



IN THE SUPREME COURT OF THE STATE OF DELAWARE

THOMAS GORDON,)
)
 Defendant Below,)
 Appellant,)
)
 v.) No. 461, 2019
)
 STATE OF DELAWARE,)
)
 Plaintiff Below,)
 Appellee.)

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

APPELLANT'S OPENING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

The Defendant was arrested on July 15, 2018 and charged with multiple drug offenses. A1. He was indicted for the offenses in January 2019. A1, 46-49.

Prior to trial, he and his codefendant moved to suppress evidence. A51-71. The motion was denied after hearing.

A trial commenced in July 2019, after which he was convicted of aggravated heroin possession. A1.

The State moved to have him sentenced as an habitual offender and recommended ten years imprisonment. After the sentencing hearing, the Superior Court imposed thirty years imprisonment at Level V followed by probation. Exhibit B attached to Opening Brief.

A notice of appeal was thereafter docketed for the Defendant. This is the Defendant's Opening Brief on appeal.

SUMMARY OF THE ARGUMENT

1. Superior Court ruled that officers were entitled to stop the vehicle because they suspected it to have been involved in a suspected drug transaction. Officers did not have probable cause and recognized as much because Trooper Toll was tasked with finding probable cause for a traffic violation stop, which based on the objective evidence under the Superior Court's finding, was a manufactured pretext for stopping and seizing the vehicle and its occupants.

2. Even if, *arguendo*, probable cause for the seizure of the vehicle and its occupants existed, the arresting trooper neither had probable cause to stop and seize the vehicle and its occupants nor was directed to stop and seize the vehicle and its occupants for that reason.

3. The "four corners" of the arrest warrant affidavit stating that a traffic violation provided probable cause for stopping and seizing the vehicle occupied by the Defendant, a statement rejected by the Superior Court as inconsistent with the objective evidence, did not otherwise show probable cause for stopping and seizing the vehicle and its occupants.

STATEMENT OF FACTS

Detective Thomas Macauley, Delaware State Police, testified that he was the lead investigator in a drug investigation called Operation Cutthroat. A wiretap order was issued on July 14, 2018 pursuant to that investigation, and he monitored wiretapped calls from a covert location in New Castle County.

A109-114 (D.I. 44, 7/24/18, pp. B15-20). Detective Macauley testified that the following day, on July 15, his wiretap unit picked up what was believed to be a call between the target of the investigation and the Defendant arranging a drug transaction at the Georgetown Manor Apartments outside New Castle. A200, 291-292 (D.I. 44, 7/24/18, pp. B21; D.I. 45, 7/25/18, pp. C8-9). Although he testified that he was familiar with the Defendant's voice, he was also unsure that he, in fact, had monitored the suspect call. A300-301 (D.I. 45, 7/25/18, pp. C17-18). Det. Macauley testified that he then notified an undercover surveillance unit located nearby to observe the suspected meeting. After the surveillance, he later contacted and requested assistance from Trooper Brian Holl, a uniformed trooper working on patrol in Kent County. A292-298 (D.I. 45, 7/25/18, pp. C9-15).

Detective Michael Macauley, Delaware State Police, was assisting in the wiretap investigation and part of the surveillance unit. He testified that he was informed that the target of the investigation, Kiree Wise, was to meet with an

unknown individual at the Georgetown Manor Apartments for a suspected drug transaction at Building Q. He set up undercover surveillance and at about 3 p.m. observed the target of the investigation sitting in a vehicle in the parking lot when a blue Mazda pulled up. He observed the target of the investigation, Kiree Wise, hand something to the Defendant which the Defendant put in his pocket. He then observed another individual give a black plastic bag to the driver of the blue Mazda who then put the plastic bag in the back seat of the Mazda. The driver of the Mazda was also observed talking with John Gordon while looking at the contents of the trunk of another vehicle at the scene. A124-128 (D.I. 42, 7/23/18, pp. A30-34). When the driver of the Mazda and the Defendant re-entered their vehicles and left the parking lot, they were followed by vehicles from the surveillance team onto Route 73 and then southbound eventually from Route 13 onto back roads in Kent County west of Dover. Det. Macauley explained that they were “following a vehicle that possibly just completed a drug transaction up in New Castle County.” A128-131 (D.I. 42, 7/23/18, pp. A34-37). Meanwhile, investigative team members were able to contact Trp. Brian Holl, a road trooper in Kent County who had experience with drug investigations and who had previously assisted the team members, through police radio and their cellular phones about stopping the blue Mazda. A153 (D.I. 42, 7/23/18, pp. A59). Because they were undercover, they were trying to

relay the vehicle location to Trp. Holl as they followed it so that he could stop it with his marked patrol vehicle. A168 (D.I. 42, 7/23/18, p. A74).

