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Case Number 264,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DEVIN TROTTER,	)	
	)	
Defendant – Below,	)	
Appellant,	)	
	)	
v.	)	**No. 264, 2016**
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff – Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

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DATE: December 19, 2016

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NATURE AND STAGE OF THE PROCEEDINGS

On March 16, 2015, a New Castle County Grand Jury returned an indictment against Devin Trotter ("Trotter") alleging Carrying a Concealed Deadly Weapon ("CCDW"), Possession of a Firearm by a Person Prohibited and three counts of drug possession (marijuana, alprazolam and heroin). A001. On June 23, 2015, Trotter filed a motion to suppress evidence which the Superior Court denied after a hearing. A003. The matter proceeded to a jury trial and Trotter was found guilty of all charges. A004. On April 22, 2016, Trotter was sentenced to six months Level IV home confinement, followed by Level 3 probation. A120-122. Trotter appealed his convictions. This is the State's answering brief.

SUMMARY OF THE ARGUMENT

I. Appellant's argument is denied. The Superior Court did not abuse its discretion when it denied Trotter's suppression motion. The police possessed probable cause to arrest Trotter when they observed the handle of a gun sticking out from underneath the driver's seat of a car Trotter had occupied and was attempting to re-enter.

II. Appellant's argument is denied. Trotter failed to preserve this issue below because he did not move for judgment of acquittal and he has not demonstrated how the interests of justice would be served by this Court's consideration of his claim. Notwithstanding Trotter's failure to raise the issue in Superior Court, there was sufficient evidence to convict him.

III. Appellant's argument is denied. The Superior Court did not abuse its discretion when it denied Trotter's request for a mistake-of-fact instruction. The Superior Court correctly determined that the mistake-of-fact instruction was not applicable to the CCDW charge in Trotter's case.

STATEMENT OF FACTS

On February 20, 2015, Corporal Jeffrey Silvers ("Cpl. Silvers") of the Wilmington Police Department was on patrol in a marked police car in the 1300 block of North Union Street in Wilmington, Delaware. A035. Cpl. Silvers drove by a white Lincoln parked on the street, and noticed four people inside the car. A035. He took down the license plate number, ran a check on it, twice, and the tag number came back as "no record found."[1] A035. Cpl. Silvers circled the block and as he drove by the Lincoln again, he saw the four people who were in the car walk into a nearby nightclub. A035. In an attempt to determine the car owner's identity, Cpl. Silvers walked up to the car and, while outside of the car, checked the vehicle identification number ("VIN") located at the base of the windshield. A035. He also looked for any indicia that the car was stolen. A035. While checking the VIN number and looking at the ignition, Cpl. Silvers saw the handle of a gun sticking out from underneath the driver's seat. A036.

After Cpl. Silvers contacted his supervisors to request assistance, several officers arrived at the scene and waited for the four prior occupants of the Lincoln to return to the car. A036. The officers eventually saw the four leave the

[1] Cpl. Silvers later determined that Trotter owned the Lincoln. A037. According to Trotter, the car was registered under the "PC" designation. A037. However, the tag did not have a "PC" designation which led to the "no record" result when Cpl. Silvers initially ran the tag without the "PC" designation.

nightclub; Devin Trotter ("Trotter") was among them. A036. As Trotter walked toward the driver's door with a key, officers approached with guns drawn and ordered him to the ground. A036. Trotter had a receipt for the firearm; however, he told Cpl. Silvers that he did not have a permit to carry the gun concealed. A037. Trotter was taken into custody, the Lincoln was transported to the police station, and Cpl. Silvers applied for a warrant to search the car. A036. The officer who transported the vehicle told Cpl. Silvers that when he placed the key in the ignition, the driver's seat automatically moved forward approximately six inches. A036. Cpl. Silvers executed the warrant and, during a search of the car, he discovered a Smith & Wesson handgun under the driver's seat, a holster on the driver's side floor board, an ammunition magazine containing 14 bullets in the glove box, 11 Alprazolam pills in a glass container located in the driver's side door panel, 47 small bags of heroin in the pocket of a hooded sweatshirt on the rear seat, six glass vials containing marijuana inside two iPhone boxes located in the trunk, and two bags of marijuana inside a prescription pill bottle labeled for Devin Trotter in the spare tire area of the trunk. A036.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY DENIED TROTTER'S MOTION TO SUPPRESS.

