IN THE SUPREME COURT OF THE STATE OFDELAWARE

DEVIN L. TROTTER,	:	
	:	
Defendant-Below,	:	
Appellant,	:	
	:	
v.	:	No. 264, 2016
	:	
STATE OF DELAWARE,	:	
	:	
Plaintiff-Below,	:	
Appellee.	:	

Upon Appeal from Superior Court to the
Supreme Court of Delaware

APPELLANT'S OPENING BRIEF

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Dated: November 16, 2016

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NATURE AND STAGE OF THE PROCEEDINGS[1]

Under Delaware Supreme Court Rule 6(a)(ii), Devin L. Trotter appeals from his convictions in Superior Court, and seeks the vacation of his convictions and reversal of the order below that denied his Motion to Suppress. Alternatively, reversal of the conviction for Carrying a Concealed Deadly Weapon is sought and a new trial is requested if the Court disagrees with the forgoing grounds for relief.

A grand jury jointly-indicted Trotter (Case No. 1502012432), and Co-Defendant Tyrell Brown (Case No. 1502012430), on charges relating to February 21, 2015. As applied to Trotter, these charges were Carrying a Concealed Deadly Weapon under 11 *Del. C.* § 1442 (Count I), Possession of a Firearm by a Person Prohibited under 11 *Del. C.* § 1448(a)(9) (Count II), Illegal Possession of a Controlled Substance under 16 *Del. C.* § 4763(c) (Count III), and Possession of Marijuana under 16 *Del. C.* § 4764(a) (Count IV).[2] As applied to Brown, these were Illegal Possession of a Controlled Substance under 16 *Del. C.* § 4763(c) (Count V).[3]

Counsel for Trotter filed a Motion to Suppress on June 23, 2015.[4] On

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[1] "A__" refers to a page of Appellant's Appendix in support of his Opening Brief. "T__/__/__" refers to a page of the Trial Transcript and "T__/__/__V" refers to a page of the Verdict Transcript.
[2] A7-8.
[3] A9.
[4] A10-24.

July 17, 2015, the Honorable Calvin L. Scott, Jr. conducted an evidentiary hearing and ruled from the bench, denying the Motion.[5]

Trotter's and Brown's cases were severed for trial. On September 9-11, 2015, Trotter was tried by a jury in Superior Court before the Honorable Diane Clarke-Streett. Trotter elected not to testify.[6] On September 11, 2015, the jury found Trotter guilty on all counts.[7]

Trotter was sentenced in Superior Court on April 22, 2016.[8] He filed a timely Notice of Appeal on May 23, 2016. This is his Opening Brief on appeal.

[5] D.I. #21, at A3.
[6] D.I. #26 to #28, at A4.
[7] A117;T09/11/2015V — 44-45.
[8] Sentencing Order, at A120-23.

SUMMARY OF ARGUMENT

I. The court below erred by not granting Trotter's Motion to Suppress. Corporal Silvers and the Wilmington Police Department effected a warrantless arrest of Devin L. Trotter that required probable cause. They did not have it. Neither did they have probable cause to obtain a search warrant for Trotter's vehicle. That Trotter was outside of a locked, stationary vehicle, which had a partially-visible firearm within, forms no part of the offense of Carrying a Concealed Deadly Weapon. Similarly, Silvers lacked knowledge whether Trotter or his companions had a concealed carry permit, and whether the gun was placed there by any of them or was owned by any of them. As a result, the firearm itself and the controlled substances in the vehicle, Trotter's statements, and all direct or derivative evidence are the fruit of the poisonous tree and must be suppressed.

II. The evidence adduced at trial was insufficient as a matter of law to support a guilty verdict for Carrying a Concealed Deadly Weapon for the very same reasons why probable cause was lacking under Argument I.

III. The court below erred by refusing the defense request for a mistake-of-fact instruction on the essential element of "concealed" that was an essential element of the Carrying a Concealed Deadly Weapon charge.

The record warranted the instruction because Trotter was mistaken whether his partially-visible gun was concealed as defined by Delaware law.

STATEMENT OF FACTS

I. THE SUPPRESSION HEARING.

At the suppression hearing, the following facts were presented to Superior Court: On February 20, 2015, Corporal Jeffrey Silvers was on patrol in the City of Wilmington.[9] On or about 11:45 p.m. and at the 3200 block of North Union Street, he observed a white Lincoln parked on the west side of the street "occupied by four subjects."[10] Silvers could not see inside the vehicle, but the occupants were inside for approximately five or seven minutes.[11] Silvers processed the license plate on DELJIS and "it came back as no record found."[12] He drove around the block and came back, in order to double-check the license plate numerals, and saw the four subjects alight the vehicle and head towards Club Lavish, which was nearby.[13] Silvers' second processing of the license plate produced the same result: no record found.[14]

Corporal Silvers has served in the Wilmington Police Department for more than 17 years.[15]

After checking the license plate a third time, Silvers exited his vehicle and approached the Lincoln on foot in order to determine if "the ignition was

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[9] A35;T07/17/2015 — 3.
[10] A35: T07/17/2015 — 3-4.
[11] A40: T07/17/2015 — 22.
[12] A35: T07/17/2015 — 4.
[13] *Id.*
[14] *Id.*
[15] A35: T07/17/2015 — 3.

popped," an indication of a stolen vehicle.[16] He testified, "As I was looking up in the front of the car I observed the handle of a gun sticking out from underneath the driver seat."[17]

Silvers then contacted his supervisor, who arrived with backup units.[18] Eventually, the four occupants of the vehicle exited Club Lavish and began walking towards the car. They were Trotter, Brown, and two others. While they approached, no criminal activity was observed.[19] "At that time, Mr. Trotter went to the driver[']s door with the key. We then approached with guns drawn, ordered him to the ground. He complied with that. We then took him into custody."[20] When the police ordered Trotter and his companions to get onto the ground, their guns were drawn and Trotter was not free to leave.[21]

Trotter and his companions were transported to the Wilmington Police station, where Trotter produced a receipt for the firearm.[22] Silvers applied for and received a search warrant for the white Lincoln.[23]

Upon executing the search warrant, Silvers located within the vehicle

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[16] A35: T07/17/2015 — 5.
[17] A35: T07/17/2015 — 5.
[18] A36: T07/17/2015 — 6.
[19] A38: T07/17/2015 — 15-16.
[20] A36: T07/17/2015 — 7.
[21] A39: T07/17/2015 — 20.
[22] A36: T07/17/2015 — 8.
[23] A36: T07/17/2015 — 9; *see also*, A17-22, for the search warrant.

a Smith & Wesson model SD40 VE black handgun, a gun holster on the driver-side floor, and a magazine in the glove box.[24] Silvers also located 11 blue Alprazolam pills and, in the rear passenger seat, he located a black hoodie that contained in the pocket 47 small Ziploc bags that contained an off-white powder and field-tested positive for heroin.[25] In the trunk of the vehicle, Silvers located approximately 3 grams of marijuana.[26] Also within the trunk, Silvers found a prescription bottle in Trotter's name that contained two sandwich bags, which field-tested positive for marijuana.[27]

