IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE,	:	
	:	I.D. No. 1204003639
v.	:	
	:	
JERMAINE D. BRINKLEY,	:	
Defendant.	:	
STATE OF DELAWARE,	:	
	:	I.D. No. 1204003637
v.	:	
	:	
GEORGE W. BRINKLEY,	:	
Defendant.	:	

ORDER

Before the Court is a motion to suppress filed by Defendant Jermaine D. Brinkley, who, along with his co-defendant and brother George W. Brinkley, was charged with various drug trafficking offenses after police found drugs on their persons during a April 5, 2012 traffic stop.[1] Defendants move to suppress any and all evidence obtained as a result of an allegedly unconstitutional search and seizure of both Jermaine Brinkley's vehicle and their persons that followed the aforementioned stop. The crux of their motion is that the arresting officer unlawfully extended the traffic stop beyond its constitutionally permissible purpose.

The Court held a suppression hearing on December 5, 2012. Based on the evidence presented during the hearing, and for the reasons set forth below, Defendants' motion to suppress is hereby denied.

[1] George Brinkley joined in the motion on December 4, 2012.

FACTUAL BACKGROUND

At approximately 7 p.m. on April 5, 2012, while traveling northbound on Bay Road in an unmarked police vehicle, Patrolman Peter Martinek ("Officer Martinek") of the Dover Police Department observed a white Crown Victoria ("Crown Vic") cross three lanes of traffic without signaling just south of the Route 13 intersection. According to Officer Martinek, these sudden lane changes forced two other motorists to brake aggressively in an attempt to avoid a collision with the Crown Vic. Officer Martinek followed the Crown Vic into the left turn lane just south of East Loockerman Street and initiated a traffic stop in the parking lot of the Jiffy Lube on Route 13.

According to Officer Martinek's testimony at the suppression hearing, he approached the driver-side window of the Crown Vic, which was already rolled down. Officer Martinek testified that as he advised Jermaine Brinkley, the driver, as to why he has been stopped, he detected an odor of raw marijuana emanating from the passenger compartment of the vehicle. He also testified that the lone passenger, George Brinkley, was extremely nervous and refused to make eye contact with him when asked to produce identification. These circumstances prompted Officer Martinek to return to his vehicle after receiving the proper paperwork from Jermaine Brinkley and call another officer for assistance.

Upon the arrival of the backup officer, Officer Martinek once again approached the driver's side of the Crown Victoria. He then asked Jermaine Brinkley to step out of the vehicle. As Jermaine Brinkley stepped out of his vehicle, two bags of heroin

fell to the ground. Upon seeing the bags of heroin on the ground, Officer Martinek arrested Jermaine Brinkley, and searched his person. This search yielded a large bag containing an additional 116 packets of heroin, each totaling 1.93 grams in weight.

Upon Jermaine Brinkley's arrest, Officer Martinek instructed the backup officer to pull George Brinkley out of the vehicle and handcuff him. A search of George Brinkley's person yielded a large bag of crack cocaine, totaling 31.11 grams in weight, and a smaller bag containing 0.23 grams of marijuana. The officers subsequently searched the passenger compartment and trunk of the Crown Victoria, but found no additional contraband.

Defendants were charged with various drug trafficking and possession offenses in an indictment handed down on July 2, 2012. The present motion was filed on November 15, 2012, and joined by George Brinkley on December 4, 2012. The motion challenges the constitutionality of the detention, arrest, and search of Jermaine Brinkley. The Court held a suppression hearing on December 5, 2012, during which the Court raised the additional issue of whether the search of George Brinkley was constitutionally permissible. Both the State and counsel for George Brinkley were given leave to file additional memoranda on this narrow issue, which were filed on December 14, 2012, and January 24, 2012, respectively.