Trooper First Class Brian Holl testified that while patrolling in Kent County that afternoon, he was contacted by Det. Thomas McCauley about stopping a blue Mazda from the New Castle County wiretap drug investigation. He drove to the area west of Dover where the undercover officers were following that vehicle and described its location to him by phone and radio as they followed it. He eventually located the blue Mazda on Pearson's Corner Road and pulled behind it in his patrol vehicle. A228-232 (D.I. 44, 7/24/18, pp. B49-53). He was told by Det. Tom Macauley about the investigation and that to protect the integrity of the investigation, he needed a traffic stop. He explained that he was told by Macauley that "you need to develop your own probable cause and go from there." A233-234 (D.I. 44, 7/24/18, pp. B54-55). He testified that it was "obviously raining" when he intercepted it and that the blue Mazda did not have its headlights illuminated which provided justification for stopping it. A234 (D.I. 44, 7/24/18, p. B55). He approached the passenger side and, when the driver, opened the glove box to retrieve an insurance card, he observed a plastic bag containing marijuana in the glove box. He ordered the Defendant in the passenger seat to exit the vehicle and handcuffed him. Assisting troopers arrived and the driver was also removed from the vehicle.

Trooper Holl located a plastic bag containing heroin packaging paraphernalia in the back seat of the vehicle. He and another trooper patted the Defendant down several times and felt a suspicious item in the Defendant's groin area. The Defendant was removed to Troop #3 where a strip search disclosed a small package containing heroin in his underwear groin area. A237-247 (D.I. 44, 7/24/18, pp. B58-68).

I. POLICE OFFICERS DID NOT HAVE PROBABLE CAUSE TO STOP THE VEHICLE OCCUPIED BY THE DEFENDANT OR ARREST AND SEARCH THE DEFENDANT.

Question Presented

The question presented is whether the Superior Court abused its discretion by denying the Defendant's motion to suppress evidence. The question was preserved by the Defendant's motion to suppress. A69-72.

Standard of Review

To the extent that we examine the trial judge's legal conclusions, we review the trial judge's determinations *de novo* for errors in formulating or applying legal precepts. To the extent the trial judge's decision is based on factual findings, we review 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. Where as here, we are reviewing the denial of motion to suppress evidence based on an allegedly illegal stop and seizure, we conduct a *de novo* review to determine whether the totality of the circumstances, in light of the trial judge's factual findings, support a reasonable and articulable suspicion for the stop.

Lopez-Vazquez v. State, 956 A.2d 1280, 1284–85 (Del. 2008) (internal citations omitted).

Argument

Based on the evidence presented at the suppression hearing, the State argued that the stop of the vehicle was valid because a traffic violation had been

committed and because there was also reason to suspect that the occupants of the vehicle had been involved in an earlier drug transaction in New Castle County. A334-352. The defense argued that the evidence did not show that there was probable cause to stop the vehicle and seize its occupants and that the traffic violation was a pretext for the seizure unsupported by the hearing evidence. A352-356. After considering the evidence presented at the suppression hearing, the Superior Court found that the arresting officer's testimony that he stopped the vehicle due to a traffic violation was not supported by the evidence. A365-368. The Superior Court ruled that officer's testimony that he stopped vehicle because it did not have headlights illuminated during rain was inconsistent with objective evidence and not entitled to credit as justification for stopping the defendants' motor vehicle.¹

The Superior Court also found, however, that the information that was known to police which led them to suspect that the occupants of the vehicle had participated in a drug transaction provided reasonable suspicion for the arresting officer to stop the motor vehicle and seize its occupants. A368-373.

¹ A passenger in a vehicle has as much an equal expectation of liberty to travel in a vehicle as the vehicle's operator and is entitled to challenge the stop of that vehicle. *Brendlin v. California*, 551 U.S. 249 (2007).

Deficient Probable Cause

The Superior Court ruled that officers were entitled to stop the vehicle because they suspected it to have been involved in a suspected drug transaction. A368-373. The investigating police officers believed so themselves, but only suspected and were unsure that they had witnessed a drug transaction. Due to their belief, Det. Macauley informed Trp. Holl that he needed to independently develop his own probable cause for stopping the motor vehicle that undercover officers had followed from the New Castle area to a rural area west of Dover. The officers did not have probable cause and recognized as much because Trooper Toll was tasked with finding probable cause for a traffic violation stop, which based on the objective evidence under the Superior Court's finding that the evidence did not show that a traffic violation had been committed, was a manufactured pretext for stopping and seizing the vehicle and its occupants.

