



IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE)
)
 Plaintiff-Below,)
 Appellee.)
)
 v.) No. 414, 2018
)
 ANDRE MURRAY,)
)
 Defendant-Below,)
 Appellant,)

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

ANDRE MURRAY'S ANSWERING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

On November 27, 2017, Andre Murray was indicted on Possession of a Firearm by a Person Prohibited, Possession of Ammunition by a Person Prohibited and Carrying a Concealed Deadly Weapon.¹ On February 2, 2018, Murray filed a Motion to Suppress the evidence seized from him upon his arrest “because his detention and subsequent search violated his rights under the Fourth Amendment to the United States Constitution, Article I, Section 6 of the Delaware Constitution and the provisions of 11 *Del.C.* Chapter 19.”² The State responded on March 2, 2018.³ A hearing was conducted on March 29, 2018 and, on April 2, 2018, the trial court issued a written decision granting Murray’s motion.⁴

The State filed a Motion for Reargument on April 9, 2018.⁵ After Murray filed his response,⁶ the trial court issued a written decision denying the State’s motion.⁷ The indictment was subsequently dismissed and the State filed a timely notice of appeal. This is Murray’s Answering Brief filed in response to the State’s Opening Brief.

¹ A1.

² A2, 6.

³ A2, 14.

⁴ *State v. Murray*, 2018 WL 1611268 (Del.Super. April 2, 2018).

⁵ B1.

⁶ B67.

⁷ A5; *State v. Murray*, 2018 WL 3629150 (Del.Super. July 26, 2018).

SUMMARY OF THE ARGUMENT

1. Denied. Contrary to the State's assertion, the Superior Court considered all of the evidence presented by Rosaio supporting his inchoate and unparticularized suspicion that Murray was carrying a concealed weapon as he was walking down the street. Further, the court accorded Rosaio's suspicion the proper deference due under the circumstances. The Superior Court, responded to this argument below when it denied the State's Motion for Reargument. In that decision, it considered all of Rosaio's observations and explained why those observations fell short in a totality-of-the-circumstances analysis. Thus, the reality is that in the end, the Superior Court found that the officer's observations did not provide a sufficient basis in the eyes of a reasonable, prudent and experienced police officer to justify detaining Murray at gun point. Therefore, the Superior Court's decision granting Murray's Motion to Suppress must be affirmed.

2. Denied. The Superior Court properly granted Murray's Motion to Suppress as it was correct in finding that when Rosaio seized Murray: 1) Rosaio had only an inchoate and unparticularized suspicion, or "hunch," that Murray was carrying a concealed weapon; and 2) Rosaio unlawfully arrested Murray without the requisite probable cause. Therefore, the Superior Court's decision granting Murray's Motion to Suppress must be affirmed.

STATEMENT OF FACTS

On October 13, 2017, at 11:00 p.m., Sergeant Rosaio and three other officers were on routine patrol in an unmarked Chevy Tahoe in the city of Wilmington.⁸ While Rosaio characterized the neighborhood as a “high crime, high drug area,” the officers were not involved in any on-going investigation that night.⁹

According to Rosaio, he was driving the Tahoe north in the 200 block of South Franklin Street toward the stop sign at the intersection with Chestnut Street.¹⁰ When the four officers were about 15 feet away from the intersection, Rosaio saw Andre Murray and Lenwood Murray-Stokes walking south on the east sidewalk in the 100 block of South Franklin Street (between Read Street and Chestnut Street).¹¹ The two men were about 50 feet away from the officers at the time.¹²

Rosaio claimed that the first thing he noticed was that “Mr. 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[.]”¹³ However, “his left arm was swinging more freely, in a more natural manner alongside of

⁸ A27-28, 40, 46.

⁹ A28. A40.

¹⁰ A30.

¹¹ A30-31.

¹² A32.