After the police had seized him, Trotter admitted he did not have a license to carry a concealed deadly weapon.[28] The record does not show that a Miranda warning was provided until arriving at the police station.[29]

Silvers admitted that a "no record found" resulted from a mistake with the Delaware Department of Motor Vehicles (DMV), and that Trotter was the title-owner of the white Lincoln.[30] Specifically, the DMV-issued license plate neglected to include the designation "PC" in front of the six digits (964593). Trotter's vehicle registration, however, included the "PC" and the

[24] A37: T07/17/2015 — 10.
[25] *Id.*
[26] A37: T07/17/2015 — 11.
[27] A37: T07/17/2015 — 11-12.
[28] A37: T07/17/2015 — 12-13.
[29] *See* A67; T09/09/2015 — 100-01 (trial testimony by Officer Danny Silva).
[30] A37: T07/17/2015 — 12.

same six digits that "did come back to Mr. Trotter" in DELJIS.[31] Silvers also admitted that a "no record found" on the computer system is not conclusive that a vehicle is stolen. In his words, the reference means there is "no information associated with that registration number," which can occur where a vehicle tag "may not have been issued" or "may be expired for years and has never been reissued . . ."[32]

The Honorable Calvin L. Scott, Jr. ruled from the bench, denying the Motion to Suppress. Consistent with *Robertson v. State*,[33] the judge reasoned that a firearm can be in plain view, for purposes of search-and-seizure, and also concealed for purposes of Carrying a Concealed Deadly Weapon.[34] The judge did not make any findings or conclusions whether the applicable threshold was reasonable suspicion or probable cause, and whether the State met either threshold.[35] The judge only permitted abbreviated oral argument.[36]

II. TRIAL ON THE MERITS.

A. Testimony by Corporal Silvers.

At trial, Corporal Silvers' testimony mostly remained the same as his

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[31] *Id.*
[32] A38; T07/17/2015 — 14-15.
[33] 704 A.2d 267 (Del. 1997).
[34] A41; T07/16/2015 — 26-28. Although Superior Court referenced the "Robinson" case at the Suppression Hearing, *id.*, clearly, *Robertson* was meant.
[35] *See id.*; *see also*, A56; T09/09/2016 — 55-56 ("PC").
[36] A40; T07/16/2015 — 23.

testimony at the suppression hearing, except for the following:

(1) The license plate on the white Lincoln contained a registration ***sticker***, correctly marked "PC" followed by the license plate number.[37] Had Silvers examined the sticker while on foot and processed that on DELJIS, he would have confirmed the ownership of the vehicle as that of Mr. Trotter. Silvers asserted the idea never occurred to him until after Mr. Trotter mentioned it post-arrest.[38]

(2) Silvers determined that the ignition was not popped or otherwise tampered, ***before*** he located the handle of the firearm.[39] After he looked at the ignition (and determined it was proper), he abandoned any attempt to look for the VIN, and began looking at the floor of the vehicle with his flashlight.[40] It was no longer a registration investigation but a gun investigation.[41]

(3) Silvers shined his flashlight into the white Lincoln, which aided his detection of the handle of the firearm.[42]

(4) The gun holster was located on the driver's floor and also in plain

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[37] A59; T09/09/2015 — 67-68.
[38] A60; T09/09/2015 — 73.
[39] A60-61; T09/09/2015 — 72-74.
[40] *Id.*
[41] A61; T09/09/2015 — 74.
[42] A54; T09/09/2015 — 48.

view from outside of the car.[43]

(5) The glove box (which contained the handgun magazine) was locked.[44]

(6) The object of requesting backup units was to apprehend the four occupants of the vehicle once they had exited the club: "I determined I was going to wait until people that were in the car came back to the car until after they had left the club."[45] As such, "We set up outside of the club," and were waiting for Trotter and his companions.[46]

(7) Trotter and his companions exited Club Lavish some 30 minutes later, which occurred around 1:30 a.m. on February 21, 2015.[47]

(8) Silvers agreed that he and his backup units effectively prevented Trotter from re-entering the locked vehicle that contained the handgun.[48]

(9) When Trotter complied with the order to get onto the ground, that prompted him to ask why he was being taken into custody.[49] Silvers replied, to the effect, because there was a gun in the car.[50] Trotter then volunteered that he had a receipt for the gun, and Silvers then asked Trotter if he had a

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[43] A57; T09/09/2015 — 59.
[44] A63; T09/09/2015 — 83-84.
[45] A54; T09/09/2015 — 49.
[46] A54, A62; T09/09/2015 — 49, 78-79.
[47] A60; T09/09/2015 — 72.
[48] A66; T09/09/2015 — 95.
[49] A62; T09/09/2015 — 79-80.
[50] A62; T09/09/2015 — 80.

concealed carry permit.[51]

B. Testimony by Officer Silva.

At trial, Wilmington Police Officer Danny Silva testified concerning a post-arrest interview that he conducted with Trotter. Mr. Trotter explained to Silva that, after the white Lincoln is turned off, the driver's seat automatically goes back, which is why the handgun was exposed.[52] Silva clarified that he could not recall when, precisely, Trotter placed the gun where it was found: *before* or *after* the driver's seat had moved back.[53]

C. Jury Instructions and Closing Arguments.

On September 10, 2015, Superior Court held a hearing, out of the jury's presence, on jury instructions. During that hearing, Superior Court inquired of the State about what timeframe it intended to argue at closing where Trotter had the firearm on or about his person.[54] The State clarified that it intended to argue that it was on or about Trotter's person (1) at the moment Corporal Silvers saw him exited the vehicle and (2) at the moment of Trotter's approaching the vehicle after he left Club Lavish.[55] Defense counsel objected to the second argument, because Silvers testified that he and his backup units effectively had prevented Trotter from re-entering the

[51] A62; T09/09/2015 — 80-81.
[52] A67-68; T09/09/2015 — 101-02.
[53] A68; T09/09/2015 — 105.
[54] A83; T09/10/2015 — 11.
[55] A85; T09/10/2015 — 18-19.

vehicle. If "there was no way they were letting him get in that car," then the firearm "was not accessible to him."[56] The State cannot rely upon a theoretical possibility, "given the police presence there, that he had accessibility to that car and that gun at that point."[57] Defense counsel also noted that the State was limited under the law of the case as set forth in the Indictment.[58] Superior Court disagreed with the objection, permitting the State to go forward on such a theory without amending the Indictment to allege the offense of attempt.[59]

During the same hearing, defense counsel requested a mistake-of-fact instruction on the issue of concealment for the charge of Carrying a Concealed Deadly Weapon. Defense counsel reasoned that concealment was a question of fact for the jury, and a mistake-of-fact instruction was warranted by the record because it would negate Trotter's state of mind.[60] The record established through Corporal Silvers that the firearm was partially concealed and through Officer Silva that the driver's seat automatically moved back when the engine was turned off.[61] Simply put, "Partial visibility, I think in the normal understanding of what that is,

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[56] A85; T09/10/2015 — 19.
[57] A85; T09/10/2015 — 20.
[58] A83; T09/10/2015 — 12.
[59] *See* A83-84; T09/10/2015 — 21-22.
[60] A93; T09/10/2015 — 52.
[61] A93; T09/10/2015 — 52-53.

doesn't constitute concealment, thus the possibility of mistake."[62] Among other things, the State argued against the instruction on grounds that it went to a mistake of law.[63] Superior Court denied defense counsel's request for the mistake-of-fact jury instruction.[64]

[62] A94; T09/10/2015 — 54.
[63] A94-95; T09/10/2015 — 57-58.
[64] A95; T09/10/2015 — 59.