Standard of Review

When presented with a motion to suppress, Delaware courts have repeatedly stated that the Defendant bears the burden of establishing that the challenged search and seizure violated his rights under the United States Constitution, the Delaware

Constitution, or the Delaware Code.[2] The Defendant must demonstrate, by a preponderance of the evidence, that he is entitled to the relief requested.[3] At a suppression hearing, the trial judge sits as the trier of fact, and determines the credibility of witnesses.[4]

DISCUSSION

Defendants move to suppress any and all evidence, including contraband, obtained by the State as a result of the roadside detention and subsequent search. They assert that the police had no reasonable suspicion of illegal activity upon which to base a prolonged detention beyond the time necessary for the issuance of a traffic citation, and that the warrantless search of their persons and vehicle violated both Article I, Section 6 of the Delaware Constitution, and the Fourth and Fourteenth Amendments of the United States Constitution. As such, they contend that any contraband procured as a result of the April 5, 2012 traffic stop was tainted by an unlawful search and seizure and should be suppressed.

The Court will first address the validity of the initial traffic stop. Assuming the initial stop was indeed valid, the Court will then determine whether Officer Martinek's request for Jermaine Brinkley to step out of the vehicle unlawfully extended the scope and duration of the initial stop. Third, the Court will address the

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[2] *See State v. Dollard*, 788 A.2d 1283, 1286 (Del. Super. Ct. 2001) (citing *State v. Huntley*, 777 A.2d 249 (Del. Super. Ct. 2000)).

[3] *Id.* (citing *State v. Bien-Aime and Smalls*, 1993 WL 138719, at *3 (Del. Super. Ct. 1993)).

[4] *Turner v. State*, 957 A.2d 565, 570-71 (Del. 2008).

validity of the warrantless search of Jermaine Brinkley's person. Finally, the Court will address the validity of the warrantless search of George Brinkley's person.

I. The Traffic Stop and its Sequelae

The Court must first determine whether Officer Martinek has probable cause to stop Jermaine Brinkley for a traffic violation. If the initial stop was valid, the next query necessarily becomes whether Officer Martinek impermissibly extended his detention of Defendants beyond the time reasonably necessary to effectuate the initial purpose of the traffic stop. Assuming this request amounted to a second seizure within the meaning of the Delaware and United States constitutions, the Court must then determine whether the second seizure was justified.

A. Officer Martinek had Probable Cause to Make the Initial Traffic Stop

Ordinarily, a police officer justifiably may stop a motor vehicle that has violated a traffic law.[5] But, a traffic stop is a seizure of a vehicle and its occupants,[6] and as such, it is subject to constitutional limitations imposed by both the Fourth and Fourteenth Amendments of the United States Constitution, and Article I, Section 6 of the Delaware Constitution.[7]

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[5] *Caldwell v. State*, 780 A.2d 1037, 1045 (Del. 2001) (citing *Whren v. United States*, 517 U.S. 806, 813-14, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996)).

[6] *Id.* at 1045-46 (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 880-81, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975), and *Whren*, 517 U.S. at 809-10, 116 S.Ct. 1789)).

[7] *Id.* Article I, Section 6 of the Delaware Constitution reads as follows:
Searches and seizures. The people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and no warrant to search any place, or to seize any person or thing, shall issue without describing them as particularly as may be;

Defendants do not contest the validity of the initial stop of their vehicle on April 5, 2012. Indeed, changing lanes without signaling is a violation of 21 *Del. C.* § 4155, which creates probable cause for an officer to stop a vehicle.[8] Accordingly, the initial stop of Jermaine Brinkley's vehicle was justified by the traffic infraction, and was constitutionally permissible.

B. Request to Exit the Vehicle Did Not Constitute a Separate Seizure

It is the sequelae of the initial traffic stop with which Defendants take issue. Specifically, they contend that Officer Martinek's request for Jermaine Brinkley to exit his car constituted a separate seizure because it exceeded the scope of a permissible investigation of the traffic stop. The State argues that Officer Martinek's request did not amount to a separate seizure because Delaware law permits an officer to ask both the driver and passenger to step out of the vehicle during a routine traffic stop. Assuming, *arguendo*, that Martinek's request did create a second, independent investigative detention, the State points to a number of facts available to Officer Martinek at the time of his initial questioning that justified the additional intrusion, most notably: 1) the odor of raw marijuana emanating from the vehicle as Officer Martinek approached the driver-side window; 2) George Brinkley's refusal to make eye contact with Officer Martinek during initial questioning; and 3) George Brinkley's rapid breathing.

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nor then, unless there be probable cause supported by oath or affirmation.
Del. Const. art. I, § 6.