¹³ A31.

his body.”¹⁴ Lenwood Murray-Stokes was walking with a more natural gait with both arms swinging naturally.¹⁵ Rosaio testified at a suppression hearing that Murray’s straight arm gait was “an indicator that he possibly could be armed.”¹⁶

Rosaio drove up to the stop sign, sat there for about 20 seconds and watched the two men who conducted themselves in the same manner as they had when Rosaio first observed them – lawfully walking down the street.¹⁷ While Murray-Stokes maintained a natural gait and was walking closest to the street, Murray continued to hold one arm straight against his body.¹⁸

According to Rosaio, it appeared to him that when the two men were about 15 feet away from the Tahoe, Murray looked in his direction, had a stutter step, stopped in his tracks and scanned the area.¹⁹ Murray and Murray-Stokes then continued to walk forward slowly (in their same respective gaits) while scanning around.²⁰

Rosaio testified that he decided to pull the Tahoe alongside of Murray due to Murray’s seemingly “suspicious, nervous behavior,” (looking around

¹⁴ A32.

¹⁵ A32.

¹⁶ A27, 37, 42.

¹⁷ A33.

¹⁸ A33-34.

¹⁹ A34.

²⁰ A34-35.

and the stutter step).²¹ He did not put on his lights or siren and did not block Murray's path.²² As soon as Rosaio got out of his car, Murray and Murray-Stokes both stopped without being told to do so. Murray then stood behind his companion and turned away from Rosaio. Murray made no furtive gestures. However, the officer claimed that he was now "confident that [Murray] had a handgun on his right side" so he drew his weapon and ordered him to "Stop, show me your hands."²³ Murray made no attempt to flee.²⁴

According to Rosaio, it was at this point, while his gun was pointed at Murray, that Murray purportedly appeared to reach for his waistband area. So, Rosaio next ordered, while continuing to point his gun at Murray, "Don't reach for your waistband. Get on the ground."²⁵ While Murray complied and acknowledged he had a gun, Rosaio and another officer rolled Murray over on his side in search of the gun. They discovered the gun when they lifted him off the ground.²⁶

²¹ A35.

²² A35.

²³ A37.

²⁴ A41.

²⁵ A37-38.

²⁶ A36-38.

I. THE SUPERIOR COURT CONSIDERED ALL OF THE EVIDENCE PRESENTED IN SUPPORT OF ROSAIO'S INCHOATE AND UNPARTICULARIZED SUSPICION THAT MURRAY WAS CARRYING A CONCEALED WEAPON AND THE SUPERIOR COURT ACCORDED ROSAIO'S SUSPICION THE PROPER DEFERENCE DUE UNDER THE CIRCUMSTANCES.

Question Presented

Whether the trial court failed to consider Rosaio's testimony that based on his training and experience, he suspected that Murray might be carrying a concealed weapon.

Standard and Scope of Review

This Court reviews evidentiary issues for abuse of discretion.²⁷

Argument

Contrary to the State's assertion, the Superior Court considered all of the evidence presented by Rosaio supporting his inchoate and unparticularized suspicion that Murray was carrying a concealed weapon as he was walking down the street.²⁸ Further, the court accorded Rosaio's suspicion the proper deference due under the circumstances. The Superior Court, responded to this argument below when it denied the State's Motion for Reargument. In that decision, it considered all of Rosaio's observations

²⁷ *Rodriguez v. State*, 30 A.3d 764, 770 (Del. 2011).

²⁸ The Superior Court set forth the officer's testimony in its decision granting Murray's Motion to Suppress. *State v. Murray*, 2018 WL 1611268*1 (Del.Super. April 2, 2018).

and explained why those observations fell short in a totality-of-the-circumstances analysis. Thus, the reality is that in the end, the Superior Court found that the officer's observations did not provide a sufficient basis in the eyes of a reasonable, prudent and experienced police officer to justify detaining Murray at gun point.

In his Motion to Suppress, Murray argued that he was unlawfully seized because police lacked reasonable suspicion that he had been or was about to partake in criminal activity.²⁹ At the conclusion of the subsequent suppression hearing, however, he argued that Murray had actually been unlawfully subjected to a “full-blown arrest[]” that lacked probable cause.³⁰ The State maintained that Murray was subjected to a lawful investigatory stop based on Rosaio's reasonable suspicion that Murray was carrying a concealed weapon.³¹ The court granted Murray's Motion to Suppress.

In granting Murray's Motion to Suppress, the Superior Court pointed out that the only observations specific to Murray were wholly innocent and that this Court, in *Lopez-Vasquez v. State*,³² said it is “impossible for a combination of wholly innocent factors to combine into a suspicious conglomeration unless there are concrete reasons for such an

²⁹ A8.

³⁰ A65.

³¹ A58.

