable suspicion. The officer knew that defendant did not possess a license and yet was observed driving. The *Brady* defendant became combative and admitted to using heroin, was observed past curfew, and again resisted police contact. The Supreme Court reversed the trial court's granting suppression where the facts supported a finding of reasonable articulable suspicion to justify the police conduct of the second seizure. Here, the handful

of facts available to Officer Wilkers pale in comparison. Defendant was not a probationer observed committing known violations of his probation. The DELJIS run proved valid. Here, there was no evidence of combative or violent criminal behavior on the part of Defendant, or any admission of wrongdoing. That he knew Defendant from a prior unrelated drug arrest that the officer thought *may* be drug-related was merely a hunch.

***8** The second factor was Defendant's response that he was coming from "around 7th Street," known to the officer as a high-crime area. Although the State argued that this was a factor that could be considered, Officer Wilkers actually testified that he did not consider this factor in his consideration of reasonable suspicion, except to say that he knew it was a high-crime area. The fact that Defendant was coming from a high-crime area without more is insufficient.

The officer further testified that he was satisfied with Defendant's response about who owned the vehicle, especially since it actually was corroborated by what he already knew about the vehicle. Similarly, in *State v. Passerini*, [51] the Court of Appeals of Nebraska found that under the totality of the circumstances, police officers did not have reasonable suspicion to justify a prolonged detention. [52] Although that case involved a rental vehicle, that court noted that "[t]he fact that [the defendant] was driving a rental vehicle is perfectly consistent with law-abiding activity, and furthermore, the matching names on the driver's license and rental agreement, coupled with the consistency of [the defendant's] story as to the timeframe of the trip ... should have dispelled, rather than created, further suspicion." [53] So too, here, the officer had already checked out who the owner of the vehicle was before making the stop. Defendant confirmed that he was not the owner of the vehicle. This should have dispelled suspicion, as the answers were consistent with what the officer already knew prior to the traffic stop.

51 *State v. Passerini,* 789 N.W.2d 60, 71 (Neb. Ct. App. 2010).

52 *Id.* at 71.

53 *Id.* at 70 (noting that the defendant had valid driver's license and a vehicle properly rented in his name, both of which were facts that weighed against the finding of reasonable suspicion).

Finally, the State argues that because it is known by law enforcement that window tint is used to conceal weapons and guns, that the window tint supplied the reasonable suspicion to call the K–9 Unit. It argues that the officer's authority to call in the K–9 Unit was reasonable because, unlike the motor vehicle violations of speeding or equipment violations found in *Chandler* and *Stanley,* respectively, "[w]indow tint is different from other equipment violations or even a moving infraction in that reasonable police officers know invalid, unapproved tint to be associated with the concealment of drugs or weapons or both." [54]

54 State's Resp. at 4.

Window tint in and of itself does not seem to have the import described by the State. Until relevantly recently, it was even unclear whether an officer's general observation of excessive window tint/being unable to see the occupants inside provided the requisite reasonable suspicion to pull over someone for the corresponding equipment violation. Recent cases such as *State v. Moore* [55] and *State v. Cannon*, [56] have helped clarify this area, in describing how a dark tint without a medical waiver provides reasonable suspicion for a possible window tint violation, even if the officer is not aware of the exact 70% or more light transmission standard. [57] Nowhere in these opinions does a court reference window tint and the connection to possible drugs and/or weapons. In fact, the case law on window tint was originally so convoluted because the statute/standards on window tint refer to the necessary degree of transparency or visibility for the driver to see *out* the window, not for officers to see *in* and other "virtually incomprehensible" safety concerns. [58] This Court is not convinced that a minivan with improper window tint triggers a call for the K–9 Unit without other telling factors that were present in cases such as *Caldwell*, [59] *Chandler*, [60] *or Stanley*, [61] and still did not give rise to reasonable articulable suspicion.

55 2017 WL 1040709 (Del. Super. Mar. 16, 2017).

56 2017 WL 1277677 (Del. Super. Mar. 30, 2017).

57 *Cannon*, 2017 WL 1277677, at *4; *Moore*, 2017 WL 1040709, at *4.

58 *Cannon,* 2017 WL 1277677, at *2 (citing *State v. Wilson,* 2013 WL 2423094, at *2 (Del. Super. Mar. 12, 2013)).

59 *Caldwell,* 780 A.2d at 1050–51.

60 *Chandler,* 132 A.3d at 143–49.

61 *Stanley,* 2015 WL 9010669, at *4.