[8] *State v. Walker*, 1991 WL 53385, at *2 (Del. Super. Ct. 1991).

If a person is lawfully stopped for a traffic violation, the officer may detain the individual only as long as is necessary to effectuate the purpose of the stop.[9] Police may request the occupants of the car to provide identification,[10] and to exit the vehicle.[11] But, "any investigation of the vehicle or its occupants beyond that required to complete the purpose of the traffic stop must be supported by independent facts sufficient to justify the additional intrusion."[12] To justify further detention for questioning on matters unrelated to the initial stop, the officer must have reasonable suspicion that the driver or his passenger has committed, is committing, or is about to commit some other crime.[13] "Reasonable suspicion" is more than an ill-defined hunch; rather, under the totality of the circumstances, the detaining officers must have a "particularized and objective basis for suspecting the particular person stopped of

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[9] *Caldwell,* 780 A.2d at 1047 (citing *Florida v. Royer*, 460 U.S. 491, 500, 103 S.Ct. 1319, 75 L.Ed 2d 229 (1983)).

[10] *Loper v. State*, 8 A.3d 1169, 1172-74 (Del. 2010).

[11] *Id.* at 1174 ("[T]he police may order the driver or a passenger to exit the car after a valid traffic stop, and that order is not a 'seizure' under the Fourth Amendment.").

[12] *Caldwell*, 780 A.2d at 1047.

[13] *See State v. Huntley*, 777 A.2d 249, 254 (Del. Super. Ct. 2000) (citing *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). Delaware has adopted a statute which authorizes brief detention for identification purposes of a person who is "abroad" or in a public place when the police officer "has reasonable ground to suspect [that the person] is committing, has committed or is about to commit a crime ....". 11 *Del. C.* § 1902(a). As the language of the statute indicates, a detention must be supported by reasonable suspicion, and where there is no reasonable basis to suspect the detainee has committed any crime, any detention of that defendant is unlawful. *Hicks v. State*, 631 A.2d 6, 9 (Del. 1993) (citing *State v. Wrightson*, 391 A.2d 227, 229 (1978)).

criminal activity."[14] It requires the police officer to point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the investigatory stop.[15]

In evaluating whether the present encounter was constitutionally permissible, the Court must first decide whether Officer Martinek exceeded the scope of the traffic stop by asking Defendants to step out of the vehicle. Defendants contend that, even if the initial traffic stop was proper, Martinek's request for Defendants to step out of the vehicle invariably resulted in a second seizure within the meaning of the federal constitution. But this argument flies in the face of established legal precedent, and thus, fails. Once a vehicle has been lawfully stopped, an officer may ask the driver to step out of the vehicle.[16] An officer may also order "passengers to get out of the car pending completion of the [traffic] stop."[17] As Jermaine Brinkley was already validly stopped for a traffic violation, the additional intrusion imposed by Officer Martinek's request was *de minimus*.

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[14] *Robertson v. State*, 596 A.2d 1345, 1350 (Del. 1991) (citing *Terry*, 392 U.S. at 27).

[15] *Terry*, 392 U.S. at 20, 88 S.Ct. 1868.

[16] *Pennsylvania v. Mimms*, 434 U.S. 106, 111, 98 S.Ct. 330, 54 L.Ed.2d 41 (1997). *See also Loper v. State,* 8 A.3d 1169, 1174 (Del. 2010) (adopting the *Mimms* holding); *Dunlap v. State*, 812 A.2d 899, at *2 (Del. 2002) (unpublished table decision) (holding that the police acted reasonably where, after stopping the defendant for driving under 10 mph in a 25-mph zone and weaving, they ordered the defendant to exit the vehicle); *Caldwell v. State*, 780 A.2d 1037, 1045 n.27 (Del. 2001) (recognizing that under the Fourth Amendment, the police can order a driver and his or her passengers to exit the car during the course of a valid traffic stop).

[17] *Maryland v. Wilson*, 519 U.S. 408, 415, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997).