³² 956 A.2d 1280, 1288 (Del. 2008).

interpretation.”³³ The Superior Court then ruled consistent with finding that the State failed to provide concrete reasons for such an interpretation in this case.³⁴

Thereafter, the State filed a Motion for Reargument and again claimed that Rosaio was justified in his actions on the grounds of reasonable suspicion.³⁵ The State also claimed, as it does now, that: the Superior Court had erroneously disregarded Rosaio’s testimony; and failed to defer to Rosaio’s training and experience.³⁶ Murray filed a response arguing the seizure was unlawful due to a lack of probable cause and that the court is not required to give total deference to a police officer in all cases.³⁷ In denying the State’s Motion for Reargument,³⁸ the Superior Court fleshed out the rationale set forth in its original decision. In doing so, it made clear that it did not disregard Rosaio’s testimony.³⁹ Rather, it discussed several cases

³³ *Murray*, 2018 WL 1611268*2.

³⁴ *Murray*, 2018 WL 1611268*2.

³⁵ B1.

³⁶ B10-11.

³⁷ B69-70.

³⁸ *State v. Murray*, 2018 WL 3629150 (Del.Super. July 26, 2018).

³⁹ As the Superior Court explained in the decision on the Motion for Reargument: “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.” *Murray*, 2018 WL 3629150*1.

and explained how Rosaio’s suspicions came up short in a totality-of-the-circumstances analysis.

Rather than disregard Rosaio’s “armed gunman” testimony, the court addressed it in great detail. The court recognized Rosaio had been trained that a straight arm gait and blading may be “indicator(s) that (someone) could be armed.”⁴⁰ Characterizing these suspicions as amounting to an “armed gunman profile,” the court analogized it to a “drug courier” profile⁴¹ to better demonstrate its point.

The court explained that such profiles are perfectly acceptable for police to use as an aid in “picking and choosing the targets of [their] attention[.]”⁴² The court also acknowledged that “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 [officer].”⁴³ However, the court stated that a profile could “not serve as a proxy for reasonable articulable suspicion” unless the behaviors particular to the defendant rose independently to reasonable articulable suspicion.⁴⁴

⁴⁰ A27, 37, 42.

⁴¹ *Murray*, 2018 WL 3629150*2.

⁴² *Murray*, 2018 WL 3629150*4.

⁴³ *Murray*, 2018 WL 3629150*3 (quoting *United States v. Sokolow*, 490 U.S. 1, 10 (1989)).

⁴⁴ *Murray*, 2018 WL 3629150* 4.

Here, the court concluded that Rosaio’s general suspicions that Murray was carrying a concealed weapon were based on wholly innocent factors that could describe a “very large category of presumably innocent [people], 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.”⁴⁵ Therefore, additional “data points” were necessary to support the officer’s suspicions before seizing the defendant.⁴⁶ Thus, the court did recognize and consider Rosaio’s armed gunman evidence.

Inherent in the State’s argument is an adoption of an erroneous assertion made by the prosecutor at the suppression hearing that “in situations such as this, all the Court does is defer to the police officer.”⁴⁷ To the contrary, as the Superior Court correctly noted:

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

⁴⁵ *Reid v. Georgia*, 448 U.S. 438, 441 (1980) (finding that agent's belief that the petitioner and his companion were attempting to conceal the fact that they were traveling together, a belief that was more an “inchoate and unparticularized suspicion or ‘hunch,’ ” than a fair inference in the light of his experience)

⁴⁶ *Murray*, 2018 WL 3629150*4. *See Harris v. State*, 806 A.2d at 126 (holding that “seemingly innocent conduct” composing the profile “provides no basis for a finding of reasonable suspicion even in the eyes of a reasonable, prudent, and experienced police officer” when there is no “cogent explanation”).

⁴⁷ A52.

‘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.⁴⁸

Not only is the Superior Court “entitled to make its own evaluation of the officer's credibility,”⁴⁹ this Court has held that it will not “accord police carte blanche to pick and choose whom to stop based on some ‘hunch’” that someone is “involved in criminal activity.”⁵⁰ That means neither the Superior Court nor this Court exist to simply “rubber stamp” an officer’s conduct simply because he “believed he had a right to engage in it.”⁵¹

Therefore, the Superior Court did not abuse its discretion in granting Murray’s Motion to Suppress.

⁴⁸ *Murray*, 2018 WL 1611268*2.