Question Presented

Whether the trial judge abused his discretion by denying Trotter's suppression motion.

Standard and Scope of Review

This Court reviews the denial of a suppression motion for an abuse of discretion, deferring to the trial court's factual findings.[2] However, the trial court's legal conclusions are reviewed *de novo*.[3]

Merits of the Argument

On appeal, Trotter argues that police officers (1) made a warrantless "arrest;" (2) lacked probable cause to arrest him; and (3) lacked probable cause to obtain a search warrant for the Lincoln. His claims are unavailing.

Trotter Was Detained

Trotter contends that he was arrested without a warrant and that the police did not possess probable cause to arrest him. He concedes, however, that "Cpl.

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[2] *Brown v. State*, 2014 WL 5099648, at *1 (Del. Oct. 9, 2014) (citing *Stafford v. State*, 59 A.3d 1223, 1227 (Del. 2012)); *Lopez–Vazquez v. State*, 956 A.2d 1280, 1284–85 (Del. 2008).

[3] *Lopez–Vazquez*, 956 A.2d at 1285.

Silvers may have had reasonable suspicion to conduct a *Terry* stop."[4] The State does not contest that Trotter was seized when the police officers ordered him to the ground at gunpoint.[5] With no legal support, Trotter claims that because "[h]e was not free to leave and he submitted to [a] show of authority[,] [h]e was thereby under arrest."[6] His argument conflates the concepts of "seizure" and "arrest." "A police stop is justified only if there are specific and articulable facts, together with rational inferences, to suggest that a suspect is committing, has committed, or is about to commit a crime. In determining whether reasonable suspicion existed to justify a detention, courts will defer to the experience and training of law enforcement officers."[7] Here, Cpl. Silvers observed the handle of a handgun under the driver's seat of the car Trotter had recently occupied, and was returning to after leaving a nightclub. When the police ordered him to the ground, Trotter was seized. And, his detention was supported by at least reasonable suspicion that he was breaking the law. In any event, Trotter's characterization of his seizure

[4] *Op. Brf.* at 16.

[5] *See e.g. Buckingham v. State*, 482 A.2d 327, 332 (Del. 1984) (officer holding three suspects at gunpoint at the rear of a vehicle "constituted a detention subject to the constraints of the Fourth Amendment").

[6] *Op. Brf.* at 16.

[7] *Johnson v. State*, 2015 WL 478258, at *1 (Del. Feb. 3, 2015) (citing *Woody v. State*, 765 A.2d 1257, 1262 (Del. 2001); *Terry v. Ohio*, 392 U.S. 1, 30 (1968)).

notwithstanding, the police possessed probable cause to arrest Trotter without a warrant.

There Was Probable Cause to Arrest Trotter

Under 11 *Del. C.* § 1904, a police officer may make a warrantless arrest for any felony, if the officer has "reasonable grounds" to believe the person to be arrested has committed the crime.[8] "Reasonable grounds" has been interpreted by this Court to be synonymous with probable cause.[9]

> "A determination of the existence of probable cause for a warrantless felony arrest is based on a totality of the circumstances. Courts generally require that the facts and circumstances within [the officers] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense. Courts must review probable cause determinations in light of the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act."[10]

Trotter argues that while officers may have possessed reasonable suspicion to detain him, they did not possess probable cause to arrest him. He contends that Cpl. Silvers could not possess "a reasonable ground for belief of guilt" with regard

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[8] 11 *Del. C.* § 1904.

[9] *Thomas v. State*, 467 A.2d 954, 957, n.3 (Del. 1983) (other citations omitted).

