



IN THE SUPREME COURT OF THE STATE OF DELAWARE

MURAD DIGGS,)	
)	
Appellant – Defendant Below,)	
)	
v.)	Supreme Court No. 282, 2020
)	
)	On appeal from Superior Court
)	ID. Nos. 1904013820 and
STATE OF DELAWARE)	1810015149A
)	
Appellee – Plaintiff Below)	

APPELLANT’S AMENDED OPENING BRIEF

/s/ Michael W. Modica
MICHAEL W. MODICA, ESQUIRE
Bar ID # 2169
Attorney for Murad Diggs
P.O. Box 437
Wilmington, DE 19899
(302) 425-3600

Date: January 20, 2020

TABLE OF CONTENTS

Table of Citations.....	ii
Nature and Stage of Proceedings	1
Summary of Argument	3
Statement of Facts	4
Arguments	
I. THE SUPERIOR COURT ERRED BY FINDING THE WARRANTLESS SEIZURE OF DIGGS, AND SUBSEQUENT SEARCH OF HIS PERSON, WERE REASONABLE UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §6 OF THE DELAWARE CONSTITUTION.....	17
A. Analysis of Superior Court’s ruling: The Court did not properly apply legal precepts in its consideration of Defendant’s claim. The Superior Court’s factual findings are erroneous.....	20
1. The Superior Court’s conclusion that the tipster qualified as a “citizen informant” whose information should be presumed reliable was clearly erroneous.....	22
2. The Superior Court erred by presuming that information from a citizen informant was reliable.....	26
3. The information provided by the informant was not reliable to support reasonable suspicion for an investigatory stop because it failed to establish the informant’s basis of knowledge.....	27
4. Officer Shupe was not entitled to rely upon Marino’s information as the sole basis to stop Diggs.....	31

5. The Superior Court’s finding that the conduct of Diggs justified a limited protective search for concealed weapons is clearly erroneous.....	33
II. THE SUPERIOR COURT COMMITTED PLAIN ERROR IN VIOLATION OF DIGGS’ FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY FAILING TO APPLY A “LOST AND/OR MISSING EVIDENCE” INFERENCE WHEN MAKING ITS SUPPRESSION HEARING FACTUAL DETERMINATIONS.....	38
Conclusion	48

Exhibit 1 – *State v. Diggs*, 2019 WL 1752644 (Del. Super. 2019).

Exhibit 2 – *State v. Diggs*, Sentencing Order (Del. Super. 8/14/2020) (Order being appealed).

TABLE OF CITATIONS

<i>Alabama v. White</i> , 496 U.S. 325 (1990).....	19
<i>Alberty v. United States</i> , 16 S. Ct. 864, 868 (1896).....	36
<i>Arizona v. Gant</i> , 556 U.S. 332, 338 (2009).....	18
<i>Bailey v. State</i> , 440 A.2d 997, 999 (Del. 1982)	23
<i>Berkemer v. McCarty</i> , 104 S.Ct.3138, 3150 (1984).....	37
<i>Bradley v. State</i> , 204 A.3d 112 (Table) (Del. 2019).....	38
<i>Brady v. Maryland</i> , 83 S. Ct. 1194 (1963).....	40-42
<i>Caldwell v. State</i> , 770 A. 2d 522 (Del. 2001).....	20
<i>California v. Hodari D.</i> , 111 S. Ct. 1547 1553 n. 4(1991).....	36
<i>Deberry v. State</i> , 457 A.2d 744 (Del. 1983).....	41
<i>Doherty v. State</i> , 21 A. 3d 1, 2 (Del. 2011)	39
<i>Dorsey v. State</i> , 761 A.2d 807 (Del. 2000).....	18
<i>Florida v. Bostwick</i> , 111 S. Ct. 2382, 2387 (1991).....	37
<i>Florida v. J.L.</i> , 120 S. Ct. 1375 (2000).....	26, 32
<i>Florida v. Royer</i> , 103 S. Ct. 1319, 1323-3-24 91983).....	37
<i>Gardner v. State</i> , 567 A.2d 404, 409-10 (Del. 1989).....	22
<i>Hammond v. State</i> , 569 a.2d 81, 86 (Del. 1989).....	43
<i>Hanna v. State</i> , 591 A.2d 158, 162 (1991).....	18
<i>Hooks v. State</i> , 416 A.2d 189 (Del. 1980).....	23

<i>Illinois v. Gates</i> , 103 S. Ct 2317 (1983).....	22-23
<i>Jackson v. State</i> , 990 A.2d 1281, 1288 (Del. 2009).....	17
<i>Jones v. State</i> , 745 A.2d 856, 863 (Del. 1999).....	19
<i>Katz v. United States</i> , 389 U.S. 347, 357 (1967).....	18
<i>Lolly v. State</i> , 611 A.2d 956 (Del.1992)	42
<i>Lopez-Vasquez v. State</i> , 956 A.2d 1280, 1284, 1288 (Del. 2008)....	17, 19
<i>McCrey v. State</i> , 2008 WL 187947, at *2 /(Del. Jan. 3, 2008).....	43
<i>Michigan v. Chesternut</i> , 486 U.S. 567, 573-574 (1988).....	19
<i>Miller v. State</i> , 25 A.3d 768, 771-772 ((Del. 2011).....	23
<i>O’Neil v. State</i> , 691 A.2d 50, 54 (1997).....	40, 41
<i>Patrick v. State</i> , 227 A.2d 486, 489 (Del. Supr. 1967).....	18
<i>Pierson v. State</i> , 351 A.2d 860 (1976);	40
<i>Purnell v. State</i> , 832 A. 2d 714, 719 -720 (Del. 2003).....	19-20
<i>Quarles v. State</i> , 696 A.2d 1334, 1336 (Del. 1997).....	19, 36-37
<i>Roy v. State</i> , 62 A.3d 1183, 1188 (Del. 2012).....	23
<i>Scott v. State</i> , 672 A.2d 550, 552 (Del. 1996).....	18
<i>Sierra v. State</i> , 958 A.2d 825, 832 (Del. 2008).....	33
<i>State v. Cooley</i> , 457 A.2d 353 (Del. 1983).....	32-33
<i>State v. Diggs</i> , 2019 WL 1752644 (Del. Super. 2019).....	passim
<i>State v. Rollins</i> , 922 A.2d 379, 382 (Del. 2007).....	17

<i>State v. Roybal</i> , 232 P.3d 1016, 1022 (Utah 2010).....	24
<i>State v. Valentine</i> , 207 A.3d 566 (2019).....	29
<i>Swan v. State</i> , 28 A.3d 362, 383 (Del. 2011).....	17
<i>Turner v. State</i> , 5 A.3d 612, 615 (Del. 2010).....	38
<i>United States v. Duffy</i> , 796 F. Supp. 1252, 1260 n. 8 (D. Minn., 1992).....	37
<i>United States v. Leon</i> , 468 U.S. 897 (1984).....	18
<i>United States v. Roberson</i> , 90 F.3d 75 (3d Cir. 1996).....	19
<i>United States v. Valenzuela-Bernat</i> , 102 S. Ct. 3440 (1982).....	41
<i>United States v. Wilson</i> , 953 F.2d 116, 126 (1991).....	37
<i>Valentin v. State</i> , 74 A.3d 645 (Del. 2013).....	41
<i>Wainer v. State</i> , 2005 WL 535010, at *3 (Del. Feb. 15, 2005).....	43
<i>Williams v. State</i> , 962 A.2d 210, 216 (Del. 2008)	18
<i>Wilson v. State</i> , 314 A.2d 905, 907-08 (Del. 1973).....	23
<i>Woody v. State</i> , 765 A.2d 1257, 1263 (Del. 2001).....	19-20

Statutes & Rules

11 Del C. §306.....	26
Delaware Constitution, Article I, §6	3, 17-18
Delaware Constitution, Article I, §7.....	39, 41
Delaware Pattern Jury Instruction 4.17.....	42

Del. Supr. Ct. R. 8.....	38
United States Constitution, Fifth Amendment.....	39
United States Constitution, Fourth Amendment.....	3, 17-19, 23
United States Constitution, Fourteenth Amendment.....	3, 18, 38-39, 41

Publications:

Ariel C. Werner, “What’s in a name? Challenging the Citizen-Informant Doctrine,” 89 N.Y.U. L. Rev. 2336 (2014).....	24
James R. Thompson, The Citizen Informant Doctrine, 64 J. Crim. L. & Criminology 163 (1973) (Introducing and labeling the “Citizen Informant Doctrine”).....	23
Sheri Lynn Johnson, Race and the Decision to Detain a Suspect, 93 Yale. L. J. 214 (1983).....	36
Wayne R. Lafave, Search and Seizure, A Treatise on the Fourth Amendment. Section 3.4(A) at 271-72(5 th Ed. 2012).....	23

NATURE AND STAGE OF PROCEEDINGS

Mr. Diggs was indicted on December 17, 2018 for the following charges: Carrying Concealed a Deadly Weapon, Resisting Arrest, Possession of a Firearm by a Person Prohibited (PFBPP) and Possession of Ammunition by a Person Prohibited (PABPP) (2 counts).

The charges stem from a “protective” search of Diggs based upon a tip from a confidential source to an off-duty officer who provided it to an on duty officer. As a result of the encounter, a firearm was seized from Diggs. Diggs filed a motion to suppress evidence seized.

The Superior Court conducted a hearing on Diggs’ motion to suppress and issued a memorandum order denying the motion to suppress evidence on April 16, 2019.¹

Diggs proceeded to trial on the severed charges of PFBPP PABPP (the “A” case) on June 4, 2019. The charges of CCDW and Resisting Arrest were severed into a “B” case to be tried at a later date. On June 5, 2019, the jury found Diggs guilty of PFBPP and PABPP. Diggs was sentenced to an aggregate 18 years L5, suspended after 10 years, followed by 18 months L3 probation.

¹ Exhibit 1, State v. Diggs, 2019 WL 1752644 (Del. Super. 2019).

Diggs filed a direct appeal of his convictions. This is his opening brief.

SUMMARY OF ARGUMENT

1. The Superior Court erred by finding that the warrantless seizure of Diggs, and subsequent search of his person, were reasonable under the Fourth Amendment to the United States Constitution and Article 1, §6 of the Delaware Constitution.
2. The Superior Court committed plain error in violation of Diggs' Fourteenth Amendment right to due process by failing to apply a "lost or missing evidence" inference when making its suppression hearing factual determinations.

STATEMENT OF FACTS

A. The Motion to Suppress

Diggs moved to suppress evidence of the firearm seized from his person as a result of a protective search after he was seized at the Shop Smart Market (the “Market”) located at the corner of S. Harrison and Elm Streets.² The initial seizure was based upon a tip to Corporal Alexander Marino from an anonymous citizen. According to Diggs’ motion, the anonymous tip acted upon by the police was not reliable and did not provide sufficient reasonable suspicion to support the detention, and subsequent pat-down of the Defendant. Furthermore, the police seized Diggs before he allegedly engaged in efforts to resist and/or attempt to flee from the officers.

The evidentiary hearing on the motion was held on March 29, 2019. The State presented two witnesses, Corporal Alexander Marino and Officer Raymond Shupe. Defendant presented the following witnesses: Guy Bullock, Andrea Price, Na’Isha Pantoja, and Julia Pantoja. All witnesses were present to witness the encounter and arrest of Diggs, except Cpl. Marino. The hearing provided the following facts:

1. The tip

² A12, Diggs Motion to Suppress. A21, State’s Response to Motion to Suppress.