⁴⁹ *Lopez-Vazquez*, 956 A.2d at 1288–89 (internal citations and quotation marks omitted).

⁵⁰ *Harris*, 806 A.2d at 130.

⁵¹ *Lee v. State*, 2015 WL 5969453 (Md.Ct.App. July 31, 2015) (finding no reasonable suspicion where officer happened to see a man on the street adjusting a bulge in his pants that based on his training in characteristics of armed gunman was consistent with being armed)

II. THE SUPERIOR COURT PROPERLY GRANTED MURRAY’S MOTION TO SUPPRESS AS SERGEANT ROSAIO HAD ONLY AN INCHOATE UNPARTICULARIZED SUSPICION, OR “HUNCH,” THAT MURRAY WAS CARRYING A CONCEALED WEAPON WHEN HE ARRESTED MURRAY AT GUNPOINT.

Question Presented

Whether the Superior Court correctly concluded that the “combination of wholly innocent factors” relied upon by Rosaio to arrest Murray at gunpoint amounted to only an inchoate and unparticularized suspicion rather than the requisite probable cause.

Standard and Scope of Review

This Court reviews the judge’s factual findings in a ruling on a suppression motion for an abuse of discretion.⁵² This Court “must adopt” the factual findings and reasonable inferences “as long as there is sufficient evidence in the record to support them and the findings are not clearly erroneous.”⁵³ This Court “review[s] the trial judge's determinations *de novo* for errors in formulating or applying legal precepts.”⁵⁴

⁵² *State v. Abel*, 68 A.3d 1228, 1232 (Del. 2012).

⁵³ *Id.*

⁵⁴ *Lopez-Vazquez*, 956 A.2d at 1285.

Argument

The Superior Court was correct in finding that when Rosaio seized Murray: 1) Rosaio had only an inchoate and unparticularized suspicion, or “hunch,” that Murray was carrying a concealed weapon; and 2) Rosaio unlawfully arrested Murray without the requisite probable cause. Therefore, the Superior Court’s decision granting Murray’s Motion to Suppress must be affirmed.

Rosaio’s Observations Of Murray’s Wholly Innocent Behaviors Did Not Rise To The Level Of Reasonable Suspicion.

At the suppression hearing, Rosaio pointed to facts upon which he relied when he seized Murray: 1) Murray was holding one arm straight to his side while he was walking down the street with a companion; 2) Murray began to look around and had a brief stutter step when he purportedly saw police; 3) Murray turned his body away from the officer; and 4) Murray was in a high crime neighborhood.⁵⁵

The officer said that, based on his training, he believed that Murray’s straight arm gait was “an indicator that he possibly could be armed.”⁵⁶ The only factors that were added to that “indicator” prior to Rosaio’s decision to pull the Tahoe up alongside of Murray was Murray’s seemingly “suspicious,

⁵⁵ *Murray*, 2018 WL 1611268*2.

⁵⁶ A27, 37, 42.

nervous behavior,” (looking around and the stutter step).⁵⁷ As soon as Rosaio got out of his car, Murray and his companion both stopped without being told to do so. Murray then stood behind the other man. No furtive gestures were made. Murray simply turned away from Rosaio and,⁵⁸ simultaneously, Rosaio “began drawing [his] weapon and ordering [Murray] to ‘Stop, show me your hands.’”⁵⁹

As the Superior Court noted, when Rosaio drew his weapon on Murray and ordered him to stop, all of the behavior’s specific to Murray were wholly innocent.⁶⁰ And, significantly,

- Police were not responding to any calls of criminal activity;

⁵⁷ A35.

⁵⁸ Because he had not been ordered to stop, Murray was free to leave, let alone turn away from the officer if he so chose. Yet, he did not leave. *See Woody v. State*, 765 A.2d 1257, 1264 (Del. 2001).

⁵⁹ A37. Contrary to what the prosecutor sought to have the Superior Court believe, it was only *after* Rosaio drew his weapon and ordered Murray to stop and put up his hands did Murray purportedly appear to reach for his waistband. A37-38.