ARGUMENT

I. THE COURT BELOW ERRED BY DENYING THE MOTION TO SUPPRESS, WHERE PROBABLE CAUSE FOR A WARRANTLESS ARREST AND FOR THE SEARCH OF TROTTER'S VEHICLE WERE LACKING, AND THE EVIDENCE SEIZED WAS THE FRUIT OF THE POISONOUS TREE.

A. Question Presented.

Did the court below err by denying Trotter's Motion to Supress evidence, namely, his statements, the firearm and contraband within the vehicle, and any other direct and derivative evidence as the fruit of the poisonous tree, where the State lacked probable cause to have arrested Trotter and to have searched his vehicle?

Trotter preserved this issue by a timely, pre-trial motion.[65] The court below only permitted an abbreviated oral argument.[66]

B. Standard and Scope of Review.

This Court reviews "a trial court's denial of a motion to suppress for abuse of discretion."[67] "To the same extent the claim of error implicates questions of law; however, the standard of review is *de novo*."[68] This Court reviews "a trial judge's factual findings to determine whether there was sufficient evidence to

[65] A10-24.
[66] A40; T07/16/2015 — 23.
[67] Holden v. State, 23 A.3d 843, 846 (Del. 2011).
[68] *Id.* (emphasis in original).

support the findings and whether those findings were clearly erroneous."[69]

C. Merits of Argument.

The instant case calls upon the Court to vindicate meaningful and predictable boundaries to the offense of Carrying a Concealed Deadly Weapon. The conduct of storing a partially-visible firearm within a locked and stationary vehicle — *while the accused is outside of the vehicle* — is entirely outside of the statute. The court below erred by not granting Trotter's Motion to Suppress. (1) Corporal Silvers and the Wilmington Police Department effected a warrantless arrest of Devin L. Trotter without sufficient probable cause. (2) They lacked probable cause to make a warrantless arrest. (3) They lacked probable cause to have obtianed a search warrant for Trotter's vehicle. (4) As a result, Trotter's statements, the firearm itself, the controlled substances found inside the vehicle, and all direct and derivative evidence are the fruit of the poisonous tree and must be suppressed.

1. The State Effected a Warrantless Arrest, Necessitating Probable Cause.

The State characterized the interaction between Trotter and the police as a *Terry* stop, necessitating reasonable suspicion rather than probable cause.[70] Corporal Silvers' testimony, however, forecloses the State's theory under the U.S.

[69] *Id.*
[70] State's Resp. ¶ 9, at A27 (citing *Terry v. Ohio*, 392 U.S. 1 (1968)).

and Delaware constitutions.[71] Trotter was ordered by uniformed police officers to get onto the ground, *with guns drawn*. He was not free to leave and he submitted to their show of authority. He was thereby under arrest, and summarily transported to a police station. For purposes of the U.S. Constitution, an arrest is a seizure. Trotter was seized because of the presence of several officers, the display of weapons by officers, the use of language or tone of voice indicating that compliance with the officer's request might be compelled, and submission to the assertion of authority.[72] Trotter was also seized under the broader protections of the Delaware Constitution, because "he was not free to ignore the police presence."[73] Consequently, the State must satisfy the threshold for probable cause rather than reasonable suspicion.

2. The State Lacked Probable Cause to Arrest Trotter for the Offense of Carrying a Concealed Deadly Weapon.

Corporal Silvers may have had reasonable suspicion to conduct a *Terry* stop, but he lacked probable cause to arrest Trotter for the offense of Carrying a Concealed Deadly Weapon.[74] Probable cause to arrest is a fair probability of both (1) a "reasonable ground for belief of guilt," and (2) which is "particular to the person seized."[75] Here, the State lacked both.

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[71] Del. Const., art. I, § 6; U.S. Const., amends. IV, XIV § 1.
[72] California v. Hodari D., 499 U.S. 621, 626 (1991); Florida v. Royer, 460 U.S. 491 (1983).
[73] Jones v. State, 745 A.2d 856, 869 (Del. 1999) (en banc).
[74] 11 Del. C. § 1442.
[75] Stafford v. State, 59 A.3d 1223, 1229 (Del. 2012) (citations and internal quotations deleted).

(a) "Carries" and "About" the Person.

Simply put, the observations by Silvers are entirely outside the scope of the offense of Carrying a Concealed Deadly Weapon, such that there never was any reasonable ground for belief of guilt. This is not a case whether a firearm was carried "upon" Mr. Trotter, but rather "about" the person of Trotter. The fullest meaning of our statute, and why probable cause is lacking here, is found by juxtaposition with the Federal Crimes Code. Section 924(c)(1) imposes sentencing enhancements on "any person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm," among other things.[76] Concealment is not required. Neither must the firearm be "upon or about" the person. The statute therefore presents a valuable corollary to Delaware law on the meaning of "carries."

A majority of the U.S. Supreme Court held in *Muscarello v. United States* that the federal statute includes the conduct of carrying a firearm within the trunk of a vehicle — even though not immediately accessible to the accused.[77] The majority rejected the dissent's more limited construction that "carries" is equivalent to "on or about" the person of the accused.[78] But even under the majority's broad reading, U.S. Courts of Appeals are in accord that the record must

[76] 18 U.S.C. § 924(c)(1)(A).
[77] Muscarello v. United States, 524 U.S. 125, 126-27 (1998).
[78] *Id.* at 147 (Ginsburg, *J.*, dissenting) ("Reading 'carries' in § 924(c)(1) to mean 'on or about [one's] person' is fully compatible with these and other 'Firearms' statutes." (alteration in original)).

show that the vehicle (having the firearm) was moved from one location to another.[79] "The fundamental element of carrying" under the statute "is actual transportation. The Government failed to present any evidence at trial that [the accused] ever drove the car anywhere, much less transported the firearm while doing so."[80]

Simply *storing* a firearm inside a stationary vehicle, is no different than storage within a house, and insufficient as a matter of law.[81] And because the carrying must occur "during and in relation to" enumerated conduct,[82] there must be a concurrence of the elements of the offense: "We decline to so extend the definition of 'carry,' and conclude that 'carry' requires more than the fact that the defendant had, ***at some time previously***, carried the firearm to a particular location."[83]

Here, Corporal Silvers saw the white Lincoln come to rest at the side of a street, but lacked any knowledge as to how the firearm was *carried* while the vehicle was in motion — whether it was concealed during that point in time or not.