Defendants rely on *Jones v. State* for the proposition that even if Officer Martinek's request did not trigger a second seizure within the meaning of the federal Constitution, Article I, Section 6 of the Delaware Constitution affords them greater protection than its Fourth Amendment counterpart. But Defendants' reliance on *Jones* is misplaced. In *Jones*, the Delaware Supreme Court was confronted with the question of whether police had seized the defendant, a "suspicious black male wearing a blue coat," by ordering him to stop and remove his hands from his coat pockets.[18] The Supreme Court concluded that at the time the officers made a showing of their authority and ordered Jones to stop, he had been "seized" within the meaning of Article I, Section 6 of the Delaware Constitution, even though the police had not used actual force to stop Jones. Here, however, Defendants were already lawfully detained as a consequence of the valid traffic stop at the time that Officer Martinek ordered Jermaine Brinkley out of the car. Their mobility having already been validly limited, they were not subject to a second seizure when Officer Martinek made this request.

Even assuming, *arguendo*, that a second "seizure" occurred when police asked Jermaine Brinkley to step out of the car, the seizure was reasonable. The record

[18] *Jones v. State*, 745 A.2d 856, 858-59 (Del. 1999). In *Jones*, the Delaware Supreme Court rejected the United States Supreme Court's definition of "seizure," articulated in *California v. Hodari D.*, 499 U.S. 621, 626, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991), which requires "either physical force ... or ... submission to the assertion of authority," and concluded that "[i]n our view, the question presented by Jones of when a seizure has occurred under Article I, Section 6 of the Delaware Constitution requires focusing upon the police officer's actions to determine when a reasonable person would have believed he or she was not free to ignore the police presence." *Jones*, 745 A.2d at 866-69.

establishes that Officer Martinek had sufficient justification to investigate Brinkley's vehicle beyond that required to complete the purpose of the traffic stop. At the evidentiary hearing, Officer Martinek testified to a number of facts that provide a reasonable articulable suspicion that Defendants were involved in a drug-related, criminal activity at the time of the April 5, 2012 traffic stop, notably that 1) an odor of raw marijuana emanated from the vehicle as Officer Martinek approached the driver-side window; 2) George Brinkley refused to make eye contact with Officer Martinek during initial questioning; and 3) George Brinkley was breathing rapidly. The smell of marijuana coupled with an occupant's nervous behavior is sufficient to give an officer reasonable suspicion that a crime has been committed, is being committed, or is about to be committed. The Delaware Supreme Court has said as much in several decisions.[19] Accordingly, the totality of the circumstances in the present case established a reasonable suspicion that Defendants were engaged in drug-related activity and justified the detention of Defendants beyond the time necessary to issue the traffic citation.

Nevertheless, Defendants attempt to analogize the circumstances of his traffic

[19] *See Chisholm v. State*, 988 A.2d 937, at *2 (Del. 2010) (unpublished table decision) (strong odor of marijuana on the passenger side of the defendant's vehicle and the fact that the defendant was seen clutching his jacket constituted probable cause for the search of the defendant's person); *Jenkins v. State*, 970 A.2d 154, 158-59 (Del. 2009) (Defendant's skittish behavior and the strong odor of marijuana were sufficient to establish probable cause to arrest defendant for driving under the influence and possession of marijuana); *Coley v. State*, 886 A.2d 1277, at *1 (Del. 2005) (unpublished table decision) (smell of marijuana coupled with the nervous behavior of both the driver and passenger gave officer probable cause to believe a drug offense was being committed).

stop to that of the defendant in *Caldwell v. State.*[20] The analogy is ultimately unpersuasive, however, as the facts of that case are vastly different. In *Caldwell*, after stopping the defendant for a traffic violation, the officer made three observations: (1) the defendant moved his right arm as he pulled over, (2) the defendant appeared to be nervous and was perspiring, and (3) the defendant implausibly asserted that he did not know the identity of the passenger.[21] The Supreme Court determined that these facts were insufficient to justify a detention of extended duration and the implementation of more intrusive investigatory measures, including the handcuffing and pat-down of the defendant.[22] Here, however, the odor of marijuana coupled with George Brinkley's behavior gave Officer Martinek sufficient justification to detain and possibly arrest Defendants.

Defendants argue that Martinek's testimony that he detected the odor of raw marijuana as he approached the driver-side window of Brinkley's vehicle should not be believed. In support of this contention, they presented expert testimony from Dr. Richard Doty ("Dr. Doty") and retired New Jersey State Police Captain Mark Weber to suggest that Martinek's testimony was not credible.