***9** Therefore, based on the totality of the circumstances, and on this record, it cannot be said that Officer Wilkers had reasonable articulable suspicion that Defendant was engaging in drug-related criminal activity to justify the second detention and to call the K–9 Unit. This Court finds that the State fails to meet its burden that the officer had the requisite reasonable articulable suspicion to detain Defendant to conduct a drug investigation. Therefore, the evidence found as a result of the second detention must be suppressed.

VI. CONCLUSION

For the foregoing reasons, Defendant's Motion to Suppress is **GRANTED.**

IT IS SO ORDERED.

/s/

Vivian L. Medinilla, Judge

All Citations

Not Reported in A.3d, 2018 WL 1382394

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE	)	
	)	
	)	
v.	)	Case I.D. No.: 1710003809
	)	
	)	
BAKR DILLARD,	)	
	)	
Defendant.	)	

ORDER

Submitted: April 30, 2018
Decided: May 17, 2018

Upon Consideration of State's Motion for Reargument,
DENIED.

AND NOW TO WIT, this 17th day of May, 2018, upon consideration of the State's Motion for Reargument and the record in this case, it appears to the Court that:

1. After the Court issued its Opinion and granted suppression in favor of Defendant, the State filed a timely Motion for Reargument on March 23, 2018. Defendant filed a response on April 2, 2018. A hearing on the Motion for Reargument was held on April 30, 2018.

2. The facts underlying the State's Motion for Reargument have been previously described by this Court in its March 16, 2018 Opinion granting

Defendant's Motion to Suppress.[1]

3. The State maintains there was no Fourth Amendment violation in what began as a routine traffic stop and resulted in the Wilmington Police Department ("WPD") officer calling in a drug detection K-9 Unit to conduct a dog sniff of the vehicle that yielded evidence sought to be used against Defendant. The State argues the Fourth Amendment was not implicated because there was no measurable extension of the stop and thus no reasonable articulable suspicion was required by the WPD.

4. The bases for the State's Motion for Reargument are two-fold. First, it argues that this Court misapprehended the facts when it ruled that the officer "detoured" from his mission of issuing the ticket, and thus found that the officer measurably extended the traffic stop into something more. Second, the State argues that because this Court improperly found the existence of a measurable extension, the Court further misapprehended the law by requiring that the officer have reasonable articulable suspicion to justify calling the K-9 Unit. The State contends that no reasonable articulable suspicion was necessary because the officer was still issuing the ticket when the dog sniff occurred. Thus, it argues, had the Court properly applied the facts and the law, it would have denied suppression.

[1] *State v. Dillard*, 2018 WL 1382394 (Del. Super. Ct. Mar. 16, 2018).

Standard of Review

5. Delaware Superior Court Criminal Rule 57(d) states: "In all cases not provided for by rule or administrative order, the court shall regulate its practice in accordance with the applicable Superior Court civil rule. . . ."[2] "Superior Court Civil Rule 59[ ] is made applicable to criminal cases by Superior Court Criminal Rule 57(d)."[3]

6. Delaware Superior Court Civil Rule 59(e) permits the Court to reconsider "its findings of fact, conclusions of law, or judgment. . . ."[4] "Delaware law places a heavy burden on a [party] seeking relief pursuant to Rule 59."[5] To prevail on a motion for reargument, the movant must demonstrate that "the Court has 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."[6] Further, "[a] motion for reargument is not a device for raising new arguments,"[7] nor is it "intended to rehash the arguments already decided

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[2] DEL. SUPER. CT. CRIM. R. 57(d).

[3] *Guardarrama v. State*, 911 A.2d 802, 2006 WL 2950494, at *3 (Del. Oct. 17, 2006) (TABLE).

[4] *Hessler Inc. v. Farrell*, 260 A.2d 701, 702 (Del. 1969). *See* DEL. SUPER. CT. CIV. R. 59(e).

[5] *Kostyshyn v. Comm'rs of Bellefonte*, 2007 WL 1241875, at *1 (Del. Super. Ct. Apr. 27, 2007).

[6] *Bd. of Managers of Del. Criminal Justice Info. Sys. v. Gannett Co.*, 2003 WL 1579170, at *1 (Del. Super. Ct. Jan. 17, 2003), *aff'd in part*, 840 A.2d 1232 (Del. 2003).