[10] *Darling v. State*, 768 A.2d 463, 466 (Del. 2001) (citing *Gardner v. State,* 567 A.2d 404, 409 (Del. 1989); *Coleman v. State,* 562 A.2d 1171, 1177 (Del. 1989); *Thompson v. State*, 539 A.2d 1052, 1055 (1988); *United States ex rel. Hawkins v. Anderson,* 343 F. Supp. 200, 201 (D. Del. 1972); *Beck v. Ohio*, 379 U.S. 89, 91 (1964)); *Hovington v. State,* 616 A.2d 829, 833 (Del. 1992) (internal quotes omitted).

to the CCDW charge because the gun found in the car was never "carried" "on or about his person" as those terms have been interpreted by other courts.[11] He principally relies on federal cases interpreting a sentencing enhancement section of a federal criminal statute in support of the argument that he did not "carry" the firearm "on or about" his person.[12] In doing so, Trotter asks this Court to reject the "reasonable and prudent" person standard to determine probable cause, in favor of a hyper-technical legal analysis with no accounting for the "practical considerations of everyday life."[13]

The question before the Court is whether the facts, viewed under the totality of the circumstances, suggested a fair probability that Trotter had committed a crime.[14] Here, Cpl. Silvers' observation of the gun handle sticking out from under the driver's seat, coupled with the fact that Trotter was returning to the car with a key in his hand, suggested that Trotter had concealed the weapon on or about his person. The handgun was "concealed" under Delaware law.[15] By walking to the

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[11] *Op. Brf.* at 16-17.

[12] *Op. Brf.* at 17-19.

[13] *Darling v. State*, 768 A.2d at 466.

[14] *Jarvis v. State,* 600 A.2d 38, 42–43 (Del. 1991) (citing *Illinois v. Gates,* 462 U.S. 213 (1983)).

[15] *See Robertson v. State*, 704 A.2d 267, 268 (Del. 1997) (holding that a weapon could be both "concealed" and in "plain view" under Delaware law when a police

car, key-in-hand, Trotter demonstrated that he had access to the gun. In other words, it was "about" his person as this Court has defined that term.[16] However, he contends that the police lacked probable cause to arrest him because he was unable to access the handgun when the police prevented him from unlocking and entering the car. Under Trotter's theory, the police should have allowed him to enter a car in which he would have immediate access to a concealed handgun. This argument lacks merit and disregards the practical considerations of police investigations and safety concerns.

Trotter also argues that Cpl. Silver lacked probable cause because "he did not possess any facts whether any of the occupants of the vehicle had a concealed carry license."[17] "The possibility that there may be a hypothetically innocent explanation for each of several facts revealed during the course of an investigation does not preclude a determination that probable cause exists for an arrest."[18] Trotter concedes that "proof of licensure is not assigned to the State's burden of

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officer observed the butt of a pistol protruding from under the passenger seat of a car).

[16] *See Dubin v. State*, 397 A.2d 132, 134 (Del. 1979) (stating "the key to whether a concealed deadly weapon may be deemed to be 'about' the person should be determined by considering the immediate availability and accessibility of the weapon to the person").

[17] *Op. Brf.* at 24.

[18] *Jarvis*, 600 A.2d at 41–42.

proof at trial."[19] Nor should it be assigned to the finding of probable cause – which is a substantially lesser burden for the State.

"A finding of probable cause does not require the police to uncover information sufficient to prove a suspects guilt beyond a reasonable doubt or even to prove that guilt is more likely than not."[20] Here, Cpl. Silvers possessed probable cause to believe that Trotter had committed the crime of Carrying a Concealed Deadly Weapon after observing the handgun in the car and Trotter returning to the car with a key in his hand.

The Search Warrant Was Supported by Probable Cause

Trotter contends that Cpl. Silvers' application for the search warrant for the Lincoln lacked probable cause for the same reasons his warrantless arrest lacked probable cause.[21] Rather than address the facts detailed in the affidavit, Trotter relies on his same hyper-technical legal argument that the police did not possess probable cause to search the car because (1) the handgun was not "concealed;" (2) he did not "carry" the gun on or "about" his person; and (3) any one of the occupants of the Lincoln may have been licensed to carry a concealed firearm.

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[19] *Op. Brf.* at 27.

[20] *Jarvis*, 600 A.2d at 43.

[21] Trotter additionally argues that there was no probable cause to believe the Lincoln was stolen. He did not present this claim to the Superior Court and its consideration is precluded by Supreme Court Rule 8. In any event, there was no allegation that the Lincoln had been stolen.