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[79] United States v. Mitchell, 104 F.3d 649, 653-54 (4th Cir. 1998) (evidence sufficient that the accused "transported the firearm in his automobile.").
[80] United States v. McPhail, 112 F.3d 197, 199 (5th Cir. 1997) (alteration added) (reversing the judgment of conviction under 18 U.S.C. § 924(c)(1)).
[81] United States v. Bono, 129 F.3d 606, 606 (5th Cir. 1997) (per curiam) (vacating the judgment of conviction and citing *United States v. McPhail*, 112 F.3d 197 (5th Cir. 1997)) ("In this case, the two loaded handguns . . . were found on top of a bookcase in the living room during the execution of the search warrant.").
[82] 18 U.S.C. § 924(c)(1)(A).
[83] United States v. Sheppard, 149 F.3d 458, 463 (6th Cir. 1998) (emphasis added).

Since 11 *Del. C.* § 1442 requires the firearm to be "upon or about" the person of the accused, then (unlike 18 U.S.C. § 924(c)(1)), Trotter's conduct of leaving the firearm inside a locked vehicle (whether or not "concealed") forms no part of the offense. The operative language of our statute compels the result articulated by the dissenting justices in *Muscarello*. If this Court considered (as it did before) the underlying legislative policy, that is, "to remove the 'temptation and tendency' to use concealed deadly weapons under conditions of 'excitement,'"[84] then leaving a firearm inside a locked vehicle while entering a nightclub is entirely consistent. But for a license, Trotter conformed his behavior to the letter and the spirit of the statute.

This Court has never stretched the concept of "about" the person to mean being outside of a locked vehicle. The *Dubin* factors are predicated on a driver *inside* the vehicle with the deadly weapon.[85] The exclusion of concealing a deadly weapon within a vehicle, per se, is a purposeful legislative choice to narrow the scope of the offense: Our legislature first enacted the offense of Carrying a Concealed Deadly Weapon in 1881, and it remains substantially the same today.[86] In 1926, however, the National Conference of Commissioners for Uniform State

[84] Dubin v. State, 397 A.2d 132, 134 (Del. 1979) (citation omitted).
[85] *See Dubin*, 397 A.2d at 135.
[86] *Compare* Act of Apr. 8, 1881, ch. 548, § 1, 16 Del. Laws 716, 716 (An Act Providing for the Punishment of Persons Carrying Concealed Deadly Weapons) (imposing punishment "if any person shall carry concealed a deadly weapon upon or about his person other than an ordinary pocket knife . . .") [*reprinted in* **A124-126**] *with* 11 Del. C. § 1442.

Laws (NCCUSL) promulgated the Uniform Firearms Act.[87] The Act sought to consolidate several firearms offenses into one comprehensive legislation, and included the following: "No person shall carry a pistol or revolver concealed ***in any vehicle*** or on or about his person, except in his dwelling house or place of business, or on other land possessed by him, without a license therefor as hereinafter provided."[88]

The Act made carrying concealed within a vehicle a distinct violation, in contradistinction with carrying concealed on or about the person. As shown in the explanatory note, "It is intended thus to remove the easy method by which a criminal on being pursued may transfer a weapon from his pocket to a concealed place in a vehicle."[89] But our legislature chose not to follow that direction. As a result, the offense in Delaware is only capable of being committed "upon or about" the person of the accused. That is a purposeful, legislative choice that the act of "carries" and "about" the person cannot refer to deadly weapons being stored within a vehicle.

The State makes much of the fact that Corporal Silvers also observed Trotter return from Club Lavish to his vehicle. But Silvers and his backup units waited until Trotter, key-in-hand, had reached the driver's door before arresting him.

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[87] UNIF. FIREARMS ACT (1926 Proposed Official Draft & Explanatory Statements and Comments), *in* 36 HANDBOOK NCCUSL PROC. 575-84 (1926) [*reprinted in* **A133-49**].
[88] *Id.* § 5, at 575 (emphasis added) [**A140**].
[89] *Id.* § 5, cmt. at 582 [**A147**].

Silvers acknowledged that Trotter was prevented from unlocking his vehicle and gaining immediate access to the gun. As previously stated, this Court held that "about" the person involves contemporaneity vis-à-vis "the ***immediate*** availability and accessiblity of the weapon to the person."[90] Standing outside of a locked vehicle does not suffice. Why? Because the record does not and cannot establish what would have happened if Trotter opened the vehicle door — whether he would have moved the vehicle with the firearm concealed on the floor or if he would have retrieved it and carried it in full view. The record shows that the driver's seat of the vehicle automatically shifts position under certain conditions. That shifting would, at distinct times, have left the firearm in full view. In other words, the State's theory of guilt rests on a hypothetical, alternative universe which, ironically, it had effectively thwarted. Corporal Silvers and his fellow officers jumped the gun, literally and figuratively.

Even if this Court were to consider its own precedents where the accused was inside the vehicle, it is consistently held that the deadly weapon must be so close that the accused can reach and touch it.[91] That cannot be said here. In *Pruitt v. Commonwealth*, the Supreme Court of Virginia expressly held that a firearm was not "about" the person where it was inside an *unlocked* vehicle, the accused was

[90] *Dubin*, 397 A.2d at 134 (citation omitted) (emphasis added).
[91] *E.g.*, Buchanan v. State, 981 A.2d 1098, 1104 (Del. 2009) ("[T]he evidence suggests that while Buchanan was driving a sedan (a Honda Accord), he had guns in a bag behind the front passenger seat and that he could physically touch the bag.").

located outside of the vehicle, and thus did not have "prompt and immediate use" of the weapon.[92] Courts in other jurisdictions, under substantially similar statutes,[93] have also ruled that a deadly weapon is not "about" the person if movement from one's current position is necessary in order to reach it.[94] "To hold otherwise would disregard the requirement that the firearm be 'within immediate physical reach' and would obliterate the distinction between carrying a conceald weapon and mere possession," and Delaware law is in accord with this proposition.[95]

Accordingly, that Trotter would have to move from his position in order to unlock his vehicle, causing the driver's seat to automatically shift and expose the firearm entirely, the State simply did not have a fair probability of guilt merely because Trotter approached his own vehicle from outside and possessed a firearm within. To hold otherwise would obliterate the distinction between "about" the person and mere possession. It would also amount to rewriting our statute to be like the Uniform Firearms Act, which our legislature did not enact. Much more

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[92] 650 S.E.2d 684, 687 (Va. 2007).

[93] *Compare* NEB. REV. STAT. § 28-1202(1)(a) ("Except as otherwise provided in this section, any person who carries a weapon or weapons concealed on or about his or her person, such as a handgun, a knife, brass or iron knuckles, or any other deadly weapon, commits the offense of carrying a concealed weapon.") *with* 11 Del. C. § 1442.

[94] State v. Senn, 884 N.W.2d 142, 147 (Neb. Ct. App. 2016). (discussing and quoting *People v. Niemoth*, 152 N.E. 537, 537 (Ill. 1926) for the proposition that "two firearms could not be said to be concealed 'on or about' the defendant's person where there was no evidence that he could have 'reached them without moving from his position in the front seat.'").

