



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 REPLY BRIEF

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REPLY STATEMENT OF FACTS

The Corrected Sentencing Order is partially incorrect. It erroneously provides that Diggs was sentenced to 10 years at L5 *suspended* for 10 months L3 for the offense of PFBPP (IN18-12-1284). In fact, Diggs was sentenced to 10 years at L5 for that offense. AR3

ARGUMENT I

THE SUPERIOR COURT ABUSED ITS DISCRETION IN DENYING DIGG'S MOTION TO SUPPRESS

Merits of the Reply Argument

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

The State glosses over the insufficiency of the evidence establishing the tipster as a "citizen informant." The "citizen informant" standard requires evidence that the tipster is (1) a passive observer, (2) having no connection with the criminal underworld, and (3) no reason to fabricate what has been seen or heard.¹ Stated another way, a "citizen informant" is a known, law-abiding citizen reporting a crime.² The Superior Court did not faithfully apply that standard to the facts in this case, and the State compounds the error in its defense of the Court's decision.

First, the State disregards its failure to establish a record that the tipster was a "passive observer" since there is no indication of the tipster's basis of knowledge (personal or hearsay).

¹ *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).

² *Bailey v. State*, 440 A.2d 997, 999 (Del. 1982).

Second, the Superior Court erred by finding that the tipster “was not a member of the criminal community” even though that is not what Marino said. The State is incorrect by implying that Marino’s designation of the tipster as a “concerned citizen” with “no pending charges” is the functional equivalent of someone who is not a member of the criminal community.

Next, the State did not establish a record to support a conclusion that the tipster had no reason to fabricate the tip.

Finally, the State exaggerates the tipster’s past 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 State’s approval of the Superior Court’s decision is not consistent with the “concerned citizen” standard.

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

The State has failed to contest the argument that the “citizen informant” doctrine operates as an improper conclusive presumption in violation of Delaware law. When presented with a motion to suppress evidence obtained as a result of a warrantless search, the State bears the burden of proving, by a

preponderance of the evidence, that the “challenged police conduct comported with the rights guaranteed [to the defendant] by the United States Constitution, the Delaware Constitution and Delaware statutory law.”³ The improper conclusive presumption improperly relieves the State from its burden of showing that the informant’s tip is reliable, and shifts the burden to the Defendant. But the Defendant is precluded from rebutting the presumption since it is conclusive.

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

Defendant stands on the facts and reasons supporting this claim in his opening brief.

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

The State misapplies the collective knowledge doctrine to support the detention in this case. The collective knowledge doctrine does not support a seizure based upon either an unreliable source of information, or information which is not reliable.

While officers are entitled to rely on information relayed to them by official channels to detain a suspect,⁴ that communication does not sanitize the

³ *State v. Kang*, 2001 WL 1729126 at 3 (Del. Super. Nov. 30, 2001).

⁴ *Gordon v. State*, __A.3d ___, 2021 WL 48208, at 9 (Del. Jan. 6, 2021) (reaffirming collective knowledge doctrine).

detention if the source of the information relayed is unreliable. In *Gordon*, the information conveyed from one officer to another who made a car stop was based upon the relaying officer's interception of a conversation in which Gordon was planning a drug transaction which was later confirmed by surveillance. Thus, the information relayed was reliable since it was based upon the officer's first-hand knowledge.

That is not the case here. While Shupe testified that Marino told him the informant was reliable, that is not supported by Marino's testimony. A review of Corporal Marino's testimony does not indicate that he conveyed any information about the informant's reliability to Officer Shupe. In addition to questions about whether Marino conveyed that the informant was reliable, the facts also raise doubts about the reliability of the information provided by the informant as addressed in the opening brief.

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

The State failed to address Diggs' argument relating to the Superior Court's erroneous disregard of defense witness testimony which contradicted the court's factual findings.

ARGUMENT II

THE SUPERIOR COURT ERRED BY FAILING TO APPLY A “LOST AND/OR MISSING EVIDENCE” INFERENCE WHEN MAKING ITS SUPPRESSION HEARING FACTUAL DETERMINATIONS

Merits of the Reply Argument

The State argues that the Superior Court did not err by *sua sponte* providing a remedy to the *Lolly/Deberry* error raised herein. It argues that Diggs waived this claim by failing to seek a lost and/or missing evidence inference as part of the suppression hearing. While defense counsel arguably established the factual predicate for the inference, a specific request was not made.