On October 26, 2018, Cpl. Marino of the Wilmington Police Department received information via telephone from a “concerned citizen” that an individual in the area of the 200 block of S. Harrison St. was in possession of a handgun. A42. The individual stated that a black male, approximately 30 to 35 years of age, was wearing a camouflage jacket, had a small handgun “on” his waistband. A45. Cpl. Marino has known the citizen for approximately 11 years and has communicated with that individual “approximately” five times during that time. A43. The citizen provided information that eventually led to an arrest of different individuals. A43. He considered the information provided by the citizen to be factual and reliable. A43, 44. The concerned citizen never received a benefit from the information provided. A44.

On cross examination he clarified that he had no record of how many times the individual provided information, but it was about five times. 34. He “can’t remember if all five led to an arrest.” A55. He could not remember the last time the individual provided him with information prior to this case. A55.

The officer suggested that the 200 block of South Harrison area was a high crime area because a few weeks prior to this incident there was a shooting or shots fired in the area where a Molotov cocktail was thrown at

somebody. Cpl. Marino elaborated that he's worked the area for 12 years, it's a high crime area, drugs are sold on a daily basis, there have been shootings, murders. A46.

On cross-examination Cpl. Marino stated that the informant contacted him on his personal cell phone. A48. He does not have a city assigned cell phone. A49. He no longer has the same cell phone that he had on October 26, 2018. A49. He did not upload the old information from his old phone to his new phone, so the record of the call is lost. A50, 51.

2. The communication between Marino and Shupe.

Since Cpl. Marino was not on duty, he relayed the information to Officer Shupe almost immediately after receiving it. A56. When asked, "*And what exactly did you relay to Officer Shupe*" he responded "*exactly what the individual told me, the description of the individual, the area, what he was wearing, and that a handgun was 'in' his waistband.*"³ A46, 47. He provided that information to him via telephone. A47. He told officer Shupe that the individual was going into the corner store at S. Harrison St. and Chestnut Street. A55, 56.

³ It is important to note that nothing was relayed about the informant's reliability.

Corporal Marino did not provide any testimony that he conveyed any information about the informant's reliability to Officer Shupe. He denied that he texted Officer Shupe with any information about the informant. A52

Officer Shupe works on the west side of the Wilmington. 38. On October 26, 2018 he was working with Officer Agosto. A60, 61. Cpl. Marino contacted him and advised that there will was possibly a black male with a camouflage jacket in the area of the 200 block of S. Harrison St. armed with a handgun, and it was in his waistband. A61. Marino told him that he obtained the information from a reliable witness. A61. He later clarified that he was informed by text or call that the tipster was reliable. A77, 78. He does not have the phone calls or text messages that he received because he routinely deletes them every week to clean his phone out. A62.

On cross-examination, Officer Shupe admitted he did not know the identity of the informant or have any personal knowledge of his reliability, but Cpl. Marino told him that the informant was reliable. A76. The reliability of the informant was conveyed to the officer by a phone call and a text by Cpl. Marino on his way to Diggs. A77. The officer believed that he received a call and they text, but it may have been more. A77.

The officer advised that the 200 block of S. Harrison St. is a high crime area, and that there was a shooting within the last two weeks. A62.

3. The encounter between Shupe and Diggs.

After receiving the information from Cpl. Marino, the officer notified his sergeant and organized other units to start heading in that direction to back them up. He arrived at the area of 200 block of S. Harrison St. very quickly. A63. When he arrived at the 200 block of S. Harrison St., and got to the area of Chestnut Street he looked eastbound on Chestnut and observed Diggs with his camouflage jacket, and that he was heading southbound on Harrison Street. A63. The convenience store is one block from the corner of South Harrison and Chestnut Street. A63. He saw Diggs in a camouflage jacket. A64. His testimony was absent of any indicia of gun possession by Diggs. There were four, maybe five other individuals dressed in all black. A64

They drove around S. Harrison St. to Chestnut St. and saw Diggs enter the Market at Elm and S. Harrison. A65. It is one block from South Harrison and Chestnut. They parked their vehicle and waited for backup to arrive because it was possible that they were going to confront somebody with a firearm. A65, 66.

After they saw Diggs enter the Market, Officers Shupe, Agosto, Jordan and Gaston started heading into the store. A66. All officers were in full uniform. A66. As Shupe was entering the store, Diggs was exiting the

store. 46. Diggs was wearing a camouflage jacket and the officer was not aware of anybody else wearing a camouflage jacket. A74. Later, after speaking with the other officers, there was only another female in the store and she may have been wearing a red shirt. A74, 75. They met in the area of the doorway and were extremely close. A66. Officer Shupe asked Diggs if he could speak with him. A67. His intention was to engage in a “consensual encounter” to get reasonable articulable suspicion that he had a firearm before he acted on it. A67.

When Shupe asked Diggs if he could speak with him, Diggs had his cell phone in one hand and a cigar in the other hand and he threw them on the ground.⁴ A67. Diggs immediately got into a defensive stance and started backing away. A67. He looked left and right like he was going to run or fight. A67. He threw his cell phone down with a significant amount of force as if he was trying to break it. A68. He placed his hands to about chest level. A68. Based upon his training and experience, hands and chest level is a good place to start to draw a firearm. A68. After he raised his hands to chest level he “crouched down in, like, a defensive stance,” and started backing away and looking left to right. A70. He was taking backward steps from the officer. A70. Diggs was facing the officer the entire time but was looking

⁴ He later admitted that he did not disclose that Diggs threw a cigar to the ground during his preliminary testimony. 62, 63.

left and right as if weighing his options. A70. It was the first time the officer had ever encountered a reaction like this when approaching a suspect. A71. Based upon his observations and belief he believed that Diggs had a firearm. A71.

Cpl. Marino then took a step forward and grabbed ahold of Diggs' arm. A71. The purpose was to "detain him to further my investigation." A71. He intended to check for potential weapons. A71.

When Officer Shupe put his hand on Diggs' arm, he believes he told him that somebody believed that he had a firearm, or that he had to talk to him in regard to an investigation. A72. At that point Diggs began pushing and pulling to get away from the officer. A struggle ensued a few steps away from the entrance to the Market inside the store. A72. Cpl. Jordan and Agosto assisted, and all ended up on the ground until they were able to handcuff Diggs. A72.

After the struggle finished, Officer Shupe conducted a protective search for weapons and found a loaded handgun in the Defendant's waistband. A73. Diggs said, "I needed for protection." A73. The officer believed that he said something about having been shot before. A73.

The store had surveillance but the officer unsuccessfully attempted on two occasions to obtain the surveillance footage. A73, 74. The employees

did not know how to download it, and it was only stored for two weeks. A74.

The Shop Smart corner store is located at South Harrison and Elm streets. There is a liquor store at South Harrison and Chestnut streets. A79.

Officer Shupe testified in this case at the preliminary hearing. A80. The officer searched him after Diggs was on the ground and then had him back up in police custody. A80. Officer Shupe performed multiple searches. A81. He performed a pat down but had to go into the Defendant's pants to retrieve the firearm. A81. The pistol would have extended to the groin area. A98. He admits that he did not disclose that the Defendant threw a cigar onto the ground during his preliminary hearing testimony. A82, 83. When the officer asked if he could speak to him, Defendant threw his items on the ground, took a step back and put his hands at chest level and started looking left and right. A84, 85. The Defendant's palms were facing forward. A85. Diggs was not reaching towards his waistband. A85. He never reached for a firearm. A85. It's possible that having your hands at chest level, palms toward the officer was for the purpose of saying "hold on for a second." A85.

Cpl. Shupe requested the surveillance tapes on the day of the incident, but the employee stated that he didn't know how to work the cameras. A86,

A87. He did not note this in his report. He did not attempt to have a Wilmington police information technology person tried to get the video.

A88. Officer Shupe went back days later to obtain a copy of the surveillance.

A89. Again, the employee stated that he did not know how to operate the cameras. He did not note this in his report. A90.

When Officer Shupe conducted the pat down, he ran his hands along the Defendant's waistline and immediately felt what felt like they handle the pistol just below his belt. A94. He reached in and grabbed it. A94. It was located just below his belt line. A94.

Guy Bullock

Guy Bullock was working as a cook at the Market when Diggs was arrested. He has a prior criminal history for shoplifting in 2015. A116. He primarily works in the kitchen. The store was crowded, and his boss asked him to come out front and watch some kids to make sure they were not stealing, and to ask anybody that was not buying anything to leave the store. A101.

He was present when the officers arrived and encountered Mr. Diggs. A101. He knows Diggs as a frequent customer. He observed that when the officers arrived, Diggs had "opened the door and he got snatched out the door and slammed to the ground." A100. At first, he didn't know that it was

an officer who grabbed him until he got to the door. A113,114. The first thing he saw when the officers entered the store is that an officer grabbed Diggs by his arm. He did not hear the officer say anything. A101. He repeated that he was facing the doorway talking to a kid when he saw Diggs grab the door. A115. He saw someone grabbed his arm and that's when he thought there was going to be a fight, so he moved a kid away. A115. He did not see Diggs throw anything. A102. Bullock was focused on making sure a kid he was talking to moved out of the way. A112.

Anrea Price

Price works for a childcare center. She was present at the Market on to purchase snacks. She is familiar with Diggs but has had limited contact with him. A128. She saw him in the Market. She described the store as crowded. A120. The space inside the store was cramped. A127.

Price stated that she was standing by Diggs ready to walk out of the store. A120. To get out of the store you pulled a door toward you. She is sure that the door opens inward. A133, 134. Diggs pulled the door open towards him to get out of the store, and his arm was grabbed from outside of the store. A122. She remembered an officer grabbing Diggs' arm and he pulled his arm back. A120. Diggs reacted by pulling his arm when it was grabbed by the officer. A122. She moved out of the way because the officer

was pursuing him. A120. She saw Diggs put his hands up and then just remembered seeing him detained on the floor. A120. Diggs put his hands up after the officer attempted to grab his arm. A121.

Price looked to see if she could leave the store but there were multiple officers present. A121. Diggs was outside of the doorway on the front step in the rest of his body was still inside the store, and his body was keeping the door open. A121.

Price is not sure if Diggs said anything during the encounter, but may have said something to the effect of, “get off of me,” or “get the fuck off me.” A122.

Price never saw Diggs throw anything. A123

Na’Isha Pantoja

Na’Isha Pantoja is the Defendant’s sister and was in front of the store with her kids but never went inside. The first thing she saw was kids coming out of the store. A138. One of the individuals was wearing a fatigue jacket A139. The police were trying to go into the store, but they never made it inside. A144. Diggs was coming outside. The next thing she saw was “them grabbing my brother’s arm and, like, throwing him to the ground.” A138. She saw an officer walk up to the store, onto the steps and grab Diggs and slam him on the ground. Diggs was in the middle of the doorway when they

slammed him on the steps. A145. She was a few steps away from the front of the store when she made this observation. Diggs may have said something to the effect that, "I have my ID, my ID is somewhere." A151.

Diggs was wearing black jeans, possibly a black hoodie, and a fatigue/camouflage coat. A137. Pantoja observed another individual leaving the store wearing a fatigue/camouflage coat. A137. It looked like the same type of coat except her brother's was bubble, and the other individuals was not. She estimated that this individual was in his mid-20s. A138.