When considering a challenge to a search warrant, a reviewing court is required to examine the affidavit to ensure that there was a substantial basis for concluding that probable cause existed.[22] "A determination of probable cause requires an inquiry into the 'totality of the circumstances' alleged in the warrant."[23] Notwithstanding the deference paid to the issuing magistrate, "the reviewing court must determine whether the magistrate's decision reflects a proper analysis of the totality of the circumstances."[24]

Here, the Superior Court correctly found that Cpl. Silvers 'had [a] reasonable probability to obtain a search warrant" after observing the handgun in the Lincoln.[25] Cpl. Silvers' affidavit details his initial observation of the Lincoln and its occupants. Importantly, the affidavit describes the handgun concealed under the driver's seat. The search warrant was validly issued upon probable cause, as the warrant application included adequate facts from which the

[22] *Smith v. State*, 887 A.2d 470, 473 (Del. 2005).

[23] *Starkey v. State*, 2013 WL 4858988, at *3 (Del. Sept. 10, 2013) (citing *LeGrande v. State*, 947 A.2d 1103, 1107 (Del. 2008) (other citations omitted)).

[24] *Id. (*citing *LeGrande*, 947 A.2d at 1108).

[25] A041.

magistrate was reasonably able to determine that probable cause for the search of the vehicle for a firearm existed.[26]

[26] *See Baxter v. State*, 2002 WL 27435, at *2 (Del. Jan. 3, 2002) (officer possessed probable cause to search entire vehicle after discovering that the driver possessed a handgun); *Ledda v. State*, 564 A.2d 1125, 1129 (Del. 1989) (upon learning of a concealed weapon in a car, officers had probable cause to conduct a search of all compartments and containers within the vehicle, including the trunk).

II. THERE WAS SUFFICIENT EVIDENCE TO CONVICT TROTTER OF CARRYING A CONCEALED DEADLY WEAPON.

Question Presented

Whether the Superior Court plainly erred by permitting the case to go to the jury, thus implicitly determining that there was sufficient evidence for any rational trier of fact, viewing the evidence in the light most favorable to the State, to convict Trotter of CCDW.

Standard and Scope of Review

This Court reviews an appeal from the denial of a motion for judgment of acquittal *de novo* "to determine whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find a defendant guilty beyond a reasonable doubt of all the elements of the crime."[27] However, when a defendant fails to make a motion for acquittal to the trial court, the defendant has failed to preserve the right to appeal the issue of the sufficiency of the evidence to convict, and this Court applies the plain error standard of review.[28]

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[27] *Lum v. State*, 101 A.3d 970, 971 (Del. 2014) (citing *Cline v. State*, 720 A.2d 891, 892 (Del. 1998); *Davis v. State*, 706 A.2d 523, 524 (Del. 1998); *Monroe v. State*, 652 A.2d 560, 563 (Del. 1995)).

[28] *Hopkins v. State*, 893 A.2d 922, 931 (Del. 2006) (citing *Hainey v. State*, 878 A.2d 430, 433 (Del. 2005)).

Merits of the Argument

Trotter contends that the evidence presented at trial that led to his conviction was "insufficient as a matter of law."[29] He incorporates by reference, his earlier arguments that he did not "carry" the firearm "on or about" his person and that the firearm was not "concealed." Trotter argues that, as a matter of law, the handgun was not "on or about" his person because the police prevented him from accessing the weapon inside the Lincoln. "The question of whether or not a weapon is "upon or about" a person is a factual question."[30] Here, the evidence presented at trial demonstrated that the handgun was located under the driver's seat of the Lincoln registered to Trotter.[31] Trotter was observed getting out of the car, going into a nightclub and then returning to the car with the car keys in his hand.[32] The officers stopped him before he could get into the car.[33] It was for the jury to determine whether the gun in Trotter's car was carried "on or about" his person. In this case, the Superior Court correctly permitted the jury to consider this question of fact.[34]

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[29] *Op. Brf.* at 34.

[30] *Dubin*, 397 A.2d at 134.

[31] A061.

[32] A060; A065.

[33] A062.