⁶⁰ Herein lies the error in the State’s reliance on *Lum v. State*, *Cropper v. State* and *Loat v. State*. Each of those cases contains significantly more circumstances that tip in favor of reasonable suspicion than in ours. *Lum v. State*, 2018 WL 4039898 (Del. Aug. 22, 2018) (after witnessing defendant actively avoiding police and adjusting waistband); *Cropper v. State*, 123 A.3d 940 (Del. 2015) (police were familiar with defendant, previously arrested him twice and recognized that he had a different demeanor); *Loat v. State*, 2017 WL 712750 (Del. Feb. 22, 2017) (finding reasonable suspicion to stop defendant when police approached because, among other things, codefendant adjusted his waistband, defendant fled, police knew he had access to weapons).

- Police did not have any tips that anyone in the area was armed or that there had been any recent criminal activity in the area;
- There is nothing to indicate that police were aware that either Murray or his companion had a criminal record;
- Police did not see a bulge or either a part of or outline of a weapon on Murray;⁶¹

In other words, Murray had done nothing to attract police attention other than to lawfully walk down the street with one arm straight against his body at the same time that Rosaio happened to be driving up the street.⁶²

Here, the Superior Court correctly concluded that the “wholly innocent factors” did not “combine into a suspicious conglomeration.”⁶³ Rather, they combined into a hunch or “unparticularized suspicion.”⁶⁴ In this manner, our case is similar to that of *Harris v. State*.⁶⁵

In *Harris*, the officer, who testified to his extensive training and experience in drug investigations, stated that the defendant had exhibited behaviors that fit a “drug courier” profile. Based on that, police blocked the defendant’s car from entering I-95 and drew their weapons on him. In

⁶¹ A28.

⁶² See, e.g., *Louisiana v. Williams*, 621 So.2d 199, 201 (La.Ct.App.2003) (finding no reasonable suspicion where officers saw defendant “fooling” with belt area, but conceded what he was doing “ ‘could have been several things’ ”); *New York v. Marine*, 142 A.D.2d 368, 371 (N.Y.App.Div.1989) (suspicion of concealed weapon based on “hunch” and “speculation,” where officer saw inebriated defendant reach into jacket with right hand while walking in high-crime area).

⁶³ *Lopez-Vasquez*, 956 A.2d at 1288.

⁶⁴ *Murray*, 2018 WL 1611268*2.

⁶⁵ 806 A.2d 119.

finding no justification for the seizure, the *Harris* Court recognized “that profile evidence is admissible to determine whether police have reasonable suspicion or probable cause regarding a defendant.”⁶⁶ However, the Court concluded that, under both the federal and state constitutions, the “seemingly innocent conduct” composing the profile “provides no basis for a finding of reasonable suspicion even in the eyes of a reasonable, prudent, and experienced police officer” when there is no “cogent explanation.”⁶⁷

Just as with *Harris*, because the behaviors particular to *Murray* did not “independently raise reasonable articulable suspicion,”⁶⁸ additional “data points” were necessary to support the officer’s suspicions. That is because the circumstances that did exist “describe a very large category of presumably innocent [people], 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.”⁶⁹ Therefore, the trial court did not err in concluding that *Rosaio* had no more than a mere hunch that *Murray* was carrying a concealed weapon.

⁶⁶ *Harris*, 806 A.2d at 128.

⁶⁷ *Harris*, 806 A.2d at 126.

⁶⁸ *Murray*, 2018 WL 3629150*. 4.

⁶⁹ *Reid*, 448 U.S. at 441 (finding that agent's belief that the petitioner and his companion were attempting to conceal the fact that they were traveling together, a belief that was more an “inchoate and unparticularized suspicion or ‘hunch,’ ” than a fair inference in the light of his experience)

The Superior Court Correctly Applied A Probable Cause Standard As Rosaio Arrested Murray When Drew His Weapon And Ordered Murray To Stop And Show Him His Hands.

Probable cause is a more stringent standard than the reasonable and articulable suspicion standard.⁷⁰ Therefore, because Rosaio’s suspicions did not even rise to the level of reasonable suspicion, they necessarily did not amount to probable cause. However, assuming, *arguendo*, this Court determines Rosaio did have reasonable suspicion, then it must go on to assess whether, and to conclude that, Rosaio was required to have probable cause, rather than just reasonable suspicion, to seize Murray as he did - at gun point.

Contrary to the State’s assertion, the trial court was correct in its decision that “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[.]”⁷¹ and immediately drew his weapon and ordered him to stop and show him his hands. An investigatory “stop” is not only more limited in duration than an arrest but also is more limited in “the amount of force” that may be used.⁷² Typically, “[t]he form of “search” deemed “reasonable” under such circumstances is also a limited

⁷⁰ *Purnell v. State*, 832 A.2d 714, 719 (Del. 2003)

⁷¹ State’s Op.Br. at p.19.