[7] *Id.*

by the court."[8] Such tactics frustrate the interests of judicial efficiency and the orderly process of reaching finality on the issues.[9] The moving party has the burden of demonstrating "newly discovered evidence, a change of law, or manifest injustice."[10]

Discussion

7. This Court determined that the conduct of WPD law enforcement enlarged the boundaries of the ordinary tasks associated with a lawful routine traffic stop such that they prolonged the duration and scope of the traffic stop without reasonable articulable suspicion to justify the seizure (i.e., the second detention.) Specifically, the State takes issue with the ruling and the characterization that "Officer Wilkers *detoured* from his task of issuing the ticket to make the call to Officer Caez and wait for the K-9 Unit to arrive. This Court considers this a measurable extension of the initial stop."[11]

8. The State claims the Court misapprehended facts or mischaracterized the conduct of the officer where there was no such "detour" because the officer was simultaneously calling the K-9 Unit to the scene while working on issuing Defendant

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[8] *Kennedy v. Invacare Corp.*, 2006 WL 488590, at *1 (Del. Super. Ct. Jan. 31, 2006).

[9] *See Plummer v. Sherman*, 2004 WL 63414, at *2 (Del. Super. Ct. Jan. 14, 2004).

[10] *E.I. du Pont de Nemours & Co. v. Admiral Ins. Co.*, 711 A.2d 45, 55 (Del. Super. Ct. 1995).

[11] *State v. Dillard*, 2018 WL 1382394, at *6 (Del. Super. Ct. Mar. 16, 2018) (emphasis added).

his traffic ticket, and the K-9 unit arrived before the officer actually issued the ticket. Thus, the State argues no reasonable articulable suspicion was required.

9. The State re-styles the same unsuccessful argument that this Court rejected in the original Opinion, wherein the Court noted:

> The State's argument that because the officer was expeditiously working on both at the same time and thus no reasonable articulable suspicion was required lacks merit, especially where the officer made his intent clear. Two other officers had already arrived on the scene when Officers decided to call for Officer Caez. The purpose of the call was not to have four officers—and a dog—assist with issuing a traffic ticket.

10. This Court conducted its fact-specific analysis of this stop as to both duration *and* scope and chose the word "detoured," in part, as utilized in the 2015 decision of *Rodriguez v. United States*.[12] The *Rodriguez* Court identifies how "[l]ike a *Terry* stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission'—to address the traffic violation that warranted the stop."[13] Here, the State fails to establish how the Court misapprehended the facts that the acts of the officer stayed true to the mission of issuing the ticket.

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[12] *See Rodriguez v. United States*, 135 S.Ct. 1609, 1616 (2015) (describing how on-scene investigations in to other crimes "detours" from an officer's safety mission).

[13] *Id.* at 1614 (citing *Caballes*, 543 U.S. 406, 407 (2005)). *See also United States v. Sharpe*, 470 U.S. 675, 685 (1985) (when evaluating the scope and duration of an investigative stop, the Court "ha[s] emphasized the need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes."); *Florida v. Royer*, 460 U.S. 491 (1983) (plurality opinion) ("The scope of the detention must be carefully tailored to its underlying justification.").

11. The facts accepted by the Court included the officer's testimony that he knew before he pulled the vehicle over that he had sufficient information to cite the driver with improper window tint, when he verified that the vehicle registration did not include the proper waiver. The officer testified that Defendant and passenger provided appropriate documents and truthful responses to his questions, and no signs of nervousness were exhibited at any time during his exchange with Defendant.

12. Rather than return to his vehicle and issue the ticket, the officer asked Defendant to step out of the vehicle to ask him more questions. As noted in its Opinion, the Court analyzed the officer's questioning in detail, and deemed them to be well within the scope of the lawful stop. However, the Court took issue with the third question of whether there was "anything illegal" in the vehicle, distinguishing and questioning the appropriateness of this particular "cart-blanche" question because it was not focused on officer safety or the ordinary questions related to the traffic ticket. Even assuming these were all appropriate questions, the Court further considered the additional command of the officer directing Defendant to sit on the curb, despite the officer's testimony that he did not fear for his safety.

13. This Court also considered the testimony that the officer knew he was calling in a "Title 16" drug dog when he called the K-9 Unit while he waited for the E-ticket system to load. It took three to five minutes for the K-9 Unit to arrive. K-9 Officer Caez further testified that when he arrived at the scene, he first went to

Officer Wilkers and spoke to him for further direction and then returned to his K-9 vehicle to retrieve his drug dog.[14] Finally, Officer Wilkers testified that he then took the time to speak with and direct and/or assist yet another officer to remove the passenger from the vehicle to facilitate the canine sniff.[15]

14. The Court considered that these independent acts occurred at the command of Officer Wilkers and were wholly unrelated to issuing a ticket for the lawful reason for the stop—improper window tint. That the acts were done prior to the issuing of the ticket does not mean that the stop was not prolonged. The State maintains these acts were constitutionally permissible because where the computer program E-Ticket was still loading, the officer had ample time to pursue other tasks. The excuse of slow technology cannot convert an otherwise unconstitutional, extended detention into a constitutional traffic stop and drug investigation. Thus, this Court found the existence of a measurable extension of the stop. Thus, the Court did not misapprehend the facts.