Pantoja did not hear the officer say anything to her brother before he put his hand on him. A139. She did not see Diggs throw anything. A139. She did not hear Diggs say, "I have a gun, I need it for protection." A152.

She had cell phone videos from the encounter but they were not saved. A146.

Julia Pantoja

Julia Pantoja is Defendant's mother. She was present when he was arrested. She was speaking to her neighbor, Bernice Matthews. When the officers approached the store or a couple of guys left the store and one had a fatigue jacket on. A154. The person wearing the fatigue jacket was in his mid-20s. A155. The officers went up the steps and it looked like a tug-of-war, the officer grabbed Digg's arm. A155. She did not see her son throw

anything. A156. She heard him say, “You don’t have to do all of that, my IDs in my back pocket” after the officer grabbed him. A156, 161. She said the officer was being aggressive pulling him out, and that he was trying to pull him through the door and you can’t pull him through the door if the door doesn’t open. It’s a right-handed door, and you can’t get in and get out at the same time. A156. There were about six or seven officers at the scene. A162.

TRIAL

Corporal Ryan Jordan and Officers Raymond Shupe and Diana Agosto testified about the investigation involving Murad Diggs on October 26, 2018. They testified that they had a lawful reason to stop and detain Diggs at the Market, although Officer Shupe indicated his intent was for a consensual encounter. When Officer Shupe asked to speak to Diggs, he immediately threw down his phone, got into a defensive stance and backed up from the officers. Officer Shupe and Corporal Jordan grabbed Diggs’ arm and a struggle ensued. Eventually, Diggs was placed in custody. A protective search followed which resulted in the seizure of a firearm from Diggs’ waistband.

Diggs was prohibited from possessing a firearm. The State presented evidence that the weapon was operable.

ARGUMENT I

THE SUPERIOR COURT ERRED BY FINDING THE WARRANTLESS SEIZURE OF DIGGS, AND SUBSEQUENT SEARCH OF HIS PERSON, WERE REASONABLE UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §6 OF THE DELAWARE CONSTITUTION.

1. Question Presented

Did the Superior Court abuse its discretion and/or commit legal error by denying Defendant's motion to suppress? Diggs preserved this claim by filing a motion to suppress leading to the Superior Court's decision denying his motion.⁵

1. Standard and Scope of Review

The Court reviews the trial court's grant or denial of a motion to suppress for an abuse of discretion.⁶ The trial court's formulation and application of legal concepts are reviewed *de novo*,⁷ as are constitutional claims.⁸ The Court will defer to the factual findings of a Superior Court judge unless those findings are clearly erroneous.⁹

⁵ Exhibit 1, *State v. Diggs*, 2019 WL 1752644 (Del. Super. 2019).

⁶ *Lopez-Vasquez v. State*, 956 A.2d 1280, 1284 (Del. 2008).

⁷ *Jackson v. State*, 990 A.2d 1281, 1288 (Del. 2009).

⁸ *Swan v. State*, 28 A.3d 362, 383 (Del. 2011).

⁹ *State v. Rollins*, 922 A.2d 379, 382 (Del. 2007).

2. Merits

Law relating to the Fourth Amendment

The Fourth Amendment to the United States Constitution prohibits warrantless search and seizures. This fundamental right extends to individual State actions through the due process clause of the Fourteenth Amendment. Article 1, Section 6 of the Delaware State Constitution provides similar protections to Delaware citizens, however, that protection has been held to be greater than that given by its federal counterpart.¹⁰

A warrantless search is *per se* unreasonable absent exigent circumstances, unless supported by a warrant.¹¹ While the State has the burden of proving exigency, “the criterion is the reasonableness of the belief of the police as to the existence of an emergency, not the existence of an emergency in fact.”¹²

Law relating to warrantless seizures

A person is considered “seized” when the circumstances surrounding

¹⁰ See, *Dorsey v. State*, 761 A.2d 807 (Del. 2000)(rejecting the “good faith” exception adopted by the United States Supreme Court in *United States v. Leon*, 468 U.S. 897 (1984) and continuing to recognize that constitutional violations require the exclusion of unlawfully seized evidence).

¹¹ *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (citing *Katz v. United States*, 389 U.S. 347, 357 (1967)); *Williams v. State*, 962 A.2d 210, 216 (Del. 2008)(noting that warrantless searches are presumed unreasonable under the Fourth Amendment); *Scott v. State*, 672 A.2d 550, 552 (Del. 1996)(citing *Hanna v. State*, 591 A.2d 158, 162 (1991)).

¹² *Patrick v. State*, 227 A.2d 486, 489 (Del. Supr. 1967).

the incident suggest that a reasonable person would not feel free to leave.¹³ The Delaware Supreme Court has held that a seizure occurs when a police officer engages “in conduct that would communicate to a reasonable person that he was not free to ignore the police presence.”¹⁴ In other words, a seizure occurs when a person is “physically forced to stop or . . . submits to a show of authority by the police.”¹⁵ Once “seized,” Fourth Amendment scrutiny is triggered, and the level of scrutiny will hinge upon the nature of the “seizure.”¹⁶

If the seizure is a “limited intrusion” referred to as a “Terry stop,” the officers must possess reasonable and articulable suspicion that the suspect has committed or is about to commit a crime. Reasonable articulable suspicion requires an officer to have a “particularized and objective basis to suspect criminal activity.”¹⁷ Reasonable and articulable suspicion is a less stringent standard than the probable cause standard and requires a quantum of proof that is less than a preponderance of the evidence.¹⁸ A court determining whether an officer’s actions were supported by reasonable and

¹³ *Michigan v. Chesternut*, 486 U.S. 567, 573-574 (1988).

¹⁴ *Jones v. State*, 745 A.2d 856, 863 (Del. 1999).

¹⁵ *Quarles v. State*, 696 A.2d 1334, 1336 (Del. 1997).

¹⁶ *Alabama v. White*, 496 U.S. 325 (1990); *United States v. Roberson*, 90 F.3d 75 (3d Cir. 1996).

¹⁷ *Lopez-Vazquez v. State*, 956 A.2d 1280, 1288 (Del. 2008).

¹⁸ *Purnell v. State*, 832 A. 2d 714, 719 (Del. 2003) (citing *Woody v. State*, 765 A.2d 1257, 1263 (Del. 2001)).

articulable suspicion “must examine 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.”¹⁹

Police must have an articulable suspicion that a suspect is armed and dangerous before conducting a pat- down search.²⁰

A. Analysis of the Superior Court’s ruling: The Court did not properly apply legal precepts in its consideration of Defendant’s claim. The Superior Court’s factual findings are clearly erroneous.

In its decision, the Superior Court made the following findings: An informant, known to Cpl. Marino, provided a tip that a black male, age 30-35, wearing a camouflaged jacket and having a firearm *in* his waistband was entering a store on the corner of Chestnut and S. Harrison Streets.²¹ The Superior Court classified the citizen who provided the tip to Cpl. Marino as a “citizen informant” because the informant “*was not a member of the criminal community, but rather an individual who occasionally telephoned police to report incidents of which he or she had knowledge.*”²² The Superior Court found that the “citizen informant” label was further supported by that fact that the informant never received any type of compensation for the

¹⁹ *Purnell, supra at 719-20, quoting Woody, 75 A.2d at 1263.*

²⁰ *Caldwell v. State, 770 A. 2d 522 (Del. 2001).*

²¹ *State v. Diggs, p. 6.*

²² *State v. Diggs, p. 6.*

information that was provided. The informant was found to be reliable based upon his “citizen informant” status.²³

The Court found that the tip was “corroborated externally” because Officer Shupe saw a person matching the description of the suspect (black male, age 30-35, wearing a camouflaged jacket) on Chestnut Street and eventually entering the Market. The location and “spot on” description of the suspect overcame the lack of any observation consistent with gun possession according to the Court.²⁴ The tip was specific enough to lead the police to disregard another black male with a similar jacket and cause Officer Shupe to go into the Market to talk to Diggs.²⁵

The Superior Court found that Officer Shupe had a particularized and objective basis to stop Diggs based upon a suspicion he “*was committing a crime – possible possession of a firearm without a license or, if hidden, carrying a concealed deadly weapon.*”

The Superior Court further found that the police had a basis to frisk Diggs to determine if he had a weapon. This conclusion was based upon the

²³ *State v. Diggs*, p. 6.

²⁴ *State v. Diggs*, p.6.

²⁵ *State v. Diggs*, p.6.

finding that Diggs “*reacted in a manner that Officer Shupe had never seen before,*” including that Diggs “*threw down the items in his hand, got into a defensive position and took steps backward.*”

The Superior Court found that it was at this point that Officer Shupe grabbed Diggs to check for weapons leading to a struggle, and eventually, the pat-down leading to the seizure of the gun from Diggs. Diggs’ “*suspicious behavior*” supported a belief that he “*was armed and presently dangerous to Officer Shupe and others*” and that Officer Shupe was justified in conducting a limited protective search for concealed weapons.²⁶

1. The Superior Court’s conclusion that the tipster qualified as a “citizen informant” whose information should be presumed reliable was clearly erroneous.

This investigation was precipitated by a tip from a claimed reliable informant. In assessing whether a tip from a confidential informant is sufficient to create a “reasonable suspicion” of wrongdoing, the “totality of circumstances” must be considered.²⁷ This Court adopted the *Gates* holding in *Gardner v. State*.²⁸ A confidential informant’s “credibility,” “reliability” and “basis of knowledge” are all highly relevant in determining the value of

²⁶ *State v. Diggs*, p.7.

²⁷ *Illinois v. Gates*, 103 S. Ct 2317 (1983).

²⁸ *Gardner v. State*, 567 A.2d 404, 409-10 (Del. 1989).

the information.²⁹ With respect to the informant’s reliability, “the specificity of the informant’s tip, and the degree to which the tip is corroborated by independent police surveillance and information” must be considered in determining whether the tip justifies a stop and seizure.³⁰ It is important that the tip contain “specific facts and conditions” that exist at the time the tip is made and indicate “future actions that are not ordinarily easily predicted.”³¹ “If there are no facts to corroborate the alleged illegal activity, then the tip itself is an insufficient basis to justify a stop.”³²

The Superior Court classified the anonymous informant in this case as a “citizen informant.”³³ The “citizen informant” doctrine reasons that individuals who witness a crime and willingly identify themselves to police are presumptively reliable.³⁴ The “citizen informant” doctrine has been embraced by this Court.³⁵

²⁹ *Illinois v. Gates*, 103 S. Ct 2317 (1983).

³⁰ *Miller v. State*, 25 A.3d 768, 771-772 (Del. 2011).

³¹ *Id.* At 772.

³² *Roy v. State*, 62 A.3d 1183, 1188 (Del. 2012).

³³ *State v. Diggs*, Exhibit A.

³⁴ See, 2 Wayne R. Lafave, *Search and Seizure, A Treatise on the Fourth Amendment*. Section 3.4(A) at 271-72(5th Ed. 2012). James R. Thompson, *The Citizen Informant Doctrine*, 64 *J. Crim. L. & Criminology* 163 (1973)(Introducing and labeling the “Citizen Informant Doctrine”).