Dr. Doty is the Director of the Smell and Taste Center at the University of Pennsylvania. He is also a professor in the department of otorhinolaryngology. Dr.

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[20] *Caldwell*, 780 A.2d 1037 (Del. 2001).

[21] *Id.* at 1050.

[22] *Id.* at 1050-51.

Doty testified as an expert in olfactory perceptions. According to Dr. Doty, based on the weather conditions and manner in which the marijuana was packaged and stored on George Brinkley's person, it would be impossible for Officer Martinek to smell the marijuana from the driver-side window. In formulating this opinion, Dr. Doty relied, in part, on a peer-reviewed and published study that he co-authored in 2004.[23] The purpose of the study was to assess whether participants could reliably smell, from the driver's compartment of an automobile, the odor of five pounds of raw marijuana packaged in a garbage bag and housed in the vehicle's trunk.[24] The results of this test showed that the number of false positive reports was essentially the same as the number of correct positive reports.[25] In other words, the probability of a correct positive was no greater than chance.[26] On cross-examination, Dr. Doty cautioned that the study has limitations, particularly that the findings were generalized to a number of circumstances and that the sample size was small. Dr. Doty conceded that he did not know the strength or potency of the marijuana found on George Brinkley's person, nor does he know whether Jermaine Brinkley's vehicle had contained any other marijuana beyond that which was found in George Brinkley's person in the days or hours leading up to the traffic stop.

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[23] Richard L. Doty et al., *Marijuana Odor Perception: Studies Modeled From Probable Cause Cases*, 28 Law and Human Behavior, No. 2, 223 (2004).

[24] *See id.* at 225.

[25] *See id.* at 226.

[26] *Id.*

The State seeks to exclude Dr. Doty's proffered testimony on the grounds that it is unreliable. The Court agrees. Rule 702 of the Delaware Rules of Evidence states that "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise."[27] When determining whether an expert opinion is admissible under Rule 702, a trial judge must ensure that all scientific testimony is both relevant and reliable, and that its evidentiary reliability is based upon scientific reliability.[28] An expert's testimony must assist the trier of fact and relate to, or "fit," the underlying facts of the case.[29]

Dr. Doty's opinions are inherently unreliable because they lack a proper factual foundation. It was Dr. Doty's opinion, based solely on the amount of marijuana found in the trunk, that Officer Martinek could not have perceived the smell of marijuana from the driver-side door. Dr. Doty was not at the scene, and his opinions appear to be based solely on the amount of marijuana seized from George Brinkley's person. Dr. Doty's opinion was predicated on only one of a number of salient factors which bear upon the question of whether it was possible for Officer Martinek to smell raw marijuana upon approaching Jermaine Brinkley's vehicle at the time of the traffic

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[27] D.R.E. 702.

[28] *Nelson v. State*, 628 A.2d 69, 74 (Del. 1993).

[29] *See State v. McMullen*, 900 A.2d 103, 113-14 (Del. Super. Ct. 2006) (citing *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 591, 113 S.Ct. 2786, 125 L.Ed 469 (1993)).

stop. For example, there is a paucity of evidence about whether any other marijuana has ever been in the interior of Jermaine Brinkley's car, or whether the particular strain found on George Brinkley's person was more pungent than that used in Dr. Doty's studies. Without considering these factors, Dr. Doty's opinion testimony is speculative. Relevant testimony from a qualified expert should be considered only if the expert knows of facts which enable him to express a reasonably accurate conclusion as opposed to conjecture or speculation.[30]

Moreover, Dr. Doty's testimony is inadmissible to the extent that it assesses Officer Martinek's veracity. The credibility of witnesses generally is not an appropriate subject for expert testimony.[31] Expert testimony designed to attack a witness' credibility impermissibly invades the province of the factfinder.[32] In the present case, Defendants appear to have offered Dr. Doty's testimony for the sole purpose of discrediting Officer Martinek. As such, Dr. Doty's testimony is excluded as it rests upon suppositions, not facts, and is designed to attack Officer Martinek's credibility.

