



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 REPLY BRIEF

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

The Superior Court found that the arresting trooper did not have probable cause to seize the vehicle in which the Defendant was a passenger because the objective evidence in the record contradicted the trooper's testimony that there was probable cause to stop the vehicle because it was being operated in the rain without illuminated headlamps. Defendant's Opening Brief, Exhibit A. (A364-380). In its answering brief, the State contends instead that the Superior Court correctly determined that the arresting trooper did not need probable cause but only needed a reasonable suspicion to seize the vehicle and its occupants because other undercover officers suspected that the occupants of the vehicle had earlier been involved in a drug transaction. Answering Brief, pp. 14-19. Both the State's contention and the Superior Court's finding that the standard of reasonable suspicion sufficed are in error under these circumstances, however, because probable cause is required. The requirement of probable cause for a warrantless arrest as occurred under these circumstances is long-standing.

Draper v. United States, 358 U.S. 307 (1959).¹ The requirement of probable

¹ *Accord, Tatman v. State*, 494 A.2d 1249, 1251 (Del. 1985) (citing *Carroll v. United States*, 267 U.S. 132 (1925) (the "automobile exception")).

cause applies in order to seize a vehicle or when the target of arrest occupies a vehicle. *Valentine v. State*, 2019 WL 1178765 (Del. 2019) (“Under the Fourth Amendment and under Article I, § 6 of the Delaware Constitution, police may search a car without a warrant if they have probable cause to believe the car contains contraband or evidence of criminal activity”).²

The reason for the standard of probable cause is evident from this case. After undercover officers observed what they suspected to be a drug transaction, the uniformed trooper in another county was instructed to seize the vehicle and arrest its occupants. The uniformed trooper was told by the undercover officers that he would need to come up with his own independent probable cause, i.e., a traffic violation, that would justify a seizure and arrest.² The State argues in its answering brief that the pretext was not a manufactured pretext to justify the search, but instead intended to protect the wiretap drug

² Only the issue of probable cause for the initial seizure of the vehicle and the Defendant, along with the attendant facts, was addressed in the Defendant’s Opening Brief. The State, nonetheless, devotes a substantial portion of its statement of facts to a painstaking description of the pat-down and subsequent strip search of the Defendant’s person, including his own personal references to his being an African-American along with detailed anatomical references (“bulge ... penis ... testicles”), none of which is relevant to an issue raised on appeal. Ans. Br. at 10-12. If the evidence was relevant to an issue before the trial court then, it is not relevant now, and no fair purpose is served by its discussion.

investigation.³ Ans. Br. at 20. If there actually had been probable cause that a moving traffic violation had occurred, not a manufactured pretext for the seizure of the vehicle and arrest of the occupants and search of the vehicle, the State's argument would be persuasive. No due process violation has occurred merely because a citizen or a suspected drug trafficker has been deceived by a law enforcement officer. But this encounter proceeded an impermissible step further. In the affidavit of probable cause, the arresting trooper represented to the Justice of the Peace Court that the vehicle had been stopped because its headlights had not been illuminated during rain. (A14). That was not true and later found not to be supported by the objective evidence. The State now acknowledges that the vehicle was stopped on a pretext and the Defendant was arrested because he was suspected to have been earlier involved in a drug transaction. In addition, at the Defendant's preliminary hearing in the Court of Common Pleas, the arresting trooper was directly asked by the prosecutor

³ One reason we may surmise that the traffic violation pretext and seizure was intended to result in an arrest and search and not merely to establish the ruse of a traffic violation is that a police officer may not conduct a full search of an automobile for a traffic violation. *Knowles v. Iowa*, 525 U.S. 113 (1998). Also, with respect to pretext, in *Valentine*, the arresting trooper testified that he smelled either burnt or raw marijuana in the vehicle he stopped for speeding which allowed him to arrest the driver and search the vehicle resulting in the seizure of a firearm although no marijuana was found. *Valentine v. State*, 2019 WL 1178765, *1 (Del. 2019).