[95] *Id.* at 148; accord. Gallman v. State, 14 A.3d 502, 505 n.6 (Del. 2011) ("The act of 'carrying' a deadly weapon in a 'concealed' manner requires a different test than possession.").

was needed in order to make a warrantless arrest of Trotter, and the State simply did not have it.

(b) "Concealed."

Silvers did not observe the firearm "concealed" as defined by this Court in *Robertson v. State*. There, this Court held, "We adopt the majority rule requiring that a concealed weapon be 'hidden from the ordinary sight of another person . . . [meaning] the casual and ordinary observation of another in the normal associations of life."[96] Here, the "normal associations of life" would entail a person sitting within the vehicle, not an investigating police officer standing outside of the vehicle, in the dark, as Corporal Silvers was positioned.[97] Notwithstanding police investigative techniques, the normal associations of life **do not** entail peering inside a vehicle owned by a stranger. Even so, where Corporal Silvers saw the handle and therefore knew that it was a firearm, then reasonable persons sitting inside the vehicle would likewise have been appraised that a firearm was in their presence. As a result, the firearm was not "concealed" within the meaning of the statute.

Robertson is the proper test for concealment, because "partial concealment"

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[96] Robertson v. State, 704 A.2d 267, 268 (Del. 1997) (alteration in original) (citations omitted).
[97] *See id.* ("[C]ourts in other states have typically distinguished 'ordinary observation' from the observations of an investigating police officer. We approve of that distinction, and hold that a weapon may be concealed even though easily discoverable through routine police investigative techniques."); *In re* Terry, 2006 WL 2320783, at *2 (Ohio Ct. App. Aug. 11, 2006) ("[D]arkness alone does not render a weapon concealed . . .").

is not a per se violation. Our statute lacks the necessary operative language that is found in other jurisdictions which criminalize partial concealment, that is to say, whether a deadly weapon was "concealed in whole or in part."[98] Without that language, it is error as a matter of law to hold that concealment means "if any part of the firearm is not visible," because "a weapon is not concealed if it is sufficiently exposed to reveal its identity even though the weapon is not in full open view."[99] As a result, Corporal Silvers lacked any fair probability to form a reasonable ground for guilt, because the firearm was not "concealed" as a matter of law.

(c) "Without a License to Do So."

Silvers also lacked probable cause for a warrantless arrest, because he did not possess any facts whether any of the occupants of the vehicle had a concealed carry license. While proof of such is not part of the State's burden of proof at trial, that is not dispositive of a reasonable search and seizure for purposes of the U.S. and Delaware constitutions.[100]

Construing 11 *Del. C.* § 1442, the U.S. Circuit Court of Appeals for the Third Circuit held that a *Terry* stop does not require a police officer to know in

[98] *E.g.*, Martin v. State, 47 So. 426, 427 (Miss. 1908) (construing "in whole or in part") ("In other words, if a person carry a deadly weapon, and only a part of it is concealed, the other part being visible, he is guilty of carrying a concealed weapon, within the meaning of the statute.").
[99] State v. White, 376 So. 2d 124, 124-25 (La. 1979) (concluding that the court below committed reversible error by instructing the jury "that if any part of the firearm is not visible it is sufficient for concealment of the weapon for the purpose of this particular statute.").
[100] Del. Const., art. I, § 6; U.S. Const., amends. IV, XIV § 1.

advance whether the suspect possessed a concealed carry license.[101] (Whether the police exceeded the scope of *Terry* "by the manner in which the search was conducted — at gunpoint, ordering Gatlin to the ground, and then handcuffing him behind his back before even asking him a single question — this issue is not before us on appeal."[102]). But a U.S. court elsewhere held that probable cause does, in fact, require that knowledge. Where federal agents had detained the accused, acting on a tip from a confidential informant, a court held that probable cause to search was lacking:

> Probable cause to believe that [the accused] had guns or machine guns in his automobile is not equivalent to probable cause that such possession was illegal. The informant had not indicated to the agents that [the accused] was a convicted felon, or that he did not have a permit for his weapons, or that they were otherwise illegal. Moreover, even if the agents had probable cause to believe that [the accused] was participating in some felonious activity and that he had a weapon in his car, that does not give rise to probable cause that the weapons in the car were in violation of 18 U.S.C. § 924(c)(2) since that provision prohibits only firearms carried otherwise unlawfully. * * * Absent further evidence that the agents knew of some facts indicating that the possession of firearms was illegal, they had no probable cause to believe that his car contained contraband.[103]

To create a per se rule that any citizen can be arrested at gunpoint, handcuffed, and transported to a police station — *before* investigating if the citizen was licensed — is manifestly unreasonable. With the incorporation of the Second

[101] United States v. Gatlin, 613 F.3d 374, 379 (3d Cir. 2010).
[102] *Id.* at 379 n.3.
[103] United States v. Grant, 476 F. Supp. 400, 405 (S.D. Fla. 1979) (alterations added).

Amendment of the U.S. Constitution against the States through the Fourteenth Amendment,[104] and as independently promised in Article I, Section 20 of the Delaware Constitution,[105] the conclusion must follow that arms are not some sort of social evil but a fundamental right in our country and that possession of a concealed carry license is a regular incident of lawful gun-ownership. As such, a reasonable search and seizure must take notice of it, even though not part of the State's burden of proof at trial. It is no more onerous than the burden under 11 *Del. C.* § 1902, to ask for the name, address, business abroad, and destination of the person being detained, which mandate was also not followed here.

That a dichotomy exists between trial on the merits of a substantive criminal offense, and an unreasonable search and seizure, is supported by Delaware jurisprudence. This Court already recognized that a firearm can be concealed for purposes of the substantive offense but also in plain view of a police officer.[106] This Court also recognized that an unreasonable search and seizure (subject to the exclusionary rule) may not furnish evidence of Resisting Arrest on the merits at trial, even though an unlawful arrest is no defense under the substantive offense.[107] Here, likewise, it is not unreasonable to require law enforcement personnel to inquire of a citizen whether a concealed carry license is had, prior to a warrantless

[104] District of Columbia v. Heller, 128 S. Ct. 2783 (2008).
[105] Del. Const., art. I. § 20 ("A person has the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use.").
[106] Robertson v. State, 704 A.2d 267, 268-69 (Del. 1997) (per curiam).
[107] Jones v. State, 745 A.2d 856, 872-73 (Del. 1999) (en banc).

arrest, even though proof of licensure is not assigned to the State's burden of proof at trial.

Here, Silvers lacked any fair probability of a reasonable ground for guilt. While the Third Circuit held that the police officers did not need information whether the suspect had a concealed carry license, as a condition for a *Terry* stop,[108] that does not answer whether that information was necessary for a warrantless arrest. Trotter respectfully submits that it is. To hold otherwise exposes an untold number of law-abiding gunowners who are duly licensed, to the unreasonable danger of being summarily arrested at gunpoint, handcuffed, and carted off to the police station.