³⁵ *Bailey v. State*, 440 A.2d 997, 999 (Del. 1982) quoting from *Hooks v. State*, 416 A.2d 189 (Del. 1980)(“The citizen-informer is a passive observer with no connection with the underworld, and no reason to fabricate what he has seen or heard, and as such is considered presumptively reliable”). See also *Wilson v. State*, 314 A.2d 905, 907-08 (Del. 1973).

The citizen informant reliability presumption enables law enforcement officers to conduct searches and seizures that would otherwise be unlawful based on uncorroborated reports and untested civilians. The doctrine has major consequences for the robustness of the Fourth Amendment protection against unjustified government intrusion. The doctrine rests on shaky foundations and courts should require law enforcement to conduct more exacting inquiries before relying on the word of a so-called citizen informant.³⁶ For instance, in *State v. Roybal*,³⁷ the Supreme Court of Utah indicated scenarios in which a citizen informant may have reasons to fabricate based personal involvement with the suspect.

The Superior Court clearly erred by classifying the tipster as a “citizen informant” based upon a finding that he “*was not a member of the criminal community, but rather an individual who occasionally telephoned police to report crimes.*”³⁸ In fact, there was no testimony that the informant was not a “member of the criminal community.” Corporal Marino stated the tipster was a “concerned citizen,” and that the individual did not have any pending

³⁶ Ariel C. Werner, “What’s in a name? Challenging the Citizen-Informant Doctrine,” 89 N.Y.U. L. Rev. 2336 (2014)(The citizen informant doctrine is particularly troubling as a rigid legal rule in light of the unsupported assertions used to justify its application. Absent empirical grounds for treating citizen informants so differently from other sources of information about crime, this doctrine demands reconsideration, or at least more principled application.)

³⁷ *State v. Roybal*, 232 P.3d 1016, 1022 (Utah 2010)(nevertheless, electing to retain the citizen informant doctrine),

³⁸ *State v. Diggs*, p. 6.

charges. A42, 44. The prosecutor did not develop whether or not this informant was a member of the criminal community, or had a criminal background, and it was clearly erroneous for the Superior Court to reach that conclusion based upon the existing record.

Furthermore, the officer did not address whether or not the informant knew Diggs, or had personal involvement with him, which may have called into question the informant's veracity and bias.

Next, the assertion that the tipster occasionally telephoned police to report criminal activity does not translate to reliability. On cross examination, Corporal Marino was vague about the informant's past efforts. He clarified that there were "*approximately five, I have no record exactly how many times the informant provided information.*" A54. He further clarified that "*I can't remember exactly if all five led to an arrest.*"A55. Finally, he did not remember that last time the informant gave information prior to this case. A55.

The reliance on the prior calls to support the court's conclusion is clearly erroneous. It cannot be ruled out that the informant gave information less than five times to the police over an 11 year period. It cannot be ruled out that the information provided led to less than five arrests. It cannot be

ruled out that the information provided to police did not result in arrests in some of the cases, or was not reliable. In short, one cannot draw any conclusions about the informant's reliability based upon the vague testimony provided.

The "external corroboration" factor advanced by the Court is specious because it involves innocuous facts not detailing specific criminal activity.³⁹ Here, the tipster provided no detailed and explicit description of gun possession.

2. The Superior Court erred by presuming that information from a citizen informant was reliable.

The "citizen informant" doctrine operates to presume the tip of the citizen informant is reliable without the need for further scrutiny. Once the Superior Court classified the informant as a "citizen informant," it presumed that the tip was reliable without analyzing the basis of knowledge for the tip. As applied here, the "citizen informant" doctrine constitutes a violation of the prohibition against conclusive presumptions.⁴⁰ Section 306, provides, in pertinent part as follows:

³⁹ *Florida v. J.L.*, 120 S.Ct. 1375, 1379 (2000) (Innocuous details do not show that the tipster has knowledge of concealed criminal activity).

⁴⁰ 11 Del. C. §306.

§306. No conclusive presumptions; rebuttable presumptions and proof thereof.

- (a) There are no conclusive presumptions in this criminal code, and all conclusive presumptions formally existing in the criminal law of the state are hereby abolished.
- (b) Rebuttable presumptions formally existing in the criminal law of the state are preserved except to the extent that they are inconsistent with this criminal code.

The Superior Court erred to the extent that it applied a conclusive presumption that the tip of the informant was reliable because of a finding that the tipster was a “citizen informant.” Its finding that the classification of the informant trumps (1) the insufficient basis of his/her knowledge, and/or (2) the lack of any indicia of gun possession observed by the police, operates as a conclusive presumption. The “spot on” description of innocuous details does not salvage the Court’s improper presumption of the informant’s reliability.

The improper presumption is not overcome by external corroboration that Officer Shupe saw a person matching the description of the suspect (black male, age 30-35, wearing a camouflaged jacket) on Chestnut Street and eventually entering the Market. That corroboration simply shows innocuous details and is absent of a detailed description of wrongdoing.

- 3. The information provided by the informant was not reliable to support reasonable suspicion for an investigatory stop because it failed to establish the informant’s basis of knowledge.**

The tip at issue in this case was that a black male, age 30-35, wearing a camouflaged jacket and having a firearm “on” his waistband was entering a store on the corner of Chestnut and S. Harrison Streets.⁴¹ A45. The location of the gun about the waistband (front, side, rear?) was not disclosed. There was no other information provided to support the informant’s conclusion, such as bulge in pants, altered gait, checking for a weapon as one walks, etc. While other innocuous facts were provided -- black male, age 30-35, wearing a camouflaged jacket, walking in a certain location -- the possession of the firearm is the alleged criminal behavior precipitating the basis for the investigation and the primary focus of legal scrutiny.

The Superior Court ruled that Officer Shupe had a “*particularized and objective basis to suspect that Mr. Diggs was committing a crime – possible possession of a firearm without a license to do so, or if hidden, carrying a concealed deadly weapon.*”⁴²

⁴¹ Cpl. Marino gave inconsistent testimony about the location of the firearm according to the informant. He initially testified that informant said it was located “on” his waistband, which would mean it was on the exterior of his pants. A45. He told Officer Shupe that the informant said it was “in” his waistband, meaning it was inside his pants. A46, 47.

Officer Shupe testified that Corporal Marino told him the informant said the gun was “in his waistband.” A61. The Superior Court’s factual finding that the gun was “in” the waistband was clearly erroneous in view of the testimony that it was “on” the waistband.

⁴² *State v. Diggs*, p. 6. (There is no crime of possession of a non-concealed firearm without a license to do so. The Superior Court erred to the extent its ruling is based upon this mistake of law.)

The Court's reasoning is erroneous because of the insufficient analysis of the informant's basis of knowledge. The informant's claimed reliability was the only basis to support his/her conclusion of criminal activity.⁴³ The lack of information provided about the informant's basis of knowledge for the tip, and "specific facts and conditions" about the alleged illegal activity, undermines the reliability of the information conveyed. There was no indication of whether the tip was based upon firsthand knowledge or hearsay. There was no information about the informant's ability to observe the gun based upon his vantage point or distance from Diggs. There was no description of the handgun other than it was small. A45. There was no description about the location of the gun on Diggs' person (Front, side, back? On or in his waistline?). There was no indication of whether there was a tell-tale bulge in the waist area or whether Diggs was walking with an altered gait. Exactly what was the informant's basis of knowledge?

It is difficult to imagine that the informant's tip could be based upon personal observation given that Diggs was wearing a camouflaged jacket that likely covered his waistline. How could the informant see a gun –

⁴³ Compare, *State v. Valentine*, 207 A. 3d 566 (2019).

whether it was “on” or “in” Diggs’ waistline -- since he was wearing a coat. If the coat did not cover the waistline, how was the informant able to observe a gun if it was in the waistline?

This observation is especially incredible in view of the fact that no other officer involved in the investigation testified that they observed a gun “in” or “on” Diggs’ waistband (or a bulge, or an altered gait) at any time during this investigation. Trained police officers were focused on Diggs and had plenty of opportunity to corroborate indicia of gun possession as he walked down the block and into the Market. No officer testified to observing a gun, or even a bulge, during their initial observation until the physical encounter. At least four officers were involved in the investigation leading up to the pat down search and at no time was there any observation consistent with possession of a weapon by Diggs. The Superior Court conceded as much when it found that Officer Shupe’s failure to see “*any indicia of gun possession by Mr. Diggs – altered gait, checking for a weapon as one walks, etc.*” ... was not “*fatal to the reasonable suspicion analysis given the source of the information...*”⁴⁴

⁴⁴ *State v. Diggs*, p.6.

However, the Court erred by finding the informant reliable in the absence of a sufficient basis of knowledge analysis. Furthermore, the facts that matched -- black male, age 30-35, wearing a camouflaged jacket, walking in a certain location -- were innocuous and do not support reasonable suspicion in the absence of reliable details of gun possession.

4. Shupe was not entitled to rely upon Marino's information as the sole basis to stop Diggs.

Officer Shupe was entitled to rely upon the tip conveyed by Corporal Marino to stop Diggs only to the extent that the tip was reliable and provided reasonable suspicion for the investigatory stop. A review of Corporal Marino's testimony does not indicate that he conveyed any information about the informant's reliability to Officer Shupe.⁴⁵ He denied that he texted Officer Shupe with any information about the informant. A52. While Officer Shupe testified that Corporal Marino told him the information was from a reliable witness,⁴⁶ that is not supported by Marino's testimony.

Since Corporal Marino did not testify that he advised Officer Shupe that the informant was reliable, the tipster's information must be treated as an anonymous tip. An anonymous tip that a person is carrying a gun, without

⁴⁵ It is repeated and reemphasized that Cpl. Marino was asked, "what exactly did you relay to Officer Shupe," and his response did not include any indication of the informant's reliability.

⁴⁶ A61.

more, will not be sufficient to justify an officer's stop and frisk of that person.⁴⁷ Here, there is nothing more than a conclusory tip, therefore there was an insufficient basis for the stop and protective search.

Under the collective knowledge doctrine, also termed the fellow-officer rule, information or observations of several officers can be combined to establish the probable cause needed for a warrantless search or seizure. The Delaware Supreme Court applied this doctrine to rule that the defendant's arrest was not lawful in *State v. Cooley*.⁴⁸ This doctrine applies to a reasonable suspicion analysis, as well.

In *Cooley*, the Court ruled that the defendant's arrest for DUI was unlawful because one officer who directed a second officer to arrest the defendant did not have probable cause to support that arrest, and because a third officer who did have sufficient facts to form the basis of probable cause did not relay that information to the first officer. *Cooley* stands for the proposition that those officers with probable cause for an arrest must communicate those facts to the officers actually carrying out the arrest. It logically follows that this applies to the question of whether a police officer has reasonable suspicion to stop and frisk a suspect based upon the facts

⁴⁷ *Florida v. J.L.*, supra.

⁴⁸ *State v. Cooley*, 457 A.2d 353 (Del. 1983)

known to another officer, but not communicated to the detaining officer. In other words, *Cooley* applies to whether a detention is valid when there is no communication with the officer who has the knowledge to justify the detention.

Here, there is insufficient proof that Corporal Marino advised Shupe of the informant's reliability, therefore there was an insufficient basis to detain Diggs.⁴⁹

5. The Superior Court's finding that the conduct of Diggs justified a limited protective search for concealed weapons is clearly erroneous.