during his testimony, “So when you pulled the car over – why did you pull the car over?” The trooper responded, “It was raining, inclement weather. The vehicle did not have its lights on as required.” (A22). We now know that the testimony was not true. The State contends, however, that the traffic violation pretext was “irrelevant” and “unimportant,” and that the Defendant’s arrest was justified because he was, in fact, suspected of having been involved in a drug transaction. Ans. Br. at 15. It was important to due process, however, because the State’s previous misleading representations before legal tribunals resulted in the Defendant’s being held in custody in default of bail for two months until his preliminary hearing, nearly six months until indictment, and more than a year before trial. (A1-9). If the prolonged deprivation of liberty is still viewed as irrelevant or unimportant because the Defendant was still reasonably suspected to have been involved in a drug transaction and subject to indictment at any time, the State’s interest in protecting its investigation, while it may be consistent with its later obtained protective order, Ans. Br. at 8, is not consistent with misleading representations before other legal tribunals in order to protect the investigation even if it serves the purpose of deceiving suspects in the drug conspiracy enterprise. To the extent that the State would suggest that its deception is defensible because it was presented with a Hobson’s choice of forgoing the contemporaneous arrest of a suspected drug trafficker or exposing

its ongoing investigation to the targets of that drug trafficking investigation, the answer to any dilemma was already in the State's hands. As the State illustrates what later happened, it could always forego immediate arrests of suspected participants in the drug enterprise in order to protect the investigation, and then obtain indictments and arrest the participants while wrapping up its drug distribution investigation. Ans. Br. at 3. What is not permitted, however, even if there is a *bona fide* "Court concern" about maintaining the secrecy of the wiretap investigation expressed through a protective order, Ans. Br. at 8, is the additional step of presenting misleading representations to other court tribunals in order to protect the secrecy of the investigation and to deceive arrestees in the investigation who are defendants before those tribunals.

Accordingly, probable cause was required for the seizure of the vehicle and arrest of the Defendant, and the Superior Court misapplied a diminished standard of reasonable suspicion. A368-373. The investigating police officers only suspected they had witnessed a drug transaction and sought a seizure and arrest, based on a manufactured pretext, in order to confirm their suspicion.

The authority relied on by the State fails to contradict that probable cause was required for the seizure and arrest. The first case, *Howard v. State*,⁴ is

⁴ 2007 WL 2310001 (Del. 2007).

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.* In this case, however, 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. *Howard*, in fact, illustrates that the Superior Court incorrectly applied the legal standard permitting the vehicle seizure in this case by permitting the vehicle seizure based on the diminished standard of reasonable suspicion. Instead, *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 based on information from a reliable informant and their own independent investigation”).

The second case primarily relied on by the State likewise does not support its argument. In *Brown v. State*,⁵ officers conducting a wiretap

⁵ 117 A.3rd 568 (Del. 2015).

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 known to him, 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 met based on the substantial evidence in that case. *State v. Brown*, 2013 WL 4051046 (Del. Super. 2013).⁶ Conversely, the diminished standard of reasonable suspicion permitted on lesser evidence in this case was not consistent with that prior authority.

⁶ *Also State v. Lum*, 1978 WL 187981 (Del. Super.)

Moreover, unlike the uniformed trooper in this case, Sgt. Skinner personally had probable cause that was sufficient to arrest Brown. *Compare 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, in this case the uniformed trooper acted without probable cause for the seizure and arrest. *Id.*, at 355-356. The State contends in its answering brief that the uniformed trooper in this case “did not need to be specifically instructed to make the vehicle stop if he otherwise had probable cause to do so.” Ans. Br. at 20. First, he did not have probable cause to make the arrest. Second, if he was not directed to make the arrest on probable cause but could rely on the secondary information possessed by other officers to do so, then *Cooley* would have been no obstacle only if it did not correctly reflect the required legal standard for the warrantless seizure. *Cooley* was correct, however, and the State’s contention that it is not applicable where there are meaningful distinctions between the cases, fails.

The arrest affidavit in this case was misleading because it represented that the reason that the vehicle was seized was because the uniformed trooper had observed a traffic violation. The “four corners” of the arrest warrant affidavit did not illustrate probable cause for the seizure and arrest. The State suggests that there was a good reason for that because of the State’s interest in

protecting the investigation. The State argues that the “four corners” requirement “ignores the reality of what occurred here.” Ans. Br. at 21. What occurred here is that the State filed a misleading affidavit in a judicial tribunal in order to protect its investigation and its witness later offered misleading testimony in a court for that same reason. The State claims that this effort to protect its investigation of heroin distribution was warranted and argument to the contrary “exalts form over substance.” Ans. Br. at 21. The State is essentially urging the Court to overturn *McDonald v. State*,⁷ Ans. Br. at 21-22, by disregarding it in this case. *McDonald* should not be overturned, particularly under these circumstances in this case.

⁷ 947 A.2d 1073, 1078 (Del. 2008).

CONCLUSION

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

Respectfully submitted,

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