(d) Fair Probability Particularized to Trotter.

Corporal Silvers also lacked any fair probability that the offense of Carrying a Concealed Deadly Weapon was particularized to Trotter. Silvers did not observe which of the four occupants of the white Lincoln had placed the handgun on the floor of the vehicle. That Trotter approached the vehicle with his companions is inadequate, because neither does that particuarlize which of them had placed the firearm where Silvers had seen it.

The law is well-settled in *Maryland v. Pringle* that, in context of cocaine found within a vehicle, the police have probable cause to arrest all occupants of the

[108] *Id.* at 378-79.

vehicle under a fair probability of joint-possession within a common enterprise.[109] But *Pringle* is readily distinguished. First, the case involved cocaine, whereas no crime exists at all under 11 *Del. C.* § 1442 if the citizen possesses a concealed carry license. Where the right to bear arms is fundamental under the U.S. and Delaware constitutions,[110] it cannot be said that a firearm, even partially concealed, is "contraband" on par with cocaine, heroin, and any other controlled substance. That is a meaningful distinction. Second, this Court has recognized that "upon or about" the person is a different test that the operative term "possession."[111]

As such, a presumed common enterprise is untenable as applied to Carrying a Concealed Deadly Weapon. The offense is personal to the accused and thereby requires an individualized analysis for purposes of a reasonable search and seizure.

(e) Facts Discovered After-the-Fact.

The State argued before Superior Court in part, "Finally, when the officers stopped the defendant to question him about the firearm, the defendant admitted that he did not posses a concelaed carry permit."[112] It is axiomatic that facts discovered *after* an arrest may not justify its validity in the first instance. Any evidence obtained after Trotter was ordered to get onto the ground may not be considered for probable cause purposes.

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[109] 540 U.S. 366 (2003).
[110] Del. Const., art. I. § 20; U.S. Const., amend. II.
[111] Gallman v. State, 14 A.3d 502, 505 n.6 (Del. 2011).
[112] State's Resp. ¶ 13, at A29.

3. The State Lacked Probable Cause for a Search Warrant.

A valid search warrant requires factual averments, within the four corners of the supporting affidavit, "for a judicial officer to form a reasonable belief that an offense has been committed and that seizable property would be found in a particular place to support a finding of probable cause."[113] The State cannot meet this standard.

(a) No Probable Cause for Carrying a Concealed Deadly Weapon.

On the basis of Carrying a Concealed Deadly Weapon, the search warrant fails for all of the same reasons stated above why the warrantless arrest of Trotter fails. The observations by Corporal Silvers are entirely outside of the statute.

(b) No Probable Cause of a Stolen Vehicle.

Within the affidavit in support of the search warrant, Corporal Silvers averred that the vehicle's license plate produced a "no record found" in DELJIS. But Corporal Silvers did not have any reasonable and articulable facts to support a suspicion that the white Lincoln was stolen and because he lacked reasonable suspicion, so too did he lack probable cause, a higher threshold. This Court held, "Based on the objective facts, we cannot extrapolate from the fact of a fictitious tag alone that (i) a car theft occurred and that (ii) the occupants must be armed and dangerous."[114] Here, ***before*** discovering the handle of a firearm, Corporal Silvers

[113] State v. Manley, 706 A.2d 535, 540 (Del.Super. 1996).
[114] Holden v. State, 23 A.3d 843, 849 (Del. 2011).

confirmed that the transmission on the white Lincoln was not popped or tampered. Significiantly, had Silvers looked at the registration sticker on the license plate, then he would have seen the "PC" designation and could have verified the vehicle in DELJIS and its ownership information.

This case therefore presents an instance of *wilfull ignorance*. With more than 17 years of experience on the Wilmington Police Department, Corporal Silvers asserts that it never occurred to him to check the registration sticker on the license plate. But Silvers testified that a "no record found" on DELJIS can refer to circumstances where a vehicle tag was never issued or had been expired for several years.[115] A reasonable police officer therefore would verify if the white Lincoln possessed a current registration sticker on the license plate.

In other contexts, the U.S. Supreme Court held under the Due Process Clause of the Fourteenth Amendment that a state actor "must take additional reasonable steps" before working a deprivation of life, liberty, or property, "if it is practicable to do so."[116] This reasonableness under the Due Process Clause is sufficiently analogous to reasonable searches and seizures under the Fourth Amendment. Here, it was reasonable and practicable for Corporal Silvers, who was already on foot, to have inspected the license plate to determine if it had a current registration sticker. His decision not to do so was unreasonable, and this

[115] A38; T07/17/2015 — 14-15.
[116] Jones v. Flowers, 547 U.S. 220, 226 (2006) (sale of real estate for delinquent taxes).

willful ignorance by a 17-year veteran police officer may not furnish suspicion of a stolen vehicle.

4. Fruit of the Poisonous Tree.

Since the State lacked probable cause to arrest Trotter, and to have obtained a search warrant for his vehicle, then all of the evidence obtained by the State is the fruit of the poisonous tree under *Wong Sun v. United States*.[117] Accordingly, Trotter's statements, the firearm and controlled substances found within the vehicle, and any other direct and derivative evidence, must be suppressed under the U.S. and Delaware constitutions.[118]

[117] 371 U.S. 471 (1963).
[118] Del. Const., art. I, § 6; U.S. Const., amends. IV, XIV § 1.

II. THE EVIDENCE ADDUCED AT TRIAL WAS INSUFFICIENT TO SUPPORT A VERDICT FOR CARRYING A CONCEALED DEADLY WEAPON, WHERE A PERSON OUTSIDE OF A LOCKED AND STATIONARY VEHICLE STORED A PARTIALLY-VISIBLE FIREARM WITHIN.

A. Question Presented.

Under Count I of the Indictment, was the evidence adduced at trial sufficient as a matter of law for a rational jury to find beyond a reasonable doubt that Devin L. Trotter was guilty of Carrying a Concealed Deadly Weapon under 11 *Del. C.* § 1442, where he was outside of a locked and stationary vehicle and stored a partially-visible firearm within?

An insufficiency of evidence claim must be presented to the trial court or it is waived.[119] Waiver is excused, if plain error requires review in the interests of justice.[120] Plain errors are those affecting substantial rights, generally, the outcome of trial.[121] Here, counsel for Trotter indirectly raised this issue by the Motion to Supress, where argument involved that the State lacked probable cause for the offense of Carrying a Concealed Deadly Weapon.[122] If probable cause was lacking, then so too was evidence insufficient as a matter of law, where probable cause is a lesser threshold. At trial, counsel for Trotter also objected to the State's closing argument that

[119] Monroe v. State, 652 A.2d 560, 563 (Del. 1995).
[120] *Id.*; Del. Supr. Ct. R. 8.
[121] Greene v. State, 966 A.2d 824, 828 (Del. 2009).
[122] A10-24.

Trotter's approaching of his locked, stationary vehicle was within the scope of the offense.[123] For these reasons, the interests of justice militate in favor of overlooking the formality of a motion for judgment of acquittal. Counsel for Trotter presented the substance of the argument before the court below, albeit within a different procedural posture.