The Superior Court found that Diggs engaged in suspicious behavior after being confronted by Officer Shupe (threw down items in his hands, got into a defensive position and stepped backwards) which provided the basis to conduct a limited protective search for weapons.⁵⁰ This finding is based upon an erroneous review of the totality of the evidence and an unjustifiable disregard of contrary facts.

Guy Bullock was employed at the Market and witnessed the encounter. He observed that when the police officers arrived, Diggs had

⁴⁹ Compare, *Sierra v. State*, 958 A.2d 825, 832 (Del. 2008) (DOJ employee could not simply vouch for the informant without providing a probation officer with sufficient facts enabling him to assess the reasonableness of the tip).

⁵⁰ *State v. Diggs*, p.7.

“opened the door and he got snatched out the door and slammed to the ground.” A100. The first thing he saw was when the officers entered the store is that an officer grabbed Diggs by his arm. He did not hear the officer say anything. A101. He repeated that he was facing the doorway talking to a kid when he saw Diggs grab the door. A115. He saw someone grabbed his arm and that’s when he thought there was going to be a fight, so he moved the kid. A115.

The Court erroneously disregarded Bullock’s testimony reasoning that he was behind Diggs, did not see the face to face interaction, and was talking to some boys.⁵¹ Those findings are erroneous under the totality of Bullock’s testimony. Bullock was in close proximity to the encounter and had a clear view. Bullock was facing the doorway and was aware of what was happening as he reacted to the encounter by taking action to move a kid away from it. A112, 115. At first, he didn’t know that it was an officer who grabbed him. A113. He didn’t know they were police officers until he got to the door. A114.

The Court erroneously dismissed the testimony of Anrea Price, reasoning that she was ten inches shorter than Diggs and could not see the face to face interaction with Officer Shupe. She did not need to see the face

⁵¹ *State v. Diggs*, p.6.

to face interaction to see that Diggs pulled the door open towards him to get out of the store, and that his arm was grabbed from outside of the store. A122. She remembered an officer grabbing Diggs arm and Diggs pulling his arm back. A120. Diggs reacted by pulling his arm when it was grabbed by the officer. A122. She moved out of the way because the officer was pursuing him. A120. She saw Diggs put his hands up *after* the officer attempted to grab his arm and then just remembered seeing him detained on the floor. A120, 121.

The Court erroneously disregarded that fact that Bullock and Price would have been able to observe if Diggs backed up, threw down a cell phone and cigar, and got in a defensive position after the initial approach by police.

Neither Bullock nor Price saw Diggs throw anything. A102, A123. Interestingly, Officer Agosto testified at trial that Diggs had the cellphone in his hand at the time he was taken to the ground by Officers Shupe and Jordan. A169, 170. This directly contradicts Officer Shupe's testimony that Diggs threw the phone down to the ground when confronted by the police.

The Superior Court did not find that Bullock and/or Price were not credible, only that the relevant inconsistencies could be attributed to their respective positions and purported inability to see the entire police

interaction. However, it disregards the undeniable fact that they were both in close proximity to the doorway, and were able to observe what happened when Diggs was at the doorway. Namely, that Diggs was grabbed by the police before any alleged suspicious behavior occurred. The Court erred by disregarding the totality of their respective testimony and ability to observe the events leading to the protective search.

Even if Diggs acted in a way to avoid speaking to the police, that is an insufficient basis to support a detention. In Chief Justice Veasey's dissent in *Quarles v. State*,⁵² he noted that there were many reasons why an innocent person may want to avoid the police, including the fear of being wrongly apprehended or a desire not be put through the annoyance and expense of detainment, or the annoyance of needlessly having to explain himself to a curious officer.⁵³ He also enunciated that "to assume that innocent persons have no reason to fear sudden approach by police ignores the experiences of many members of minority groups."⁵⁴

Officer Shupe testified that his intention was to engage in a consensual encounter with Diggs. A67. "Just as detainees are free to walk

⁵² *Quarles v. State*, 696 A.2d 1334 (1997)(Veasey, C.J. dissenting)

⁵³ *Quarles*, Veasey, C.J. dissenting, at 1341, citing *Alberty v. United States*, 16 S.Ct. 864, 868 (1896).

⁵⁴ *Quarles*, Veasey, C.J. dissenting, at 1341, citing Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 Yale. L. J. 214 (1983), and *California v. Hodari D.*, 111 S. Ct. 1547 1553 n. 4(1991)(Stevens, J., dissenting).

away from consensual encounters, *Berkemer v. McCarty*,⁵⁵ they are similarly free to rebuff attempts by law enforcement personnel to approach them.”⁵⁶ “The adverse inference that an officer draws about the way a person communicates his desire not to speak to an officer is nothing more than a hunch which, under *Terry*, cannot become the sole basis for detaining a person.”⁵⁷

⁵⁵ *Berkemer v. McCarty*, 104 S.Ct.3138, 3150 (1984)

⁵⁶ *Quarles*, Veasey, C.J. dissenting, at 1341, citing *Florida v. Bostwick*, 111 S. Ct. 2382, 2387 (1991); *Florida v. Royer*, 103 S.Ct. 1319, 1323-3-24 91983) and *United States v. Wilson*, 953 F.2d 116, 126 (1991).

⁵⁷ *Quarles*, Veasey, C.J. dissenting, at 1341, citing *United States v. Duffy*, 796 F.Supp. 1252, 1260 n. 8 (D. Minn., 1992).

ARGUMENT II

THE SUPERIOR COURT COMMITTED PLAIN ERROR IN VIOLATION OF DIGGS' FOURTEENTH AMENDMENT RIGHT TO DUE BY FAILING TO APPLY A "LOST AND/OR MISSING EVIDENCE" INFERENCE WHEN MAKING ITS SUPPRESSION HEARING FACTUAL DETERMINATIONS.

1. Question Presented

Did the Superior Court commit plain error in violation of Diggs' Fourteenth Amendment right to due process by failing to apply a "lost and/or missing evidence" inference when making its suppression hearing factual determinations. Diggs did not raise this argument below. The interest of justice exception to Supreme Court Rule 8 applies because this claim involves plain error depriving Defendant of substantial rights under the Fifth and Fourteenth Amendments to the United States Constitution. In the absence of plain error, this Court may review questions not presented to the trial court "when the interests of justice so require" pursuant to Supreme Court Rule 8.⁵⁸

2. Standard and Scope of Review

When a defendant has failed to preserve an issue for appeal, the Court will apply the plain error standard.⁵⁹ Under that standard, "the error

⁵⁸ *Bradley v. State*, 204 A.3d 112 (Table)(Del. 2019).

⁵⁹ Del. Supr. Ct. R. 8.

complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.”⁶⁰

3. Merits

The Fifth Amendment to the United States Constitution guarantees a criminal defendant the due process right to a fair suppression hearing. This fundamental right extends to individual State actions through the due process clause of the Fourteenth Amendment. Article 1, Section 7 of the Delaware State Constitution provides similar protections to Delaware citizens, however, that protection has been held to be greater than that given by its federal counterpart.

This claim relates to the failure of the police to preserve and disclose two categories of evidence which violated Defendant’s right to due process depriving him of a fair suppression hearing. First, Cpl. Marino did not preserve proof of his call with the informant or his text exchange with Officer Shupe. A50-52. Officer Shupe deleted the text exchange with Marino. A62. This evidence was relevant to the suppression issues and potentially exculpatory as it related to the circumstances of the tip, and the substance of the information exchanged.

⁶⁰ *Doherty v. State*, 21 A. 3d 1, 2 (Del. 2011) (quoting *Turner v. State*, 5 A.3d 612, 615 (Del. 2010).

Second, the police failed to obtain existing video surveillance evidence which likely captured the encounter between Diggs and Shupe inside the Market. This evidence was relevant and potentially exculpatory as it likely provided conclusive evidence of the encounter resolving the conflicting testimony about the encounter.

Diggs filed a discovery request seeking this information.⁶¹ The State's discovery response did not disclose this information.⁶² Both categories of evidence were relevant and material to the issue of whether there was reasonable suspicion based upon information from a reliable informant to believe that Diggs possessed a gun, as well as the sequence of events at the corner store. This material was discoverable because it was material to the preparation and presentation of his motion to suppress.

It is well settled law that a State's failure to turn over evidence favorable to an accused upon request violates due process "where the evidence is material either to guilt or to punishment . . ."⁶³ The obligation to disclose exculpatory information is triggered by the defendants request pursuant to Super. Ct. Crim. Rule 16 and is not limited to trial proceedings.⁶⁴ To withhold exculpatory information at earlier stages of a criminal

⁶¹ A30-32

⁶² A33-36.

⁶³ *Brady v. Maryland*, 83 S.Ct. 1194 (1963).

⁶⁴ *Pierson v. State*, 351 A.2d 860 (1976); *O'Neil v. State*, 691 A.2d 50 (1997).

prosecution equally deprives a defendant of an opportunity to vindicate possible deprivation of his constitutional guarantees.⁶⁵ This includes disclosure of all information relating to the credibility of any prosecution witness whether oral, written, or recorded.⁶⁶ A *Brady* violation does not rest upon the good faith or bad faith of the prosecution.

The State had a duty to preserve and disclose the evidence which is the focus of this claim, especially in light of the discovery request made by counsel, and in light of its duty under Super. Ct. Crim. R. 16.⁶⁷

Evidence Preservation Requirement

The failure of the police to preserve cell phone information, as well as the failure to obtain and preserve the Market surveillance video, violated Diggs' constitutionally guaranteed right of access to evidence.⁶⁸ In *Deberry v. State*,⁶⁹ this Court recognized that the "obligation to preserve evidence is rooted in the due process provisions of the Fourteenth Amendment to the United States Constitution and the Delaware Constitution, Article I, Section 7."⁷⁰ *Deberry* involved a situation in which the police failed to preserve

⁶⁵ *O'Neil*, at 54.

⁶⁶ *Valentin v. State*, 74 A.3d 645 (Del. 2013).

⁶⁷ *Deberry v. State* 457 A.2d 744 (Del.1983) and *Lolly v. State*, 611 A.2d 956 (Del.1992) (disclosure of any known potentially exculpatory lost or destroyed evidence is required).

⁶⁸ *United States v. Valenzuela-Bernat*, 102 S.Ct. 3440 (1982).

⁶⁹ *Deberry v. State*, 457 A.2d 744 (Del. 1983),

⁷⁰ *Id* at 751-52.

evidence that was once in their possession. In *Lolly v. State*,⁷¹ the Court concluded that Deberry's holding and analysis was equally applicable to claims involving the alleged failure to gather evidence ab initio.⁷²

The relief sought in this case is similar to the relief provided for the same infraction at the trial level, that is, application of a "lost and/or missing evidence" inference when making the Court's suppression hearing factual determinations.⁷³

The law relating to a lost/missing evidence instruction is instructive to this claim. To determine whether a missing evidence instruction is appropriate, it must first be determined whether the material "would have been subject to disclosure under Superior Court Criminal Rule 16 or under

⁷¹ *Lolly v. State*, 611 A.2d 956 (Del. 1992)

⁷² *Id.* At 960.

⁷³ Note, Pattern Jury Instruction 4.17 is instructive on the nature of the relief to be provided. That instruction provides as follows:

4.17 [UNCOLLECTED/UNPRESERVED/UNMAINTAINED] EVIDENCE

In this case, the Court has ruled that the State failed to [collect/preserve/maintain] evidence that is material or significant to the defense. The evidence in question is [describe the evidence]. Because the State failed to [collect/ preserve/maintain] this evidence, you must assume that, if the evidence were available at trial, it would tend to prove that the defendant is not guilty.