⁷² *Flowers v. State*, 2018 WL 4659227 (Del. Sept. 27, 2018).

one: a “frisk” or pat down to find weapons.”⁷³ However, while it is true, as the State asserts, “[p]olice officers may forcibly stop and a detain a person if they have reasonable suspicion of criminal activity on part of that person[,]”⁷⁴ the use of unreasonable force under the circumstances ripens a stop into an arrest requiring probable cause to justify it.⁷⁵

Here, as the facts observed by Rosaio reveal, there was nothing to indicate that it was reasonably necessary for police to immediately draw a weapon on Murray for protection. Prior to Rosaio drawing his weapon, Murray had done nothing to attract police attention other than to lawfully walk down the street with one arm up against his body at the same time that Rosaio happened to be driving up the street.⁷⁶ The totality of the wholly innocent factors available to Rosaio at that time “describe a very large category of presumably innocent [people] [.]”⁷⁷

There were four officers. While Murray had a companion, there was nothing in the record indicating that he posed any danger whatsoever.

⁷³ *Flowers*, 2018 WL 4659227 *4.

⁷⁴ State’s Op.Br. at 19. (*citing Coleman v. State*, 532 A.2d 1171, 1174 (Del. 1989)).

⁷⁵ *Id.* (*quoting Wiers v. Barnes*, 925 F.Supp. 1079, 1087 (D. Del. 1996)).

⁷⁶ *Flowers*, 2018 WL 4659227. Unlike in *Flowers*, there was no tip that there was anyone carrying a weapon or that there was any criminal activity in the area. According to Rosaio, Murray had made no attempt to flee either before or after he was stopped. Murray was completely compliant.

⁷⁷ *Reid*, 448 U.S. at 441.

Murray may have acted nervous but he had made no furtive gestures prior to Rosaio drawing his gun. In fact, as soon as Rosaio got out of the Tahoe, both Murray and his companion stopped without being told to do so.

Therefore, the Superior Court was correct in requiring the State to establish that Rosaio possessed probable cause to seize Murray at gunpoint.

Rosaio Did Not Have The Requisite Probable Cause To Arrest Murray.

As an initial matter, the State made no effort, either below or on appeal, to argue that Rosaio had probable cause to justify Murray's arrest. Accordingly, it has waived this argument.⁷⁸ Thus, if this Court concludes that the Superior Court was correct in applying a probable cause standard, it must conclude that the State failed to establish that Rosaio had probable cause to arrest Murray. Alternatively, should the Court choose to review the record to determine whether the State established probable cause, it still must find that the State failed to meet its burden.

This Court has held that “when an arrest is made without a warrant, the requirements to satisfy a determination of probable cause must be at least equal to those where an arrest warrant is obtained.”⁷⁹ “The determination of whether such probable cause exists is essentially a balancing test wherein the

⁷⁸ *Lum*, 101 A.3d at 972 (Del. 2014) (finding appellant waived an argument not properly raised in opening brief and not objected to below).

⁷⁹ *Thompson v. State*, 539 A.2d 1052, 1055–56 (Del. 1988) (citing *Wong Sun v. United States*, 371 U.S. 471, 479 (1963)).

necessities of effective law enforcement are measured against the constitutional rights of citizens to be protected against arbitrary police action.”⁸⁰

As previously stated, when Rosaio drew his weapon on Murray and ordered him to stop, all of the behaviors specific to Murray were wholly innocent. Assuming this Court finds that the “combination of those wholly innocent factors” amount to more than “inchoate and unparticularized suspicion” it certainly cannot conclude that it rises to the level of probable cause to justify an arrest at gunpoint. Accordingly, the Superior Court’s decision granting Murray’s suppression motion must be affirmed.

⁸⁰ *Garner v. State*, 314 A.2d 908, 910–11 (Del. 1973) (citing *Brinegar v. United States*, 338 U.S. 160 (1949)).

CONCLUSION

For the reasons and upon the authorities cited herein, the trial court's decision must be affirmed.

Respectfully submitted,

/s/ Nicole M. Walker
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DATED: November 9, 2018