B. Standard and Scope of Review.

This Court reviews "*de novo* a trial judge's denial of a criminal defendant's Motion for Judgment of Acquittal to determine whether any rational trier of fact, viewing the evidence in a light most favorable to the State, could have found the essential elements of the crimes charged *beyond a reasonable doubt*."[124] Application of the rule of law to particular cases, "must of necessity expound and interpret that rule."[125] Statutory interpretation is a question of law bound up within the sufficiency of the evidence and is reviewed *de novo*.[126]

C. Merits of Argument.

Carrying a Concealed Deadly Weapon occurs when a person knowingly "carries concealed a deadly weapon upon or about the person"

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[123] *See supra* Statement of Facts, Part II.C.
[124] White v. State, 906 A.2d 82, 85 (Del. 2006) (en banc) (citation omitted) (emphasis in original).
[125] Marbury v. Madison, 5 U.S. (1 Cran.) 137, 177 (1803).
[126] *See* Dixon v. State, 673 A.2d 1220, 1224-25 (Del. 1996).

without a license provided by law.[127] The State presented evidence that a deadly weapon, i.e., a SD40 VE black handgun, was partially-visible within a locked, stationary vehicle. And that Trotter was outside of that vehicle.

For all of the same reasons discussed in greater detail in Part I, above, the evidence adduced at trial is insufficient as a matter of law. The record does not establish that Trotter had "carrie[d]" the firearm through the vehicle, since the vehicle was stationary and, where it was not, the record does not establish whether the firearm was concealed at that point in time.[128] A partially-visible firearm is not "concealed" within the statute, where in the normal associations of life, that is, a passenger within the vehicle, would be apprised that a deadly weapon was in his or her presence.[129]

Accordingly, the judgment of conviction under Count I of the Indictment should be reversed, and the case remanded for re-sentencing.

[127] 11 Del. C. § 1442.
[128] *See supra* Part I.C.2(a).
[129] *See supra* Part I.C.2(b).

III. THE COURT BELOW ERRED FOR REFUSING THE DEFENDANT'S REQUEST FOR A MISTAKE-OF-FACT JURY INSTRUCTION.

A. Question Presented.

Under Count I of the Indictment, did the court below err by refusing the request by Devin L. Trotter for a mistake-of-fact jury instruction? This issue was preserved by timely request to the court below on September 10, 2015 during a hearing, out-of-the jury's presence, on jury instructions.[130]

B. Standard and Scope of Review.

"The standard of appellate review for denial of a defense requested affirmative defense jury instruction on ignorance or mistake of fact pursuant to 11 *Del. C.* § 441(1) is plenary or *de novo*."[131]

C. Merits of Argument.

A mistake-of-fact instruction is available where evidence of record has a tendency of showing that "the ignorance or mistake negatives the state of mind for the commission of the offense . . ."[132] Carrying a Concealed Deadly Weapon occurs when a person *knowingly* "carries concealed a deadly weapon upon or about the person" without a license provided by law.[133] The *Criminal Pattern Jury Instructions* contain a mistake-of-fact

[130] *See supra* Statement of Facts, Part II.C.
[131] Burrell v. State, 766 A.2d 19, 26 (Del. 2000).
[132] 11 Del. C. § 441(1).
[133] 11 Del. C. § 1442; Ross v. State, 232 A.2d 97, 98 (Del. 1967).

instruction.[134]

Here, the record established that the firearm was partially visible within the vehicle. Through Officer Silva's interview of Trotter, Mr. Trotter did not believe the firearm was concealed, because after the vehicle's ignition is turned off the driver's seat automatically goes back, exposing the handgun.[135] Since the record below included affirmative evidence in the nature of Trotter's statements concerning his state of mind, it was reversible error for Superior Court to have refused the requested jury instruction. The error is reversible because, in a close case like this one, the instruction focused the jury's inquiry on whether Trotter did not knowingly conceal the

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[134] Instruction 5.4 provides at length:

> The defendant has raised the defense of ignorance or mistake of fact.
>
> The defense is available if:
>
> the ignorance or mistake negates the state of mind required for the crime; or
> the statute defining the crime, or a related statute, expressly provides that ignorance or mistake constitutes a defense; or
> the ignorance or mistake supports a defense of justification.
>
> If, after considering all the evidence tending to support this defense, you find that the evidence raises a reasonable doubt in your mind about the defendant's guilt, you must find the defendant not guilty of the crime. You must consider evidence of this defense along with all the other evidence in determining whether the State has satisfied its burden of proving the defendant's guilt beyond a reasonable doubt.

Superior Court of Delaware, Criminal Pattern Jury Instructions 5.4 (2012) [**A132**].

[135] *See supra* Statement of Facts, Part II.B.

firearm, which was essential and dispositive to the outcome of guilt.[136]

The State's argument below that the instruction was not warranted, because it amounted to a mistake of law, is manifestly incorrect. In *Dubin v. State*, this Court expounded at length, "The question of whether or not a weapon is 'upon or about' a person is a factual question. The Trial Court erred in holding that a pistol in the glove compartment of a car is 'upon or about' the defendant's person as a matter of law." Such error deprived the accused of the constitutional right to a trial by jury.[137] The reasoning in *Dubin* applies with equal force to the essential element of "concealed" under the statute. The State cannot maintain a fantastic theory that whether something is concealed is a mistake of law or else trial courts are entitled to instruct the jury that something is, indeed, concealed, depriving defendants of their right to have the jury make that determination beyond a reasonable doubt. The mens rea requirement of "knowingly" applies to the essential element of "concealed." Carrying a Concealed Deadly Weapon is not a strict-liability offense.[138]

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[136] *Cf.* State v. May, 997 P.2d 956, 959 (Wash. Ct. App. 2000) (refusal of mistake-of-fact instruction was reversible error, where the record had a tendency to show that the defendant's mother owned the firearm and left it inside his house by mistake).

[137] Dubin v. State, 397 A.2d 132, 133 (Del. 1979).

[138] *See, e.g.*, State v. Torres, 75 P.3d 410, 411-12 (N.M. Ct. App. 2003) (distinguishing Unlawfully Carrying a Deadly Weapon from Unlawfully Carrying a Firearm into a Licensed Liquor Establishment and holding that the latter is a strict-liability offense that does not warrant a mistake-of-fact instruction whether the establishment was licensed

CONCLUSION

For the forgoing reasons, Appellant Devin Trotter respectfully requests that this Honorable Court: (1) reverse the order below, which denied the Motion to Supress, and vacate his sentences and convictions under the Indictment; or, alternatively, (2) reverse the judgment of conviction for Carrying a Concealed Deadly Weapon and remand for re-sentencing; or, alternatively, (3) vacate the sentences and convictions under the Indictment and remand for new trial.

Respectfully submitted,

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Dated: November 16, 2016

liquor establishment).