[34] *Id.* (holding that Superior Court erred when it determined, as a matter of law, that the weapon was "on or about' the defendant's person because the question of

Trotter also claims, as a matter of law, that the weapon was not "concealed." In *Lively v. State*, this Court considered the same sufficiency of the evidence argument in another CCDW case.[35] In that case, the police discovered a handgun that 'was almost totally concealed" under a floormat on the driver's side of a car.[36] The Court held that "the jury was warranted in concluding from the evidence that the handgun found was both concealed and deadly."[37] The result should be no different here. Cpl. Silvers observed the handle of the gun sticking out from under the driver's seat of the Lincoln. Consistent with this Court's holding in *Robertson v. State*, even though the gun was easily discoverable through ordinary police investigation, it was nevertheless concealed because it was "hidden from the ordinary sight of another person … [meaning] the casual and ordinary observation of another in the normal associations of life."[38]

Viewing the evidence in the light most favorable to the State, including all reasonable inferences to be drawn therefrom, any rational trier of fact could have

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whether a pistol concealed in a glove box was "on or about" the defendant's person is for the jury to determine).

[35] *Lively v. State*, 427 A.2d 882 (Del. 1981).

[36] *Id.* at 883.

[37] *Id.*

[38] *See Robertson*, 704 A.2d at 268 (gun was "concealed" when officers observed the butt of a pistol protruding from under the passenger seat of a car) (citing *Ensor v. State*, 403 So.2d 349, 354 (Fla. 1981)).

found that the State proved beyond a reasonable doubt that Trotter carried the firearm concealed on or about his person. The Superior Court, therefore, did not plainly err by permitting the jury to consider the CCDW charge.

III. THE SUPERIOR COURT CORRECTLY DENIED TROTTER'S REQUEST FOR A MISTAKE-OF-FACT INSTRUCTION.

Question Presented

Whether the trial judge erred by denying Trotter's request for a mistake-of-fact jury instruction.

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*."[39]

Merits of the Argument

Trotter argues that he was entitled to a mistake-of-fact instruction because he 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."[40] 11 *Del. C.* § 441 provides, in part:

> In any prosecution for an offense it is a defense that the accused engaged in the conduct charged to constitute the offense under ignorance or mistake of fact if: (1) [t]he ignorance or mistake negatives the state of mind for the commission of the offense.[41]

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[39] *Burrell v. State*, 766 A.2d 19, 26 (Del. 2000) (citing *Lunnon v. State*, 710 A.2d 197, 199 (Del. 1998); *Seth v. State*, 592 A.2d 436, 439 (Del. 1991)).

[40] *Op. Brf.* at 36.

[41] 11 *Del. C.* § 441.

The 1973 Commentary to the Delaware Criminal Code discusses section 441, noting:

> [a] defendants mistake must make some difference to his criminal liability before he is given a defense. Thus, for example, if he would still be committing the crime if the facts were as he thought them, this section would provide no defense.[42]

Here, there was no rational basis in the evidence to warrant instructing the jury that if Trotter believed the gun would not be concealed because of the automatic movement of his car seat, such a belief would negate his knowing state of mind. At trial, Detective Danny Silva ("Det. Silva") testified that Trotter told him that he placed the gun and a holster under the driver's seat.[43] He also told Det. Silva that when he exited the Lincoln, the seat moved back exposing the gun.[44] Trotter's alleged "mistake" made no difference to his criminal liability. The evidence demonstrated that Trotter knowingly concealed the gun when he placed it under the driver's seat.[45] In other words, the gun was concealed prior to the seat moving. Moreover, the gun remained concealed, but for a portion of the handle, after

[42] Del. Crim. Code with Commentary at 100–01 (1973).

[43] A067.

[44] A070.

[45] A067.

Trotter exited the car and the seat moved.[46] The Superior Court did not err in declining to provide the jury with a mistake-of-fact instruction.

[46] A061.

CONCLUSION

For the foregoing reasons the judgment of the Superior Court should be affirmed.

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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 Times New Roman 14-point typeface using Microsoft Word 2016.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 4281 words, which were counted by Microsoft Word 2016.

Dated: December 19, 2016

/s/ Andrew J. Vella
Signature of filing attorney