This assumption, which is also called an inference, does not mean that the defendant should be found "not guilty." You must weigh the assumption along with all other evidence in order to reach your conclusion about whether the defendant is guilty or not guilty.

*Brady v. Maryland.*⁷⁴ If disclosure was required, it must next be determined “whether the State had a duty to preserve the material” and if so, “whether the State breached that duty and what consequences should flow from that breach.”⁷⁵ Such consequences are determined by considering the following three factors: “(i) the degree of negligence or bad faith involved; (ii) the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available; and (iii) the sufficiency of the other evidence produced at trial to sustain the conviction.”⁷⁶ “Where ‘the State does not act negligently or in bad faith in failing to preserve evidence, and the missing evidence does not substantially prejudice the defendant’s case,’ a missing evidence instruction is not necessary.”⁷⁷

Here, the *McCrey* factors are applied to determine whether a lost/missing evidence inference should have been made by the court in its suppression hearing analysis. Application of the *McCrey* factors leads to the conclusion that the inference should have applied. The cell phone material would have been subject to disclosure under Rule 16 as it was (1) requested ⁷⁸ (2)

⁷⁴ *McCrey v. State*, 2008 WL 187947, at *2 (Del. Jan. 3, 2008).

⁷⁵ *Id.*

⁷⁶ *Id.* (quoting *Hammond v. State*, 569 A.2d 81, 86 (Del. 1989)).

⁷⁷ *Id.* (quoting *Wainer v. State*, 2005 WL 535010, at *3 (Del. Feb. 15, 2005)).

⁷⁸ A30-32, III.

potentially exculpatory, and (3) relevant to suppression issues. The cell phone material was in the possession, control and custody of the State. The cellphones were used in the course and scope of a criminal investigation – it does not matter that they were owned by the officers. The duty to preserve the cellphone information existed as it was potentially exculpatory and related to their respective credibility. The failure to preserve potentially exculpatory evidence within its custody and control constitutes a breach of its duty.

The result is the same with respect to the Market surveillance video. The surveillance video would have been subject to disclosure under Rule 16 as it was (1) requested⁷⁹ (2) potentially exculpatory, and (3) relevant to suppression issues. The police had sufficient authority and opportunity to secure the surveillance video, either through a search warrant or subpoena. Its forensic unit certainly had the expertise to extract the video even if employees of the Market truly were unable to retrieve it.⁸⁰ The duty to obtain and preserve the video existed as it likely captured the police encounter and

⁷⁹ A30-32, III.

⁸⁰ One wonders if the effort to secure the video would have been as lackadaisical if it captured a crime for which a suspect had not been identified.

was potentially exculpatory. The failure to obtain and preserve the video was a breach of its duty.

The consequences flowing from the breach are determine by applying the following factors:

(i) The degree of negligence or bad faith involved.

With respect to the cellphone material, the officers either deleted the relevant material, or failed to preserve it when a new cellphone was purchased. It was grossly negligent to delete and/or fail to preserve evidence related to a criminal investigation which would have been the subject of a Rule 16 disclosure.

With respect to the surveillance video, this also involves gross negligence. The lack of a better effort to obtain the best evidence of the encounter was inexcusable under the circumstances.

(ii) The importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available.

With respect to the cellphone material, it would have provided indisputable evidence (date and time of call from informant, substance of

text communications between officers) relevant to the suppression inquiry. It would have provided documentation about whether Corporal Marino conveyed that the informant was reliable in his text to Officer Shupe. This evidence would have been more reliable than the vague and inconsistent witness testimony.

With respect to the surveillance material, video is more reliable than witness testimony and would have been the most effective means to resolve the inconsistent testimony presented at the suppression hearing and establish the truth about the events inside the Market.

(iii) The sufficiency of the other evidence produced at trial to sustain the conviction here, to support the constitutionality of the stop and frisk.

The Superior Court had to make credibility determinations for the witness testimony presented at the suppression hearing, including to resolve substantial inconsistencies relating to the encounter in the Market. The video likely would have provided irrefutable proof of the encounter. It likely would have been issue dispositive.

The cellphone material would have provided irrefutable proof of the communication relevant to the suppression issue, and more desirable than relying exclusively upon the recall of the officers.

Prejudice

The lost/missing evidence inference should have been applied by the court. The failure to apply the lost/missing evidence inference was plain error which resulted in the deprivation of Diggs' due process right to a fair suppression hearing. Application of the lost/missing evidence inference would have resulted in a favorable outcome in this suppression motion.

CONCLUSION

Defendant respectfully requests this Court to reverse the Superior Court's decision denying his motion to suppress and remand the case for further proceedings.

/s/ Michael W. Modica
MICHAEL W. MODICA, ESQUIRE
Bar ID # 2169
Attorney for Murad Diggs
P.O. Box 437
Wilmington, DE 19899
(302) 425-3600

Dated January 20, 2021

Exhibit 1

2019 WL 1752644

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

Superior Court of Delaware.

STATE of Delaware,
v.
Murad T. DIGGS, Defendant.

Dated: April 16, 2019

MEMORANDUM ORDER DENYING MOTION TO
SUPPRESS

Eric M. Davis, Judge

*1 Upon consideration of the Motion to Suppress Evidence (the "Motion") filed by Defendant **Murad T. Diggs** on March 11, 2019; the State's Response to Defendant's Motion to Suppress (the "Response") filed by the State of Delaware on March 22, 2019; the evidence provided by the parties at a hearing begun on March 29, 2019 (the "Hearing"); the arguments made on the Motion and Response by the parties at the Hearing; the unsolicited letter from Misty A. Seemans, Esq. to the Honorable Eric M. Davis submitted after the Hearing on April 1, 2019 (the "Letter"); and for the reasons set forth below, the Motion is **DENIED**.

Introduction

This is a criminal action. The State has charged Mr. **Diggs** with: (i) possession of a firearm by a person prohibited; (ii) possession of ammunition by a person prohibited; (iii) carrying a concealed deadly weapon; and (iv) resisting arrest. On October 26, 2018, a citizen contacted Corporal Alexander Marino of the Wilmington

Police Department ("WPD"), by way of Corporal Marino's personal cellphone, regarding a black male, age 30-35, wearing a camouflaged-styled jacket with a handgun in his waistband. According to the citizen, the black male was entering into a store located at the corner of Chestnut Street and S. Harrison Street. Corporal Marino was not on duty so he relayed the information to on-duty WPD Officer Raymond Shupe.

Officer Shupe responded to the area of S. Harrison Street and observed four to five black males—including a black male, age 30-35, wearing a camouflaged-styled jacket—walking down S. Harrison Street towards Elm Street. Officer Shupe saw the black male enter the Market on the corner of S. Harrison Street and Elm Street. Officer Shupe called for back-up and, after back-up arrived, approached the Shop Smart Market (the "Market"). As Officer Shupe entered the Market, Officer Shupe immediately encountered the black male, later identified as Mr. **Diggs** and asked to speak to him. Officer Shupe testified that Mr. **Diggs** threw down a cellphone and a cigar, took a defensive position, looked around and stepped backwards. Believing that Mr. **Diggs** might have a firearm, Officer Shupe grabbed Mr. **Diggs**' arm to check for weapons. A struggle ensued with two other WPD officers assisting and Officer Shupe found a gun in Mr. **Diggs**' waistband area.

Mr. **Diggs** filed the Motion to suppress the gun found on his person arguing that Officer Shupe lacked sufficient reasonable articulable suspicion to "seize" Mr. **Diggs** because: (i) the citizen providing information to Corporal Marino did not provide detailed enough information; (ii) the citizen's information was relayed to Corporal Marino and not Officer Shupe; (iii) Officer Shupe did not observe Mr. **Diggs** engage in any suspicious activity prior to engaging him in the Market.

The State opposes the Motion. The State claims that: (i) Officer Shupe's initial encounter with Mr. **Diggs** did not amount to a seizure; and (ii) Officer Shupe seized Mr. **Diggs** based on the tip of the citizen, his own observations and due to the high crime area where the encounter took place. The State contends that the totality of the circumstance created reasonable articulable suspicion that Mr. **Diggs** was carrying a concealed deadly weapon.

Facts¹

*2 The Court held the Hearing on March 29, 2019 and April 1, 2019. Six persons testified at the Hearing. Corporal Marino and Officer Shupe testified for the State

and were cross-examined by Mr. Diggs' counsel. Mr. Diggs presented as witnesses: (i) Guy Bullock; (ii) Andrea Price; (iii) Na'Isha Pantoja; and (iv) Julia Pantoja. The State had the opportunity to cross-examine each of Mr. Diggs' witnesses. All the witnesses, except Corporal Marino, were at the Market on October 26, 2018.

Corporal Marino is a WPD officer with 12 years of experience. On October 26, 2018, Corporal Marino was off-duty. Corporal Marino received a call from a person he has known for 11 years. Corporal Marino did not describe this person as a confidential informant. Instead, Corporal Marino stated the person was a citizen who had provided Corporal Marino with information on various crimes on five occasions. The name of the citizen was not provided at the Hearing. Corporal Marino testified that the citizen's information was factually reliable and held lead to arrests. Corporal Marino knows where the citizen lives, and stated that this citizen had never received any compensation (money, dropped charges, etc.) in exchange for any information provided.

Corporal Marino provided that, on October 26, 2018, the citizen called and told him that a black male, age 30-35 and wearing a camouflaged jacket had a handgun in his waistband. Corporal Marino testified that the citizen also provided that the black male was going into a store located at the corner of S. Harrison and Chestnut Street. Corporal Marino immediately relayed the information to a WPD officer, Officer Shupe, who was on-duty on October 26, 2018. Corporal Marino testified that it was standard operating procedure for an off-duty officer to relay this type of information to an on-duty officer.

Corporal Marino stated that the location of S. Harrison and Elm Streets was the 200 block of S. Harrison. Corporal Marino said that this particular block was a high crime rate neighborhood that had recently experienced a shooting and an incident involving "Molotov Cocktails."

Corporal Marino did not keep any messages or phone log from October 26, 2018. Corporal Marino testified that he bought a new phone and no longer had the old phone which was wiped as part of the upgrade.

Officer Shupe is a WPD officer with 2.5 years of experience. Officer Shupe was on-duty on October 26, 2019. Officer Shupe discussed his training, including his training on how to identify a person armed with a gun—checking to see if the gun is secured, non-swinging arm on side where gun is located, type of walk, etc. Officer Shupe also testified about the ready position when drawing a fire arm with the hands up at chest level as opposed to one's side.

On October 26, 2018, Officer Shupe was in uniform and patrolling in a "fully marked" car with Officer Agosto.

Officer Shupe received a call from Corporal Marino. Officer Shupe testified that Corporal Marino reported that a reliable source told him that a black male, age 30-35 in a camouflaged jacket had a handgun in his waistband on the 200 block of S. Harrison Street, specifically on the corner of Chestnut Street and S. Harrison Street. Officer Shupe noted that the 200 block of S. Harrison Street is a high crime area that recently experienced a shooting incident.