Defendant rejects any argument that he waived this claim by not raising this issue below.⁵ There is a distinction between “waiver” and “forfeiture” for appellate review purposes. “[W]aiver is accomplished by intent, [but] forfeiture comes through neglect.”⁶ Waiver is the “intentional relinquishment or abandonment of a known right.”⁷ Counsel’s failure to seek the lost and/or missing evidence inference constitutes a forfeiture, subject to plain error review.⁸

Next, the State’s overlooks the general supervisory authority of the courts to ensure due process in criminal proceedings. In other contexts, regulation to

⁵ *Williams v. State*, 98 A.3d 917 (Del. 2014) (Distinguishing between tactical decisions and oversight).

⁶ *United States v. Carrasco-Salazar*, 494 F.3d 1270, 1272 (10th Cir. 2000), quoting *United States v. Staples*, 202 F.3d 992, 995 (7th Cir. 2000).

⁷ *United States v. Olano*, 507 U.S. 725, 733 (1993).

⁸ *United States v. Teague*, 443 F.3d 1310, 1314 (10th Cir. 2006) (holding that in cases of forfeiture, the defendant may obtain appellate review on a plain error standard).

prevent constitutional violations is an obligation Delaware Courts have assumed in the past.⁹ A court's supervisory authority extends beyond constitutional violation issues. In *United States v. Serubo*,¹⁰ the Third Circuit acknowledged that there existed in the Federal Courts an "institutional interest, independent of their concern for the right of the particular defendant" in assuring "the appearance and the reality" of fair practices in the criminal justice system. Delaware courts share the same interest.

Defendant has applied the *Deberry/McCrey* factors demonstrating that a lost and/or missing evidence inference should have been applied by the Superior Court when making its suppression hearing factual determinations.

The State should not be able to circumvent its *Brady* obligations because potentially exculpatory text communications are contained on personal cell phones owned by police officers. The police should not be able to delete communications which the State has a duty to preserve just because they were contained on personal devices. Police communication outside official police channels should not be beyond review for *Brady* material when it occurs during the course and scope of police business. It is troublesome that personal

⁹ See e.g., *Biggins v. Dep't of Corr. Of State*, 2000 WL 710093 (Del. Super. 2000), *Ross v. Dep't of Corr.*, 722 A.2d 815 (Del. Super. 1998) (holding that inmates were entitled to individual copies of disciplinary rules); *Johnson v. State*, 442 A.2d 1362 (Del. 1982) (holding that a Delaware prisoner transferred to a federal facility outside the state had a constitutional right to reasonable access to Delaware legal reference materials or a reasonable alternative); *Bailey v. State*, 521 A.2d 1069 (Del. 1987) (Affirming the trial court's handling of inmates Sixth Amendment right to the assistance of counsel)).

¹⁰ *United States v. Serubo*, 604 F.2d 807 (3rd Cir 1979).

cellphone communication is becoming a standard practice during police investigations without being subject to review for *Brady* material.

Video evidence doesn't lie. In this case, there were significant discrepancies between the police and civilian witnesses. Moreover, there was a significant material discrepancy between Agosto and Shupe regarding the key point of whether Diggs threw his phone down when confronted by police. 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.¹¹ The surveillance video likely would have resolved all factual discrepancies in this case avoiding the need for the court to recreate what happened. The police had the authority and technical capacity to preserve the video in this case. It just did not have the will or initiative.

This Court should reverse Murad Digg's conviction to serve notice on the State that the police failure to obtain and/or preserve key evidence in this case on the whole, falls short of that acceptable by the Court, even without a finding of prejudice or lack of harmlessness.

¹¹ See e.g., *Biggins v. Dep't of Corr. Of State*, 2000 WL 710093 (Del. Super. 2000), *Ross v. Dep't of Corr.*, 722 A.2d 815 (Del. Super. 1998) (holding that inmates were entitled to individual copies of disciplinary rules); *Johnson v. State*, 442 A.2d 1362 (Del. 1982) (holding that a Delaware prisoner transferred to a federal facility outside the state had a constitutional right to reasonable access to Delaware legal reference materials or a reasonable alternative); *Bailey v. State*, 521 A.2d 1069 (Del. 1987) (Affirming the trial court's handling of inmates Sixth Amendment right to the assistance of counsel)).

CONCLUSION

Defendant respectfully requests this Court to reverse his Superior Court convictions and sentence and remand the matter for further proceedings consistent with the Court's decision.

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