Moreover, even if the Court was to presume that Dr. Doty's opinion about Officer Martinek's ability to smell marijuana under the circumstances was correct, it

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[30] *See Perry v. Berkley*, 996 A.2d 1262, 1269 (Del. 2010) ("[A]n expert's testimony is inadmissible if based on suppositions rather than facts.").

[31] *See State v. Foray*, 715 A.2d 855, 862 (Del. 1997) ("Such testimony is often excluded because it is not helpful to [the factfinder], which can make its own determination of credibility.").

[32] *Id.* At 863.

does not follow that Officer Martinek did not perceive the smell of marijuana. It has long been the law that the negligent or innocent mistakes of arresting officers do not violate the Fourth Amendment.[33] Defendants have not adduced any evidence which show that Martinek's report of the marijuana odor was intentionally or recklessly false or made in bad faith.[34] Even if Martinek was factually mistaken about the smell of marijuana, for Fourth Amendment purposes, the lack of evidence showing that Martinek intentionally, recklessly or in bad faith reported the smell of marijuana is fatal to Defendants' claim.

In sum, even if Officer Martinek initiated a second, independent investigative detention by asking Jermaine Brinkley to step out of his own vehicle, this detention was justified because it was based on a reasonable, articulable suspicion that Defendants were committing a drug-related crime. The odor of marijuana coupled with the passenger's nervous behavior gave Officer Martinek the requisite reasonable suspicion to briefly extend the scope and duration of the traffic stop to confirm or dispel his suspicion that Defendants were engaged in drug-related activity.

II. Search of Defendants' Persons

The Court must next consider whether the searches of Defendants' persons

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[33] *See Franks v. Delaware*, 438 U.S. 154, 171, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). *See also Maryland v. Garrison*, 480 U.S. 79, 87, 107 S.Ct. 1013, 94 L.Ed.2d 72 (1987) (recognizing the "need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants").

[34] *See id.* at 171. It is the defendant's burden to "establish by a preponderance of the evidence that the affidant knowingly and intentionally or with reckless disregard for the truth included a false statement in the affidavit of probable cause." *Id.* at 156.

were constitutionally permissible. A warrantless search is presumed invalid unless it falls within one of the recognized exceptions to the warrant requirement.[35] The fruits of an illegal search must be suppressed unless they were obtained by independent source.[36] It is with these guidelines in mind that the Court must analyze the facts of this case to determine whether police conducted a warrantless search of either defendant's person.

C. The Warrantless Search of Jermaine Brinkley's Person Was Lawful as a Search Incident to His Arrest.

The suppression motion mistakenly characterizes Officer Martinek's search of Jermaine Brinkley's person as a *Terry* frisk,[37] but this overlooks the fact that two bags of heroin fell to the ground as Jermaine Brinkley exited his vehicle. This occurrence gave Officer Martinek the probable cause to believe that the defendant was committing a drug-related felony in his presence and, consequently, the right to make a warrantless arrest.[38] It follows then that the search of Jermaine Brinkley's person

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[35] *Tatman v. State*, 494 A.2d 1249, 1251 (Del. 1985).

[36] *See Ellison v. State*, 410 A.2d 510, 526 (Del. Super. Ct. 1979) (adopting the test enunciated in *Wong v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), to determine whether the evidence sought to be suppressed has been obtained by sufficiently independent means).

[37] A *Terry* frisk is a limited pat-down of a detainee's outer clothing during a noncustodial, investigatory detention. *Terry*, 392 U.S. at 29, 88 St. Ct. at 1884. Its purpose is not to discover evidence, but rather to search for weapons that may be used to harm police officers or bystanders. *Id.*

[38] *See* 11 *Del. C.* § 1904(b)(1) (giving Delaware law enforcement officers authority to make a warrantless arrest when a crime has been committed in their presence, or where they have

was lawful under the "search incident to arrest" exception to the Fourth Amendment's warrant requirement.[39] Once a custodial arrest occurs, as it did here, no additional justification is required for a search of the arrestee's person to discover evidence of the crime for which the arrest was made.[40] Accordingly, the warrantless search of Jermaine Brinkley's person by which Officer Martinek discovered the larger bag of heroin packets did not violate the Fourth Amendment, and the fruits of such search are admissible.