15. The State also fails to demonstrate how the Court misapprehended the law. The State reiterates that the state actor was merely conducting an efficient

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[14] Tr. of Suppression Hearing (Feb. 22, 2018) at B72:16–20. Officer Wilkers corroborates this, stating that after Officer Caez arrived at the scene, Officer Wilkers "advised" him as to "what was going on." *Id.* at B43:11–13.

[15] *Id.* at B42:17–B43:11 (after the dog arrived, Officer Wilkers directed Officer Rosado to have the passenger exit the vehicle).

investigation within a permissible timeframe that did not run afoul of the Fourth Amendment, and thus this Court misapprehended the United States decisions in *Rodriguez v. United States* and *Illinois v. Caballes*.[16]

16. The State's request that the Court follow *Caballes* is inappropriate since this Court already considered *Caballes* and distinguished it from the facts of this case in its Opinion.[17] It bears repeating that *Caballes* accepted that there was no measurable extension of the stop when the Illinois State Police Drug Interdiction Team arrived with a drug dog upon overhearing the radio transmission of the stop.[18]

17. Notably, a decade after *Caballes,* the U.S. Supreme Court decision in *Rodriguez* considered and rejected the same argument the State makes here:

> "[t]he Government argues that an officer may 'incremental[ly]' prolong a stop to conduct a dog sniff so long as the officer is reasonably diligent in pursuing the traffic-related purpose of the stop, and the overall duration of the stop remains reasonable in relation to the duration of other traffic stops involving similar circumstances.[19]

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[16] *Rodriguez v. United States*, 135 S.Ct. 1609 (2015); *Illinois v. Caballes*, 543 U.S. 406 (2005). Notably, Justice Ginsburg dissents in *Caballes*, and writes for the majority ten years later in the 2015 decision in *Rodriguez. See Caballes*, 543 U.S. at 417–425 (Ginsburg, J. dissenting).

[17] In *Caballes,* there was no evidence to suggest that the interstate highway officer who pulled over the *Caballes* defendant did anything but pull over the driver and begin to issue the speeding ticket, when another officer showed up to the scene with the drug dog. As the Court issued in its Opinion, here, the above-mentioned acts taken by the officer, in addition to calling in the dog, are distinguishable from *Caballes* and thus implicate the Fourth Amendment.

[18] *Caballes*, 543 U.S. at 408 ("[W]e accept the state court's conclusion that the duration of the stop in this case was entirely justified by the traffic offense and the ordinary inquires incident to such a stop.")

[19] *Rodriguez*, 135 S.Ct. at 1616.

The Supreme Court of the United States found that this argument, in effect, was arguing that "by completing all traffic-related tasks expeditiously, an officer can earn bonus time to pursue an unrelated criminal investigation."[20] Instead, the Court found that the focus should be on the acts of the individual officer and whether that officially diligently completed the traffic stop, rather than on a specific average duration of a similar traffic stop. The Court stated "[t]he reasonableness of a seizure, however, depends on what the police in fact do. . . . How could diligence be gauged other than by noting what the officer actually did and how he did it?"[21] This Court's Opinion considered what Officer Wilkers actually did and determined that he extended the traffic stop. Indeed, the record and the admission of Officer Wilkers support as much.[22]

18. Finally, the State fails to demonstrate why an officer does not require reasonable articulable suspicion to call in a drug dog to conduct an independent drug investigation. The State ignores the Delaware authority cited throughout the

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[20] *Id.*

[21] *Id.* (citing *Knowles v. Iowa*, 525 U.S. 113, 115–17 (1998)).

[22] Defense asked Officer Wilkers, "The time you spent talking to Dillard and the time you spent putting him on the curb, right, and then the time you spent getting in your car and making your radio transmission to Caez, all that time you could have spent logging into E-ticket and issuing, getting ready to issue Dillard a ticket, right?" Officer Wilkers responded, "Yes, sir. Once my thorough investigation was complete." Tr. of Suppression Hearing (Feb. 22, 2018) at B40:04–13.