Officer Shupe proceeded to the area. When Officer Shupe arrived, he saw four to five black males walking up the 200 block of S. Harrison Street in the direction away from Chestnut Street and towards Elm Street. Officer Shupe testified that he saw that one of the black males matched the description provided to him by Corporal Marino. Officer Shupe noted that the individual entered the Market on the corner of S. Harrison Street and Elm Street. Due to the report of a handgun, Officer Shupe called and waited for additional WPD officers to arrive. Once Officers Jordan and Gaskin arrived, Officer Shupe got out of his car and approached the Market. As Officer Shupe entered the Market, he immediately encountered the black male, age 30-35 and wearing the camouflaged jacket who was leaving the Market. Officer Shupe testified that he later learned this person was Mr. Diggs.

*3 Upon encountering Mr. Diggs, Officer Shupe stated that he asked to speak with Mr. Diggs as part of a casual encounter. Officer Shupe testified that Mr. Diggs threw down a cellphone and cigar that he was holding and assumed a defensive position with arms raised to chest level. Mr. Diggs then took steps backward while looking around. Mr. Diggs faced Officer Shupe during this initial encounter. Officer Shupe stated that this was the first time he had approached a person to talk to him/her and the person acted in this manner. Based on this and the information he had from Corporal Marino, Officer Shupe testified that he believed that Mr. Diggs had a firearm. As such, Officer Shupe grabbed Mr. Diggs' arm and tried to check for weapons. Officer Shupe said a struggle ensued in the Market and that Officers Jordan and Agosto joined in to secure Mr. Diggs. As this was happening, Officer Shupe found a loaded handgun in Mr. Diggs' pants. Officer Shupe testified that Mr. Diggs told him that "I need it for protection...I've been shot before."

After the arrest, Officer Shupe asked a person for the footage from a camera located in the Market. Officer Shupe was told by a person working at the Market that he did not know how to retrieve the footage. At a later date, Officer Shupe went back and tried again to retrieve the footage but, once again, was told that no one could retrieve the footage and give it to him.

At the Hearing, Officer Shupe stated that no one else in the Market was wearing a camouflaged jacket. Officer

Shupe felt the store was not overly busy and that he only remembered one other customer—a woman in a red shirt.

On cross-examination, Officer Shupe provided that he did not know of Corporal Marino's relationship with the citizen. Officer Shupe **stated** that he did not know the citizen other than from the phone call with Corporal Marino and was not concerned with the reliability of the citizen. Officer Shupe admitted that he did not mention the cigar at the preliminary hearing and did not demonstrate, as he did at the Hearing, the defensive stance taken by Mr. **Diggs** at the preliminary hearing. Officer Shupe testified that he did not keep any call log or text messages from October 26, 2018 as he has to use his personal phone and that he needs to erase items for memory reasons.

Mr. Bullock is a cook at the Market. Mr. Bullock was working at the Market on October 26, 2018. Mr. Bullock **stated** that it was unusually hectic that night and that the store was crowded. Mr. Bullock was talking to children, at the request of the manager, by an ice cream machine in the front when Officer Shupe encountered Mr. **Diggs**. Mr. Bullock saw Officer Shupe grab Mr. **Diggs** but did not see Mr. **Diggs** throw anything to the ground before Officer Shupe grabbed him. Mr. Bullock said everything happened very quickly. Mr. Bullock thought that the officer that grabbed Mr. **Diggs** looked white but that it happened so quickly he could not be sure. Mr. Bullock said a number of officers were involved. Mr. Bullock noted that his focus was on the children. Mr. Bullock said he did not really know Mr. **Diggs** other than his name. Mr. Bullock **stated** that he saw Mr. **Diggs** at least once a day for over a year when Mr. **Diggs** came in and purchased a certain type of sandwich but never really talked to Mr. **Diggs**.

Ms. Pierce is a neighborhood resident, living across the street from the Market. Ms. Pierce was in the Market on October 26, 2018. Ms. Pierce was behind Mr. **Diggs** when Officer Shupe arrived. Ms. Pierce is 10 inches shorter than Mr. **Diggs**. Ms. Pierce said she saw officers grabbing at Mr. **Diggs** and that Mr. **Diggs** tried to get away with his hands up. Ms. Pierce **stated** that everything happened very quickly. Ms. Pierce did not see Mr. **Diggs** throw anything to the ground and that the incident took place in the narrow entryway to the Market—half in and out of the storefront. Ms. Pierce knows Mr. **Diggs** from a friend of her mother.

Ms. Na'Isha Pantoja is the sister of Mr. **Diggs**. Na'Isha was outside the Market on October 26, 2018. Na'Isha saw the WPD officers approach the store. She noted that there was another black male wearing a camouflaged jacket that the officers did not stop. Na'Isha said that this black male was younger, "in his twenties." Na'Isha testified that the encounter between WPD and Mr. **Diggs** happened first at

the door and that Mr. **Diggs** was wrestled to the ground outside the Market. Na'Isha said the officers searched Mr. **Diggs** between 20 to 30 times. On cross-examination, Na'Isha **stated** that she took video of the incident, but that the phone somehow deleted the "front end" and the "back end" of the incident but retained the middle portion of the event. No part of the video was played at the Hearing.

*4 Na'Isha **stated** that she has dinner with Mr. **Diggs** "maybe" four times a week. Despite having dinner with Mr. **Diggs** on a regular basis, Na'Isha testified that she has never discussed the October 26 incident with her brother.

Ms. Julia Pantoja is Mr. **Diggs**' mother. Julia was outside the Market on October 26, 2018. Ms. Pantoja also testified that there was another younger black male wearing a camouflaged jacket that was not stopped by WPD officers. Julia said that six to seven officers approached. Julia said the officers grabbed Mr. **Diggs** and searched him six to seven times, including several times with respect to his pants. Julia **stated** that Mr. **Diggs** is part of a close family and that she has talked to him briefly about the October 26 incident between three and four times.

Analysis

The **State** bears the burden of proof on a motion to suppress a warrantless search or seizure.² The **State** must demonstrate, by a preponderance of the evidence, that the challenged police action comported with the defendant's rights guaranteed under the United States and Delaware Constitutions.³

The Fourth Amendment to the United States Constitution and Article 1, § 6 of the Delaware Constitution prohibit unreasonable searches and seizures.⁴ The Delaware Supreme Court has held that a person is seized only if, under the totality of the circumstances, a reasonable person in the same position would not feel free to "go about his business" or "ignore the police presence."⁵

As the fact finder here, the Court is the judge as to the credibility of each witness and of the weight to be given to the testimony of each.⁶ The Court is taking into consideration each witness's means of knowledge, strength of memory and opportunity for observation. The Court will also consider the reasonableness or unreasonableness of the testimony and whether it is consistent or inconsistent. The Court will consider the motivations of the witness, whether the testimony has

been contradicted, the bias, prejudice or interest of the witness, the demeanor of the witness upon the witness stand, and all other facts and circumstances shown by the evidence that affect the credibility of the testimony.

The Court does find that some of the testimony at the Hearing was conflicting by reason of inconsistencies. As such, the Court has the duty to reconcile it, if reasonably possible, so as to make one harmonious story of it all. Even with the inconsistencies, the Court finds that it can reconcile the inconsistencies to make one harmonious story of it all. Moreover, a number of the inconsistencies—number of searches, and alike—are not relevant to the Court's ultimate conclusion.

The Court finds that Officer Shupe seized Mr. Diggs at the time he grabbed Mr. Diggs' arm. At this point in time, a reasonable person in the same or similar situation would not have felt free to go about his/her business. Therefore, the Court will focus on whether Officer Shupe had reasonable suspicion at the time he grabbed Mr. Diggs' arm.

*5 Police officers may seize or detain an individual for a limited investigation if the "officer ha[s] a particularized and objective basis to suspect" that the individual "is committing, has committed, or is about to commit a crime."⁸ Delaware codified this reasonable suspicion standard in 11 Del. C. § 1902. This Court has explained that reasonable suspicion is evaluated by 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."⁹

Section 1903 of Title 11 provides that:

A peace officer may search for a dangerous weapon any person whom the officer has stopped or detained to question as provided in § 1902 of this title, whenever the officer has reasonable ground to believe that the officer is in danger if the person possesses a dangerous weapon. If the officer finds a weapon, the officer may take and keep it until the completion of the questioning, when the officer shall either return it or arrest the person. The arrest may be for the illegal possession of the weapon.¹⁰

The United States Supreme Court recognized, in *Terry v. Ohio*,¹¹ that a policeman making a reasonable investigatory stop should not be denied the opportunity to protect himself from attack. "When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others," the officer may conduct a limited protective search for concealed weapons.¹²

The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence. As such, the limited search for a weapon might be equally necessary and reasonable whether or not carrying a concealed weapon violated any applicable state law. As stated in *Nash v. State*, if an officer is entitled to make a stop or a detention to question and has reason to believe that the suspect is armed and dangerous, then the officer may conduct a weapons search limited in scope to this protective purpose.¹³ Actual fear by the police officer for his or her own safety is not a prerequisite to the reasonableness of the limited search for weapons.¹⁴

The Supreme Court has held that certain anonymous tips lack enough reasonable suspicion to allow an officer to perform an investigatory stop.¹⁵ The Supreme Court has also held that a prior basis for establishing the informant's reliability is unnecessary "in the case of an average law abiding citizen performing a civic duty by reporting a crime. Indeed, a citizen informant 'is a passive observer with no connection with the underworld, and no reason to fabricate what he has seen or heard, and as such is considered presumptively reliable.'"¹⁶ In fact, in the case of an average law-abiding citizen doing her civic duty by reporting a crime, the mere revelation of identity and reporting of criminal activity by the citizen may be enough to constitute probable cause.¹⁷

*6 The Court finds from the facts presented at the Hearing that Corporal Marino's citizen falls into the category of "citizen informant." Mr. Diggs attempts to have this citizen characterized as a "confidential informant;" however, the record demonstrates that the citizen informant was not a member of the criminal community, but rather an individual who occasionally telephoned police to report incidents of which he or she had knowledge. Corporal Marino's testimony that his caller was a citizen who never received compensation (money, dropped charges, etc.) for relayed information support the finding that the caller was a citizen informant.

Moreover, an informant's tip (whether from a citizen or another type of informant) can be corroborated externally.¹⁸ While that may not be as necessary in a case involving a citizen informant, such is the case here. Corporal Marino relayed that he had facts from a reliable source that a black male, age 30-35, wearing a camouflaged jacket and having a firearm in his waistband was entering a store on the corner of Chestnut and S. Harrison Streets.¹⁹ When Officer Shupe arrived shortly afterwards, Officer Shupe saw a person matching that description on the same block, walking away from Chestnut Street and eventually entering the Market. The description was specific enough that the evidence demonstrates that WPD officers, including Officer Shupe, did not even stop and question another black male

wearing a similar jacket. Instead, Officer Shupe went into the Market to talk to Mr. **Diggs**.

Mr. **Diggs** contends that Officer Shupe did not testify that he saw any indicia of gun possession by Mr. **Diggs**—altered gait, checking for a weapon as one walks, etc. While more corroboration is necessarily better, the Court does not find this fatal to the reasonable suspicion analysis given the source of the information, Mr. **Diggs**' location on the same block as first reported, and the spot-on description of Mr. **Diggs**' age, race and apparel.

The Court finds that Officer Shupe had a particularized and objective basis to suspect that Mr. **Diggs** was committing a crime—possible possession of a firearm without a license or, if hidden, carrying a concealed deadly weapon. Given that reasonable articulable suspicion supported the stop, the inquiry shifts as to whether Officer Shupe could frisk Mr. **Diggs** to determine whether Mr. **Diggs** had a weapon.

