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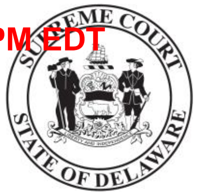

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANTHONY CALM,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	
v.	)	No. 577, 2018
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

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DATE: June 7, 2019

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NATURE AND STAGE OF THE PROCEEDINGS

Anthony Calm ("Calm") was arrested on December 12, 2017, and later charged by Indictment with Possession of a Firearm by a Person Prohibited ("PFBPP"), Possession of Ammunition by a Person Prohibited ("PABPP"), Possession of a Weapon with a Removed, Obliterated or Altered Serial Number, Carrying a Concealed Deadly Weapon ("CCDW"), and Resisting Arrest. (A1).

On May 3, 2018, Calm filed a motion to suppress the firearm found on him during the pat down. (A2). The State filed its response (A3), and the Superior Court held a hearing on June 12, 2018, prior to Calm's jury trial. The Superior Court denied the motion. The State entered a *nolle prosequi* on the obliterated serial number charge. (B9). At trial, the State presented one witness, and Calm testified in his own defense. The jury found Calm guilty as charged on all remaining counts. (B22).

On October 26, 2018, the Superior Court sentenced Calm to a total of 21 years at Level V, with credit for time-served, to be suspended after the minimum five-year sentence (for PFBPP) for one year of supervision at Level III. Sent. Trans. at 7-8. (B28-29).

Calm appealed, and filed his Opening Brief on May 6, 2018. This is the State's Answering Brief.

SUMMARY OF ARGUMENT

I. DENIED. Two Wilmington police officers stopped the vehicle in which Calm was a front-seat passenger for an undisputed traffic violation. The officers obtained permission from the driver to search the vehicle. Calm behaved oddly from the outset of the traffic stop, and the officer developed reasonable articulable suspicion to pat down Calm to protect officer safety. The Superior Court did not abuse its discretion in denying Calm's suppression motion. Calm's appeal has no merit.

STATEMENT OF FACTS

Suppression Hearing

Evidence presented at the suppression hearing established that, on December 12, 2017, Corporal O'Connor of the Wilmington Police Department was working on the "Disrupt" task force. (A15, 16 19). At about 10 or 11 p.m., Corporal O'Connor and his partner, Corporal Metzner, were in an unmarked police vehicle in Wilmington when they observed a vehicle and followed it for several blocks. (A19-20, 35). They determined, based on their speed, that the subject vehicle was travelling approximately 10 miles per hour over the 25 mile per hour speed limit, and they also noticed the vehicle's windows were illegally tinted. (A20). They checked the vehicle registration, and determined that it did not have a tint waiver. (A20).

The officers stopped the vehicle on Thatcher Street. (A21). Corporal O'Connor spoke with the passenger, Anthony Calm ("Calm"), while Corporal Metzner spoke with the driver. When Corporal O'Connor asked Calm for his identification, Calm asked why he needed to identify himself. (A21). Corporal O'Connor explained it was police practice to identify all occupants of a vehicle during a traffic stop. (A22). Corporal O'Connor considered Calm's reluctance as a "small red flag." (A22). In addition, while speaking with Corporal O'Connor, Calm looked straight ahead and did not turn his head to engage in the conversation.

(A22). Corporal O’Connor considered this deliberate lack of eye contact to be “a second minor red flag.” (A23). Calm gave Corporal O’Connor his identification, and the officers returned to their vehicle to search their information. (A23).

Corporal Metzner told him that the driver was acting “very nervous.” (A21). The officers determined that the driver of the vehicle was on Level III probation. (A23). Calm, however, had no active capiases and was not under supervision. (A23). Based on the driver’s nervous behavior and his status as a probationer, the officers approached the car again, and Corporal Metzner asked the driver if there were any weapons in the vehicle. (A24). The driver said there were not, and consented to a search of the vehicle. (A24).

When the driver gave consent, Calm immediately opened the passenger door and put his leg out. (A24). Corporal O’Connor believed Calm intended to flee, and stepped in front of the door to block it. (A24). In Corporal O’Connor’s experience, people attempt to flee a search if they are wanted or have contraband. As Calm was not wanted, Corporal O’Connor believed that he possessed contraband. (A25). O’Connor told Calm to relax and wait to exit the car; however, Calm became extremely nervous—he was moving excessively in his seat, fidgeting with his hands, and checking his pockets. (A27).

According to Corporal O’Connor, when the driver consents to the search of the vehicle, the officers remove the occupants one-by-one for safety reasons.

(A26). Here, Corporal Metzner removed the driver and patted him down, while Corporal O'Connor ensured that Calm remained in the vehicle. (A26).