Opinion that addresses the state and federal constitutional parameters in these traffic stops, and the role of reasonable articulable suspicion if an officer determines that an extension or expansion of the traffic stop is warranted. Here, the Court did not misapprehend the facts in finding that the officer extended the stop. Thus, it relied on the applicable Delaware case law, and the respective analyses germane to these decisions.[23] It accepted that under Delaware law, a "second detention" occurred—a prolonged stop—that required reasonable articulable suspicion, accordingly.

19. In *Caldwell v. State*, the Delaware Supreme Court identified how "an initially valid traffic stop could not serve as the justifying predicate for the narcotics-related investigation that followed in its immediate wake, notwithstanding the fact that the total length of the stop was brief and did not exceed the normal duration for a traffic stop."[24]

20. Additionally, in *State v. Stanley*, the State had a similar argument concerning whether there was a measurable extension of the traffic stop. The State argued that there was no measurable extension as long as the K-9 sniff occurred *simultaneously* with another officer explaining a warning citation to the defendant. The Superior Court rejected this reasoning, as the "simple act of removing the

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[23] *See Caldwell v. State*, 780 A.2d 1037 (Del. 2007); *State v. Chandler*, 132 A.3d 133 (Del. Super. Ct. 2015); *State v. Stanely*, 2015 WL 9010669 (Del. Super. Ct. Dec. 9, 2015).

[24] *Caldwell*, 780 A.2d at 1048 n.24 (quoting *Charity*, 753 A.2d at 566).

occupants from the vehicle extended the traffic stop."[25] As explained in the Court's prior Opinion, an officer may remove passengers from a vehicle for safety purposes.[26] But where an officer does not have safety concerns, as was the case here,[27] even this command can constitute a measurable extension of a traffic stop. Here, this Court accepted that under *Loper,*[28] the Defendant could be ordered to exit his vehicle. The removal of the passenger, however, further aligns with *Stanley* and other factors that weighed in favor of suppression. Thus, this Court followed both federal and Delaware law.

Conclusion

This Court finds that the State moves for reconsideration of conclusions of law by rehashing arguments previously presented, and raising new arguments not properly before this Court per Rule 59. The State fails to meet the heavy burden of demonstrating newly discovered evidence, a change or error of law, or manifest injustice. Specifically, the State fails to demonstrate that this Court overlooked controlling precedent or legal principles when it granted Defendant's Motion to

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[25] *Stanley*, 2015 WL 9010669, at *4.

[26] *State v. Dillard*, 2018 WL 1382394, at *4 (Del. Super. Ct. Mar. 16, 2018) (describing such an exit command for officer safety as a *de minimis* intrusion).

[27] Indeed, Officer Wilkers did not articulate any safety concerns and did not conduct a patdown of Defendant. Tr. of Suppression Hearing (Feb. 22, 2018) at B16:19–20.

[28] *Loper v. State*, 8 A.3d 1169 (Del. 2010).

Suppress. Moreover, this Court did not misapprehend the law or facts such as would change the outcome of the underlying decision. The State's Motion for Reargument is, therefore, **DENIED.**

IT IS SO ORDERED.

Judge Vivian L. Medinilla

oc: Prothonotary
cc: Patrick J. Collins, Esquire
Mark A. Denney, Deputy Attorney General
Investigative Services Office

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	
v.	)	ID. No. 1710003809
	)	
BAKR DILLARD,	)	
	)	
Defendant.	)	

ORDER

AND NOW, TO WIT, this 8th day of June, 2018, upon the State's certification that evidence suppressed in the above matter is essential to the prosecution of Counts 1 through 6 of the indictment, and upon request of the State, it is hereby ORDERED that these specific counts are DISMISSED pursuant to 11 Del. Code, Section 9902(b).

Counts 7 and 8 remain - counsel to contact Court for trial dates

IT IS SO ORDERED.

Judge Vivian L. Medinilla
Superior Court
State of Delaware

Ex. C

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	
Plaintiff – Below,	)	
Appellant,	)	
	)	
v.	)	**No. 312, 2018**
	)	
BAKR DILLARD,	)	
	)	
Defendant – Below,	)	
Appellee.	)	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using MS Word.

2. This brief complies with the type-volume requirement of Rule 14(d)(i) because it contains 4,591 words, which were counted by MS Word.

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

/s/ Andrew J. Vella
Deputy Attorney General
ID No. 3549

DATE: October 15, 2018

CERTIFICATION OF SERVICE

The undersigned certifies that on October 15, 2018, he caused the attached *State's Second Corrected Opening Brief* to be delivered electronically via Lexis/Nexis File and Serve to the following person:

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