The witnesses testifying at the hearing give various accounts of what happened at the entrance of the Market. The relevant inconsistencies in testimony relate to the interaction between Mr. **Diggs** and Officer Shupe prior to Officer Shupe grabbing Mr. **Diggs**. The Court understands from all of the testimony that the encounter between Officer Shupe and Mr. **Diggs** happened fast over a few seconds.²⁰ In addition, given the narrow aisles at the Market, no witness at the Hearing had a clear view of the face to face interaction between Officer Shupe and Mr. **Diggs** other than Officer Shupe. Mr. Bullock was behind Mr. **Diggs** and, at the request of management, talking to some boys in the shop. Ms. Pierce was also behind Mr. **Diggs**. Although not dealing with customers like Mr. Bullock, Ms. Pierce is 10 inches shorter than Mr. **Diggs** and necessarily had her view of the face-to-face encounter between Officer Shupe and Mr. **Diggs** blocked by Mr. **Diggs**. Na'Isha and Julie Pantoja were outside the Market and were restricted in their view of the encounter by Officer Shupe and the additional WPD officers at the scene. Under these circumstances, the Court would expect the testimony to differ as to what exactly happened between Officer Shupe and Mr. **Diggs**.

*7 Officer Shupe was in an area that had recently experienced a shooting and an incident involving Molotov cocktails. The citizen informant provided that Mr. **Diggs** had a concealed firearm. According to Officer Shupe, Officer Shupe tried to talk to Mr. **Diggs** but, after asking

to speak with him, Mr. **Diggs** reacted in a manner that Officer Shupe had never seen before. Mr. **Diggs** threw down the items in his hands, got into a defensive position and took steps backwards. At this point, Officer Shupe believed that Mr. **Diggs** had a gun and grabbed him to check for weapons. A struggle ensued, other WPD officers joined in and a loaded handgun was found in Mr. **Diggs**' waistband.

The Court finds that Officer Shupe was justified in believing that Mr. **Diggs**, whose suspicious behavior he was investigating at close range, was armed and presently dangerous to Officer Shupe or others. Officer Shupe was a policeman making a reasonable investigatory stop in a situation where reliable information supported the conclusion that Mr. **Diggs** may be armed with a handgun. Officer Shupe, therefore, should not be denied the opportunity to protect himself from possible attack when faced with situation involving suspicious behavior. Accordingly, the Court finds that Officer Shupe did not violate Mr. **Diggs**' constitutional rights when Officer Shupe attempted to conduct a limited protective search for concealed weapons.²¹

Conclusion

For the above reasons, the Court finds that there was reasonable suspicion to stop Mr. **Diggs** based on the information provided to Corporal Marino by the citizen informant and relayed to Officer Shupe. The conduct of Mr. **Diggs** subsequent to Officer Shupe approaching him demonstrated to Officer Shupe that Mr. **Diggs** might be armed and presently dangerous. As such, Officer Shupe was justified in his attempts to conduct a limited protective search for concealed weapons.

IT IS HEREBY ORDERED that the Motion is **DENIED**.

All Citations

Not Reported in Atl. Rptr., 2019 WL 1752644

Footnotes

1 Unless otherwise noted, the facts in this section are from the Hearing.

2 *Hunter v. State*, 783 A.2d 558, 560-61 (Del. 2001).

3 *Id.*

4 *Harris v. State*, 806 A.2d 119, 124 (Del. 2002).

5 *Flannory v. State*, 805 A.2d 854, 857 (Del. 2001).

6 *See Dunlap v. State*, 812 A.2d 899 (Del. 2002)(table); *see also Poon v. State*, 880 A.2d 236, 238 (Del. 2003).

7 *Lopez-Vazquez v. State*, 956 A.2d 1280, 1288 (Del. 2008).

8 *Woody v. State*, 765 A.2d 1257, 1262 (Del. 2001).

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

10 11 Del. C. § 1903

11 392 U.S. 1 (1968).

12 *Id.* at 26; *see also Adams v. Williams*, 407 U.S. 143 (1972).

13 *Nash v. State*, 295 A.2d. 715, 717 (Del. 1972).

14 *Id.* at 718.

15 *Guilfoil v. State*, 3 A.3d 1097 (Del. 2010)(table)(quoting *Bloomingtondale v. State*, 842 A.2d 1212, 1219 (Del. 2004)) (internal quotations omitted).

16 *Baily v. State*, 440 A.2d 997, 999 (Del. 1982)(quoting from *Harris v. State*, 416 A.2d 189, 202 (Del. 1980)); *see also Wilson v. State*, 314 A.2d 905, 907-08 (Del. 1973).

17 *See Wilson*, 314 A.2d at 907.

18 *See, e.g., Garner v. State*, 314 A.2d 908 (Del. 1973).

19 At the Hearing, Mr. Diggs seemingly contended that the fact that Corporal Marino talked to the citizen informant and relayed the information to Officer Shupe somehow negatively impacted the credibility of the information provided by the citizen informant. Delaware courts have held that an arresting officer is entitled to rely on information relayed to him through official channels and that the arresting officer need not be apprised of the underlying circumstances which gave rise to the conclusion of probable cause. *See Thomas v. State*, 8 A.3d 1195, 1198 (Del. 2010); *State v. Cooley*, 457 A.2d 352, 355 (Del. 1983)(officer can act in the belief that his fellow officer's judgment is correct). While Officer Shupe did not receive the information from WPD dispatch, Officer Shupe received the call from a superior officer, Corporal Marino, who had been working in the area for many years. In addition, Corporal Marino testified that it was "standard operating procedure" for an off-duty officer to relay the information to an on-duty officer.

20 Every witness testified that the event happened quickly. This probably lead to inconsistencies about the location where the encounter occurred, the number officers on the scene and alike.

- 21 The Court is using the word “attempted” here because the seizure by Officer Shupe escalated due to resistance by Mr. **Diggs** and the limited protective search required intervention by other WPD officers.

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

Exhibit 2

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE

VS.

MURAD T DIGGS

Alias: See attached list of alias names.

DOB: 11/18/1982

SBI: 00363464

CASE NUMBER:
N1810015149A
N1904013820

IN AND FOR NEW CASTLE COUNTY
CRIMINAL ACTION NUMBER:

IN19-04-1143
DDEAL TIER 4(F)
IN18-12-1284
PFBPP PABPP(F)
IN18-12-1285
PFBPP PABPP(F)

RELEASE

Nolle Prosequi on all remaining charges in this case
ALL SENTENCES OF CONFINEMENT SHALL RUN CONSECUTIVE

CORRECTED SENTENCE ORDER

NOW THIS 26TH DAY OF AUGUST, 2020, IT IS THE ORDER OF THE
COURT THAT: THE ORDER DATED August 14, 2020 IS HEREBY
CORRECTED AS FOLLOWS:

The defendant is adjudged guilty of the offense(s) charged.
The defendant is to pay the costs of prosecution and all
statutory surcharges.

AS TO IN19-04-1143- : TIS
DDEAL TIER 4

Effective August 14, 2020 the defendant is sentenced
as follows:

- The defendant is placed in the custody of the Department
of Correction for 25 year(s) at supervision level 5 with
credit for 484 day(s) previously served

- Suspended after 2 year(s) at supervision level 5

- For 23 year(s) supervision level 4 DOC DISCRETION

- Suspended after 6 month(s) at supervision level 4 DOC
DISCRETION

APPROVED ORDER 1 August 26, 2020 15:13

EXHIBIT 2

STATE OF DELAWARE
VS.
MURAD T DIGGS
DOB: 11/18/1982
SBI: 00363464

- For 2 year(s) supervision level 3
- Hold at supervision level 5
- Until space is available at supervision level 4 DOC
DISCRETION

AS TO IN18-12-1284- : TIS
PFBPP PABPP

- The defendant is placed in the custody of the Department of Correction for 10 year(s) at supervision level 5
- Suspended for 18 month(s) at supervision level 3

AS TO IN18-12-1285- : TIS
PFBPP PABPP

- The defendant is placed in the custody of the Department of Correction for 8 year(s) at supervision level 5
- Suspended for 18 month(s) at supervision level 3

Probation is concurrent to criminal action number
IN19-04-1143 .

SPECIAL CONDITIONS BY ORDER

STATE OF DELAWARE
VS.
MURAD T DIGGS
DOB: 11/18/1982
SBI: 00363464

CASE NUMBER:
1904013820
1810015149A

The defendant shall pay any monetary assessments ordered during the period of probation pursuant to a schedule of payments which the probation officer will establish.

Pursuant to 29 Del.C. 4713(b)(2), the defendant having been convicted of a Title 11 felony, it is a condition of the defendant's probation that the defendant shall provide a DNA sample at the time of the first meeting with the defendant's probation officer. See statute.

Obtain and remain gainfully employed.

Be evaluated for substance abuse and follow any recommendations for counseling, testing or treatment deemed appropriate.

Forfeit \$1,289.00 seized cash

See Notes

For the purposes of ensuring the payment of costs, fines, restitution and the enforcement of any orders imposed, the Court shall retain jurisdiction over the convicted person until any fine or restitution imposed shall have been paid in full. This includes the entry of a civil judgment pursuant to 11 Del.C. 4101 without further hearing.

NOTES

=====CORRECTED ORDER=====

And now this 26th day of August, 2020, the effective date has been corrected to August 14th, 2020 and is corrected to reflect 484 days of credit time. All others terms and conditions previously imposed remain the same.

JUDGE CHARLES E BUTLER

APPROVED ORDER

3

August 26, 2020 15:13

FINANCIAL SUMMARY

STATE OF DELAWARE
VS.
MURAD T DIGGS
DOB: 11/18/1982
SBI: 00363464

CASE NUMBER:
1904013820
1810015149A

SENTENCE CONTINUED:

TOTAL DRUG DIVERSION FEE ORDERED	
TOTAL CIVIL PENALTY ORDERED	
TOTAL DRUG REHAB. TREAT. ED. ORDERED	
TOTAL EXTRADITION ORDERED	
TOTAL FINE AMOUNT ORDERED	
FORENSIC FINE ORDERED	
RESTITUTION ORDERED	
SHERIFF, NCCO ORDERED	315.00
SHERIFF, KENT ORDERED	
SHERIFF, SUSSEX ORDERED	
PUBLIC DEF, FEE ORDERED	200.00
PROSECUTION FEE ORDERED	200.00
VICTIM'S COM ORDERED	
VIDEOPHONE FEE ORDERED	3.00
DELJIS FEE ORDERED	3.00
SECURITY FEE ORDERED	30.00
TRANSPORTATION SURCHARGE ORDERED	
FUND TO COMBAT VIOLENT CRIMES FEE	45.00
SENIOR TRUST FUND FEE	
AMBULANCE FUND FEE	
<hr/>	
TOTAL	796.00

APPROVED ORDER

4

August 26, 2020 15:13

LIST OF ALIAS NAMES

STATE OF DELAWARE

VS.

MURAD T DIGGS

DOB: 11/18/1982

SBI: 00363464

CASE NUMBER:

1904013820

1810015149A

BRANDON KING

MURAD T DIGGS SR

MURAD DIGGS

MAURD DIGGS

MORAD T DIGGS

BRIAN DIGGS

BRENDON KING

MORAD DIGGS

ARCHIE L PANTOJA