Because Calm had questioned the officer's need for his identification, avoided eye contact, attempted to exit the car and was very nervous, Corporal O'Connor believed that Calm was armed and that he needed to pat down Calm as well. (A27, 31, 33). Before doing so, Corporal O'Connor asked Calm if he had any weapons on him. (A29). Calm hesitated before saying no. (A29). O'Connor had Calm place his hands on the roof of the car. (A28). As he started the pat down, Calm moved his hand to the left side of his body. (A29). Corporal O'Connor told Calm to relax and not to reach for anything, as he moved Calm's hand back to the roof of the car. (A30). As O'Connor released Calm's hand, Calm shoved off the car very hard, spun, and tried to run. (A30). Corporal O'Connor had a grip on Calm's belt, and, after initially being pulled off balance, Corporal O'Connor regained his balance, and took Calm to the ground. (A30). After Corporal O'Connor asked Calm what he had on him, Calm admitted he had a gun, which the officer recovered from Calm's left-side waistband. (A31).

Jury Trial

At a jury trial on June 12, 2018, Corporal O'Connor presented essentially the same testimony. (B12-13). Corporal O'Connor testified that the gun he retrieved from Calm's waistband was a 40 caliber Hi Point handgun, loaded with

11 rounds of ammunition, including one round in the chamber. (B13-14). Calm did not have a permit to carry a concealed weapon. (B14). The parties stipulated that Calm was prohibited from possessing, owning or controlling a firearm. (B17).

Calm testified at trial that Corporal O'Connor planted the weapon on Calm. (B19-20). According to Calm, the officers ordered both men out of the car at the same time, and Calm tried to run because of the planted weapon. (B19). According to Calm, Calm never admitted the firearm belonged to him. (B20).

In rebuttal, Corporal O'Connor denied Calm's allegations, and testified that he had no familiarity with Calm at all until the December 12, 2018 traffic stop, and he had no reason to plant a weapon on Calm. (B20-21).

I. THE SUPERIOR COURT CORRECTLY DENIED THE SUPPRESSION MOTION; THE OFFICER HAD REASONBLE ARTICULABLE SUSPICION TO PAT DOWN CALM.

Question Presented

Whether Calm's questioning the officer's authority to ask for identification, refusal to make eye contact, attempt to avoid the car search, and extreme nervousness gave the officer reasonable articulable suspicion to pat down Calm when the officers had him exit the car for the consent search.

Scope and Standard of Review

This Court "review[s] the trial court's refusal to grant the motion to suppress evidence under an abuse of discretion standard."[1] The trial judge's legal conclusions are reviewed "*de novo* for errors in formulating or applying legal precepts."[2] "To the extent the trial judge's decision is based on factual findings, [this Court] review[s] for whether the trial judge abused his or her discretion in determining whether there was sufficient evidence to support the findings and whether those findings were clearly erroneous."[3] "An abuse of discretion occurs when 'a court has . . . exceeded the bounds of reason in view of the circumstances,' [or] . . . so ignored recognized rules of law or practice . . . to produce injustice."[4]

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[1] *Woody v. State*, 765 A.2d 1257, 1261 (Del. 2001).

[2] *Lopez-Vazquez v. State*, 956 A.2d 1280, 1285 (Del. 2008).

[3] *Id.*

[4] *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994) (quoting *Firestone Tire & Rubber*

This Court can affirm on grounds different from those cited by the Superior Court.[5]

Argument

On appeal, Calm argues that the pat down violated his right to be free from unreasonable searches guaranteed by the Fourth Amendment to the United States Constitution and Article I, Section 6 of the Delaware Constitution. Op. Br. at 6. Because he has failed to adequately brief a state constitutional claim, it is waived.[6] The officer had reasonable articulable suspicion to believe Calm was armed, and the pat down was appropriate for officer safety. The Superior Court did not abuse its discretion in denying Calm's suppression motion.

Police stopped the vehicle in which Calm rode as a passenger because the driver was speeding. The officers asked both the driver and Calm, the passenger, for their identification.[7] The driver, a probationer, consented to the officer's request to search the vehicle. To perform the search, the officers asked the two occupants step out of the vehicle. The procedure for this is to have the occupants

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Co. v. Adams, 541 A.2d 567, 570 (Del. 1988)).

[5] *Unitrin, Inc. v. American General Corp.,* 651 A.2d 1361, 1390 (Del. 1995).

[6] *See Wallace v. State*, 956 A.2d 630, 637-38 (Del. 2008) (citing *Ortiz v. State*, 869 A.2d 285, 291 n. 4 (Del. 2005) ("This Court has held that "conclusory assertions that the Delaware Constitution has been violated will be considered to be waived on appeal."); *Loper v. State*, 8 A.3d 1169, 1172, n.5 (Del. 2010) (declining to review Loper's claim under the Delaware Constitution with respect to the firearm found on him during a pat down in the course of his traffic stop).