The Superior Court found that the officer's own beliefs – their suspicion that they had witnessed a drug transaction - were irrelevant because the evidence permitted a reasonable suspicion that the occupants of the seized vehicle had engaged in a drug transaction. In reaching this decision, the Superior Court relied on two cases that examined vehicle seizures during drug investigations. The Superior Court incorrectly determined that both cases supported its finding that the vehicle seizure in this case was justified because

the officers had reasonable suspicion to believe that the vehicle occupants had earlier been involved in a drug transaction. The first case, *Howard v. State*,² was inapposite because *Howard* decided that the arresting police officer's subjective pretextual intent for stopping a vehicle – furthering a drug investigation – was irrelevant because the officer had a valid alternative ground providing probable cause for the vehicle seizure – observed traffic violations prior to the seizure. *Id.* This case is different, however, because there was no legally valid, alternative ground for the vehicle seizure – the Superior Court found that the evidence was contrary to the State's contention that a traffic violation had been committed that may otherwise provided probable cause. Moreover, *Howard* also illustrates that the Superior Court incorrectly applied the legal standard permitting the vehicle seizure in this case. The Superior Court permitted the vehicle seizure based on the diminished standard of reasonable suspicion in this case; while *Howard* clearly indicates that the appropriate standard is probable cause, a standard that the police officers themselves recognized had not been met in this case. *Id.* (“Police also had probable cause to believe that Howard was engaged in drug activity before they stopped Howard for traffic violations

² 2007 WL 2310001 (Del. 2007).

based on information from a reliable informant and their own independent investigation”).

The second case relied on by the Superior Court likewise does not support its ruling in this case. In *Brown v. State*,³ officers conducting a wiretap investigation observed a drug transaction occurring at the wiretap target’s home. The information heard during four calls on the wiretap setting up the drug transaction correctly foreshadowed the details and timing of what another officer on surveillance there confirmed. Based on that aligned information, Sgt. Skinner, the detective who was monitoring the wiretap, drove to the location and then followed Brown, the individual who had set up the drug transaction, when he left in a vehicle. Some distance away, Sgt. Skinner stopped that vehicle and arrested and searched Brown, finding cocaine. Not only did Sgt. Skinner rely on much more detailed information than the police had gathered and presented in that case than the officers presented in this case, as was also evident in the prior *Howard* case, but the Court again made clear that Sgt. Skinner correctly acted on probable cause, not reasonable suspicion, to arrest and search Brown. *Id.*, at 577-578. In *Brown*, the Superior Court had also applied the correct legal standard of probable cause and found that it had been

³ 117 A.3rd 568 (Del. 2015).

met based on the substantial evidence in that case. *State v. Brown*, 2013 WL 4051046 (Del. Super. 2013).⁴ Conversely, the diminished standard of reasonable suspicion permitted on lesser evidence in this case was not consistent with that prior authority.

Invalid Arrest

The Superior Court also ruled that the “collective knowledge” of the police officers justified the seizure of the vehicle and arrest of its occupants. A369. The Defendant had pointed out that Trooper Holl had not been directed to seize the vehicle and arrest the occupants because there was probable cause for arrest. A353-354. Even if there were, *arguendo*, probable cause for the seizure of the vehicle and its occupants, the arresting trooper neither had probable cause to stop and seize the vehicle and its occupants nor was directed to stop and seize the vehicle and its occupants for that reason. *State v. Cooley*, 457 A.2d 352 (Del. 1983). In the absence of information warranting probable cause for arrest or being directed by another officer who possessed such information to arrest for probable cause, Trp. Holl acted without probable cause for the seizure and arrest. *Id.*, at 355-356.

The “Four Corners” of the Arrest Affidavit

⁴ Also *State v. Lum*, 1978 WL 187981 (Del. Super.)

The “four corners” of the arrest warrant affidavit stating that a traffic violation provided probable cause for stopping and seizing the vehicle occupied by the Defendant, a statement rejected by the Superior Court as inconsistent with the objective evidence, did not otherwise show probable cause for stopping and seizing the vehicle and its occupants. A14-15. After considering the evidence and testimony, the Superior Court found that there was not probable cause to seize the vehicle and arrest the Defendant based on the alleged traffic violation. A365-368.

The affidavit of probable cause described only the traffic violation as cause for the seizure and arrest. Under the “four corners test,” sufficient facts must appear on the face of the arrest affidavit such that a reviewing court can ascertain from that document alone the factual basis for a determination that probable cause exists.” *McDonald v. State*, 947 A.2d 1073, 1078 (Del. 2008). There was no justification in the affidavit for the Superior Court’s alternative ruling upholding the search and seizure on reasonable suspicion during a wiretap drug investigation. Accordingly, the Superior Court lacked a basis to uphold the seizure and search on that ground. *Id.*

Because police improperly seized the vehicle occupied by the Defendant, any evidence gathered as a result of that seizure should be suppressed as “fruit

of the poisonous tree.”⁵

⁵ *Wong Sun v. United States*, 371 U.S. 471, 484-485 (1963).

CONCLUSION

For the reasons and upon the authorities cited herein, the Defendant's convictions should be reversed.

Respectfully submitted,

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