A. **Correct.**
Q. Okay. Before he left the vehicle, was he ever seen handling the gun?
A. **I was driving past, I couldn't see inside. They were inside the car for five, seven minutes.**
Q. Okay?
A. **As I had driven past -- when I drove past the first time and ran the tag I had to drive around the full block. When I came back the second time, they were starting to get out of the car. So they spent some time in the car, I couldn't see what they were doing.**
Q. Okay. So you never saw -- it's a fair statement you never actually saw Mr. Trotter in physical control handling the gun himself, having it on his person; is that fair to say?
A. **Yes.**
Q. And then when you came back to the car, he was apprehended before he ever got into the car?
A. **Correct.**
Q. Okay. And then the car was taken down to WPD, then you got the search warrant and then it was searched at that point?

A. **Correct.**
MR. MALIK: Just have one moment, Your Honor, please.
THE COURT: Yes.
MR. MALIK: Thank you, Detective. I have no further questions.
THE COURT: Any redirect?
MS. DOKO: No, Your Honor. It does not prompt anything further.
THE COURT: You may step down.
THE DEFENDANT: Thank you, Your Honor.
MS. DOKO: Your Honor, that's the State's only witness. The State rests.
THE COURT: Defense have any witnesses?
MR. MALIK: No, Your Honor.
THE COURT: Brief argument, first from the State.
MS. DOKO: Yes, Your Honor.
Your Honor, the State understands that the defense argument was twofold, one is regarding the stop and one regarding the search warrant.
Really, Your Honor, here we have probable cause that really could be used for both. What was

inside that search warrant is also relevant, Your Honor, is the basis for the stop.
Ultimately, in this case, what the search warrant was for, what the stop was for was for carrying a concealed deadly weapon.
The facts you heard all point to evidence of carrying a concealed deadly weapon. You have a firearm -- well, the handle of the gun observed on the driver's side; with the defendant who ultimately ends up being the owner of the vehicle comes to the driver side that is immediate when he is stopped. Again, Your Honor, close proximity to the firearm, that's exactly where he's going. He's got the key out, just about to open the door when they stop him. He tells police at the scene, Your Honor, that he doesn't have a concealed -- a permit to carried concealed. All those facts, Your Honor, support a finding of probable cause. And, again, even just with a mere detention, Your Honor, at that point were reasonable suspicious.
This is something that the officers have -- the officers have pointed to specific and articulable facts, which again, Your Honor, suggest

that a crime has been or will be committed with respect to this case; and that's exactly what we have here is carrying a concealed deadly weapon. And the defendant ultimately admits the firearm is his, hands him a receipt. Subsequent the search warrant reveals additional contraband in the vehicle, including controlled substances.
All that information, Your Honor, is contained in the warrant. The State doesn't contest the way that defense asserts what's in the warrant, but the State would argue, Your Honor, that's all the State really needs to show is that there was a firearm, it was concealed and that the defendant was the one who had control over it. And that's exactly what we have here, that's exactly what's written in the warrant. For those reasons, Your Honor, the State finds that -- that you deny the motion to suppress in this matter.
Do you have any specific questions, Your Honor?
THE COURT: No.
MR. MALIK: Your Honor, I disagree with the State's characterization. I think the one critical

factor here that the gun was in plain view. When the officer came to look at the gun -- excuse me, when the officer came to the car to look for the VIN number, his first instinct was to check the ignition to see if it had been popped out because he thought it may have been a stolen car, so he viewed it from the passenger side. He stepped up and saw something in plain view without --

THE COURT: Okay. Hasn't the Supreme Court already ruled on this?

MR. MALIK: About the --

THE COURT: Robinson holds that an item may be in plain view for search and seizure purposes though concealed for the purposes of the substantive law.

MR. MALIK: Your Honor, I still -- if you look at the wording of the statute Carrying a Concealed Deadly Weapon as 11 Del.C. Section 1442, "A person is guilty of carrying a concealed deadly weapon when the person carries a concealed deadly weapon on or about the person without a license to do so." The -- I would submit that it wasn't on Mr. Trotter's person, it was in the vehicle. And

at that time when it was viewed he was not in the vehicle. If the vehicle -- if the gun was in complete -- if it was sitting on the seat, Your Honor, I would submit that it's not on his person, it's in complete --

THE COURT: Can you give me case law to support this? Because it seems like the case law goes totally the other way.

MR. MALIK: I do not, Your Honor.

THE COURT: Okay. Anything else?

MR. MALIK: No, Your Honor.

THE COURT: Anything else from the State?

MS. DOKO: No, Your Honor.

Just as you point out, both carrying and concealed -- if you look at standard pattern jury instruction that we use, Your Honor, it talks about actual possession, constructive possession, includes all that, including premises, inside a vehicle, it doesn't require full complete concealment, Your Honor.

THE COURT: Anything else from the defense?

MR. MALIK: No, Your Honor.

THE COURT: I think the evidence supports

the fact that the officer walked to the car, saw the gun, it was concealed.

I think Robinson distinguishes between an item in plain view for search and seizure purposes versus one that's concealed for the purposes of criminal law. So we had reasonable probability to obtain a search warrant and, therefore, the motion is denied.

MR. MALIK: Thank you, Your Honor.

MS. DOKO: Thank you, Your Honor.

(Whereupon, the proceedings concluded at 2:31 p.m.)

STATE OF DELAWARE:
NEW CASTLE COUNTY:

I, MICHELE R. HONAKER, RPR, Official Court Reporter of the Superior Court, State of Delaware, do hereby certify that the foregoing is an accurate transcript of the proceedings had, as reported by me in the Superior Court of the State of Delaware, in and for New Castle County, in the case therein stated, as the same remains of record in the Office of the Prothonotary at Wilmington, Delaware, and that I am neither counsel nor kin to any party or participant in said action nor interested in the outcome thereof.

This certification shall be considered null and void if this transcript is disassembled in any manner by any party without authorization of the signatory below.

WITNESS my hand this 19th day of July, 2016.

/s/ Michele Honaker
MICHELE R. HONAKER, RPR

IN THE SUPREME COURT OF THE STATE OFDELAWARE

DEVIN L. TROTTER,	:	
	:	
Defendant-Below,	:	
Appellant,	:	
	:	
v.	:	No. 264, 2016
	:	
STATE OF DELAWARE,	:	
	:	
Plaintiff-Below,	:	
Appellee.	:	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Time New Roman 14-point typeface using Microsoft Word for Mac 2011 Version 14.5.3.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 8,336 words, which were counted by Microsoft Word for Mac 2011 Version 14.5.3.

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Dated: November 16, 2016

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DEVIN L. TROTTER,	:	
	:	
Defendant-Below,	:	
Appellant,	:	
	:	
v.	:	No. 264, 2016
	:	
STATE OF DELAWARE,	:	
	:	
Plaintiff-Below,	:	
Appellee.	:	

CERTIFICATE OF SERVICE

I, John S. Malik, do hereby certify that on this 16th day of November, A.D., 2016, I have had forwarded via Lexis Nexis File and Serve electronic delivery a copy of Appellant Devin Trotter's Opening Brief and Appendix to the following individual at the following address:

Elizabeth McFarlan, Esquire
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