[7] *See Cropper v. State*, 123 A.3d 940 (Del. 2015).

step out one at a time, in case an issue arises. Calm's behavior while he waited in the vehicle, and his attempt to get out of the vehicle once he heard the driver give consent to search the car, gave the officer reasonable articulable suspicion to perform a pat down search for officer safety when Calm stepped out of the vehicle.

This Court addressed the interaction between police and the passenger of a vehicle involved in a traffic stop in *Cropper v. State.*[8] The Court explained:

> Under Delaware law "[a] police officer who observes a traffic violation has probable cause to stop the vehicle and its driver." "During a lawful stop, a police officer may order both the driver and passengers out of the vehicle pending completion of the traffic stop." At that point, "all passengers are subject to some scrutiny." The police are permitted to question the passenger about his or her identity and those questions are not outside the scope of a reasonable investigation.[9]

The driver and any passengers are "lawfully detained" as a result of the traffic stop.[10] Ordering them out of the car is not a second Fourth Amendment seizure that requires independent justification.[11] When the occupants are ordered from the car, "[t]he Fourth Amendment permits a police officer to frisk a person 'who has

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[8] 123 A.3d 940.

[9] *Cropper, id.*, at 944.

[10] *Id.* at 945.

[11] *Id.* (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977) in referring to the situation as a "mere inconvenience."); *Loper v. State*, 8 A.3d at 1174 ("Loper's mobility having already been validly limited, he was not subject to a 'second seizure' when the police ordered him to exit his car.").

been detained if he possesses a reasonable articulable suspicion that the detainee is armed and presently dangerous."[12]

Reasonable articulable suspicion is based upon an officer's ability to "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion."[13] In determining whether reasonable articulable suspicion exists, the court "must examine the totality of the circumstances surrounding the situation as viewed through the eyes of a reasonable, trained police officer in the same or similar circumstances, combining objective facts with such an officer's subjective interpretation of those facts."[14] In so doing, the Court, "defers to the experience and training of law enforcement officers."[15] Courts have recognized that included in the determination are "inferences and deductions that a trained officer could make that might well elude an untrained person."[16] "Reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the

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[12] *Id.* (citing *State v. Henderson*, 892 A.2d 1061, 1064-65 (Del. 2006) (citing *Terry v. Ohio*, 392 U.S. 1, 22 (1968)).

[13] *State v. Henderson*, 892 A.2d at 1064; *Coleman v. State,* 562 A.2d 1171, 1174 (Del.1989) (citing *Terry v. Ohio,* 392 U.S. 1, 21 (1968)).

[14] *Cropper*, 123 A.3d at 945 (quoting *Henderson*, 892 A.2d at 1064-65 (quoting *Jones v. State,* 745 A.2d 856, 861 (Del. 1999); *accord Quarles v. State,* 696 A.2d 1334, 1337 (Del. 1997)).

[15] *Woody v. State*, 765 A.2d at 1263.

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

evidence."[17]

The Superior Court correctly denied Calm's suppression motion because Corporal O'Connor cited specific facts that provided him reasonable articulable suspicion to believe Calm possessed a weapon, justifying the pat down. First, the Superior Court determined there was no dispute that the driver was speeding, and that the officers had authority to stop the car. (A40). The Superior Court then found:

> Once they stopped the vehicle . . . they did a routine questioning of the individuals in the car, [and] obtained the identification of the driver and the passenger. They then ran the names through the criminal history, [and] found out that the [driver] was on probation and that the defendant had nothing as far as a warrant status. And at that point in time, if nothing else had happened, and they had gone back to the car and handed the identification back, . . . they had no justification beyond to search the vehicle at that point in time.
>
> But the officer asked if there [were] any guns in the car. The driver said no. He was then asked whether or not he would consent to a search. Once he said yes, that provided the officers the ability to remove both the [driver] and the defendant from the vehicle so that they could conduct safely a search of that vehicle.
>
> If the driver had said no, . . . I'm not sure they had justification to pursue anything further at that time. But he did say yes. They searched and they had the right at that point in time to remove both the driver and the passenger from the vehicle. Once they removed them from the vehicle, they have the right to pat down those individuals for their own protection. And the pat down resulted in [a]

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

> firearm being found in the defendant's waistband. And there is no basis to suppress that evidence since it was done in a legal pat down for officer safety, as a result of a valid motor vehicle stop and a consent to search a vehicle.
>
> The other factors testified by the officers as to the suspicion certainly provided some further justification for the conducting of the pat down, but I don't believe, in and of itself it would have justified the moving of the defendant and patting him down. The consent is the key that allowed them to remove the defendants. And once that happened, the defendant's conduct not only—not only were they allowed to conduct the pat down from their own safety, but the defendant's reaction to being removed from the vehicle and being patted down provided the officers with further justification.[18]

(A40-43). The Superior Court's ruling does not address the reasonable articulable suspicion the officer had to conduct the pat down for officer safety before Calm was removed from the vehicle; however, the Superior Court's holding to deny the suppression motion was correct, and this Court can affirm on grounds that differ from those cited by the Superior Court.[19]

Calm contests the Superior Court's factual findings. Calm argues that he "did not act nervous or suspicious, made no threatening gestures or sudden movements and never exhibited a bulge that would show he may be carrying a weapon." Op. Br. at 7. But Calm did make a sudden movement—he tried to get

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[18] The judge mistakenly stated that the defendant was the driver; however, he was the passenger. This does not affect the analysis of the issues; therefore, it is harmless error. *See* Supr. Ct. R. 8.