D. Probable Cause Existed to Arrest George Brinkley and Search His Person Incident to Said Arrest.

George Brinkley also contests the validity of both his warrantless arrest and the subsequent search of his person. He argues that his mere presence as the front-seat passenger of his brother's car is not enough to establish probable cause to arrest him. At issue here is not whether George Brinkley's mere presence in the Crown Vic supported his arrest but whether his presence, his relationship to his brother, his

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"reasonable ground to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed.").

[39] *Coley v. State*, 886 A.2d 1277, at *1 (Del. 2005) (unpublished table decision) (holding that because the officer had probable cause to make the arrest, the incident search was lawful even before the arrest was made). A warrantless search incident to arrest is a recognized exception to the warrant requirement. *Id.* (citing *Chimel v. California*, 395 U.S. 752, 762-63, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969)).

[40] *See Coley*, 886 A.2d at *1 ("A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; the intrusion being lawful, a search incident to arrest requires no additional justification ... it is the fact of the lawful arrest which established the authority to search.") (quoting *United States v. Robinson,* 414 U.S. 218, 235 (1973)).

behavior at the inception of the stop, and the odor of raw marijuana emanating from the car gave officers sufficient probable cause to arrest him.

The Court begins by determining whether, in fact, George Brinkley was arrested when he was handcuffed, or merely subject to an investigatory detention. The use of handcuffs is a relevant, but not dispositive, factor in distinguishing investigatory detentions from formal arrests.[41] In reaching a determination of whether an arrest has occurred, the court may consider the following factors:

> [T]he amount of force used by the police, the need for such force, and the extent to which the individual's freedom of movement was restrained, ... and in particular such factors as the number of agents involved ...; whether the target of the stop was suspected of being armed ...; the duration of the stop ...; and the physical treatment of the suspect ...; including whether or not handcuffs were used."[42]

Thus, an arrest need not be formal or characterized by specific words. Rather, "[w]hen the formal indicia of arrest are lacking ... [an arrest] of the person has occurred when, in view of all the circumstances, a reasonable person would believe he is not free to leave."[43] In the present case, upon considering the factors enumerated above, it is clear that an arrest occurred. Although there is no indication that the officers believed that George Brinkley was armed or dangerous, the use of handcuffs,

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[41] *State v. Kang,* 2001 WL 1729126, at *6 (Del. Super. Ct. 2001).

[42] *Id*.

[43] *State v. Rizzo*, 634 A.2d 392, 395 (1993) (citing *Michigan v. Chesternut*, 486 U.S. 567, 574, 108 S.Ct. 1975, 100 L.Ed. 565 (1988)).

the tenor of the encounter and the officers' subsequent conduct suggest that, at this juncture, any reasonable person would no longer believe he was free to leave, even though the formal words of an arrest were lacking.

Turning to whether probable cause existed to arrest George Brinkley, the Court examines the situation the officers' were presented with at the time of his arrest. Upon his initial approach of the vehicle, Officer Martinek smelled an odor of raw marijuana. When Officer Martinek interviewed Jermaine Brinkley, George Brinkley acted suspiciously, seemed very nervous and tried to avoid eye contact with Martinek. Two bags of heroin fell from Jermaine Brinkley's person when he exited the vehicle, and a larger quantity of the same drug was recovered from his waistband. Given that no marijuana was recovered from Jermaine Brinkley's person, it is an entirely reasonable inference that George Brinkley possessed some quantity of raw marijuana. Thus, a reasonable officer could conclude that there was probable cause to believe that George Brinkley committed the crime of possession of marijuana.[44] It follows then, that the search of his person following his arrest was lawful in that it was incident to his arrest. Accordingly, the search did not violate his constitutional rights. Any and all evidence recovered as a result of this search is admissible.

[44] *See, e.g., Maryland v. Pringle*, 540 U.S. 366, 373 (2003) (holding that it was reasonable for an officer to infer a common enterprise among the three men when a large quantity of cocaine and cash were found in the passenger compartment of the car).

CONCLUSION

Defendants' Motion to Suppress is hereby **DENIED**. IT IS SO ORDERED this 19th day of February, 2013.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh
oc: Prothonotary
xc: Nicole S. Hartman, Esquire
John S. Malik, Esquire
Kevin M. Howard, Esquire