[19] *Unitrin, Inc. v. American General Corp.,* 651 A.2d at 139.

out of the car when he heard the police were going to search it. And he did act nervous—after the officer stopped him from getting out of the car, he became very nervous and fidgety, repeatedly checking his pockets. Calm's factual claims are thus belied by the record.

And Calm's legal claim has no merit. Calm's reliance on *Holden v. State*[20] is misplaced. In *Holden*, this Court found that the initial traffic stop was valid; however, the officers arrived after Holden had gotten out of the vehicle, and they ordered him back inside.[21] "Even though Holden was detained before police ordered him back inside the vehicle, neither officer asked Holden any questions about his identity, his address, or his purpose for being there," and the officer who patted him down "did not even believe Holden was armed and dangerous before ordering him to get back into the vehicle, and therefore, lacked the necessary reasonable suspicion to conduct the pat down."[22] In *Holden*, this Court explained:

> Officer Fleming testified that he did not see Holden get out of the vehicle and that Holden was approximately two feet away from the Bronco when the officer's arrived. Thus, as a factual matter, this Court [was] not persuaded that Holden either left or attempted to leave the scene to avoid contact with the police. . . . In [this Court's] view, Holden did not intentionally evade the police because, he returned to the vehicle and fully cooperated with the investigation.

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[20] 23 A.3d 843 (Del. 2011).

[21] *Id.* at 847.

[22] *Id.* at 848 (citing *State v. Rollins*, 922 A.2d 379, 383 (Del. 2007), for its "holding that a stop occurs when a police officer displays conduct that would communicate to a reasonable person that they are not at liberty to leave."). *Id.*

> While recognizing the importance of officer safety during a traffic stop, a pat down still requires articulable facts specific to the person frisked. Generalized cursory searches are impermissible. Here, the police were unable to articulate facts that reasonably suggested Holden posed a threat to officer safety.[23]

The Court made very clear in *Holden* that "the mere incantation of 'officer safety' [does not] provide the necessary reasonable suspicion for a frisk. More importantly, the Constitution does not condone routine pat downs without any reasonable articulable suspicion that the officer's personal safety requires it."[24]

Here, unlike *Holden*, the officer had reasonable articulable suspicion that Calm was armed and dangerous. The officer acted in conformity with his belief that Calm was armed and dangerous—he frisked Calm after removing him from the vehicle. *Holden* does not assist Calm here.

Rather, this case is akin to *Cropper v. State*.[25] In *Cropper*, the defendant was the front-seat passenger during a traffic stop.[26] The officer, who knew the defendant, found that the defendant was unusually non-talkative, avoided eye contact, and appeared nervous while in the car, and exhibited odd behavior after

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[23] *Id.* at 849-50 (citing *Robertson v. State*, 596 A.2d 1345, 1353 (Del. 1991) (finding pat down was appropriate for officer safety) and *Ybarra v. Illinois*, 444 U.S. 85, 94 (1980)).

[24] *Id.* at 850.

[25] 123 A.3d 940.

[26] *Id.* at 943, 945.

removed from the car.[27] The Court found based on the officer's training and Cropper's behavior, the officer had reasonable articulable suspicion to conduct the pat down.[28] The Court affirmed Cropper's conviction for PFBPP and PABPP. Following *Cropper*, Calm's conviction must stand.

Here, police stopped the vehicle for a traffic violation, obtained permission from the driver to search the vehicle, and then proceeded to remove both occupants, one-by one. During the course of the traffic stop, the officer who interacted with Calm developed reasonable articulable suspicion to pat down Calm when the officers removed him to conduct the car search. Calm's behavior before and after the officers ordered him out of the vehicle, including his attempt to flea before the car search, provided the officer with the reasonable belief, based on his training and experience, that Calm posed a potential threat. The Superior Court did not abuse its discretion in denying Calm's suppression motion. Calm cannot prevail on appeal.

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[27] *Id.* at 945.

[28] *Cropper*, 123 A.3d at 945-46.

CONCLUSION

The judgment of the Superior Court should be affirmed.

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DATE: June 7, 2019

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Dated: June 7, 2019

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