EFiled: Jan 17 2017 11:58PM EST
Filing ID 60083023
Case Number 264,2016

IN THE SUPREME COURT OF THE STATE OFDELAWARE

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

Upon Appeal from the Superior Court of the State of Delaware to the Supreme Court of Delaware

APPELLANT DEVIN TROTTER'S REPLY BRIEF

JOHN S. MALIK
ID No. 2320
100 East 14th Street
Wilmington, Delaware 19801
(302) 427-2247
Attorney for Appellant,
Devin Trotter

Dated: January 17, 2017

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases Cited:

Statutes Cited:

PRELIMINARY STATEMENT

This is a Reply Brief in support of Devin Trotter's appeal.

The State's Answering Brief is cited as "Answering Br.," the Opening Brief is cited as "Op. Br.," and the Appendix filed with the Opening Brief is cited as "A." All of these references are followed by a page number.

This Reply Brief addresses several of the State's arguments. The State's arguments not addressed here were anticipated and addressed in Mr. Trotter's Opening Brief. Mr. Trotter does not waive or concede any of those arguments but instead submits that they have been adequately briefed and thus are ripe for decision.

\

ARGUMENT

I. THE STATE CONCEDES NUMEROUS POINTS AND ERRONEOUSLY ASSERTS THAT "CARRIES" AND "WITHOUT A LICENSE" ARE IRRELEVANT FOR PROBABLE CAUSE TO ARREST AND TO OBTAIN A SEARCH WARRANT FOR THE OFFENSE OF CARRYING A CONCEALED DEADLY WEAPON.

A. The State Misconstrues the Record and Cites Authority Which Supports of Trotter's Position that Probable Cause Rather than Reasonable Suspicion is Applicable.

The State maintains that Corporal Silvers need only have had reasonable suspicion rather than probable cause to have approached Trotter, assisted by other police officers, with guns drawn and to have ordered Trotter onto the ground, and where Trotter submitted to their authority.[1] In its Answering Brief, the State asserts, "***With no legal support***, Trotter claims that because 'he was not free to leave and he submitted to a show of authority, he was thereby under arrest.'"[2] On the contrary, for that argument the Opening Brief cites controlling authority in *California v. Hodari D.*, among others, and *Jones v. State*.[3]

Equally perplexing is reliance in the State's Answering Brief on this Court's decision in *Darling v. State*.[4] There, this Court held:

---

[1] *See* Answering Br. 5-7.
[2] *Id.* at 6 (quoting Op. Br. 16) (emphasis added) (internal brackets deleted).
[3] Op. Br. 16 & nn.72-73 (citing *California v. Hodari D.*, 499 U.S. 621 (1991), *Florida v. Royer*, 460 U.S. 491 (1983) and *Jones v. State*, 745 A.2d 856 (Del. 1999) (en banc)).
[4] Answering Br. 7 (quoting *Darling v. State*, 768 A.2d 463, 466 (Del. 2001)).

> We have concluded under the unique circumstances of this case, that the police conduct in carrying out a plan to surround Darling at gunpoint and order him to the ground was more than a seizure but, in fact, constituted an arrest under both the United States Constitution and the Delaware Constitution.[5]

For that proposition, the *Darling* Court, like the Opening Brief in the instant case, cited *Jones v. State*.[6] As such, the applicable standard for the seizure was probable cause, not reasonable suspicion, because an arrest resulted.[7]

The instant case is indistinguishable from *Darling*. After Corporal Silvers observed a partially visible handgun within Trotter's vehicle, Silvers contacted his supervisor, who arrived with backup units. They waited for Trotter to walk towards the vehicle, where Silvers and fellow police officers approached with guns drawn, and ordered Trotter onto the ground.[8] Trotter submitted.

The State makes no effort to distinguish the authorities cited by Trotter. In *Hodari D.*, it was clarified, "An arrest requires either physical force" or, if absent, "submission to the assertion of authority."[9] The instant case presents both. Consequently, the State should be deemed to have waived this issue by its failure to rebut controlling authorities cited in Appellant's Opening Brief.[10]

---

[5] *Darling v. State*, 768 A.2d 463, 465 (Del. 2001) (en banc).
[6] *Id.* at 465 n.4 (citing *Jones v. State*, 745 A.2d 856 (Del. 1999) (en banc)).
[7] *Id.* at 465-66.
[8] Op. Br. 6 (citing A35-36, A38-39).
[9] *California v. Hodari D.*, 499 U.S. 621, 626 (1991).
[10] *Flamer v. State*, 953 A.2d 130, 134 (Del. 2008); *Gonzalez v. Caraballo*, 2008 WL 4902686, at *3 (Del.Super. Nov. 12, 2008) ("[C]ounsel is required to develop

B. The Constitutional Right to Keep and Bear Arms is Not a "Hypothetically Innocent Explanation" for Search and Seizure Purposes and Cannot Be Unreasonably Impaired by the State.

The State errs by asserting that the essential element of "carries" is too hyper-technical for probable cause[11] and that verifying if the accused has a concealed carry license is unnecessary[12] to make a warrantless arrest under 11 *Del. C.* § 1442. Where the State maintains that these are "hypothetically innocent" explanations,[13] the United States Court of Appeals for the Third Circuit distinguished that from constitutional rights, in *United States v. Ubiles* and its progeny.[14] Additionally, this Court agrees, "If the State applies reasonable laws in circumstances that unreasonably impair the right to keep and bear arms, the State's police power must yield in those circumstances to the exercise of the right."[15] That applies with equal force in the context of unreasonable searches and seizures.

---

a reasoned argument supported by pertinent authorities."); *United States v. Holm*, 326 F.3d 872, 877 (7th Cir. 2003) ("We have repeatedly warned that perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived (even where those argument raise constitutional issues)." (internal quotations deleted)).

[11] *Compare* Answering Br. 8 (dismissing the need for "carries" as "a hyper-technical legal analysis with no accounting for the 'practical considerations of everyday life.'") *with* 11 Del. C. § 1442 ("A person is guilty of carrying a concealed deadly weapon where the person ***carries*** concealed a deadly weapon upon or about the person without a license . . ." (emphasis added)).

[12] Answering Br. 9-10.

[13] Answering Br. 9 (quoting *Jarvis v. State*, 600 A.2d 38, 41-42 (Del. 1991)).

[14] 224 F.3d 213 (3d Cir. 2000).

[15] *State v. Hamdan*, 665 N.W.2d 785, 799 (Wis. 2003), *cited with favor and followed in*, *Griffin v. State*, 47 A.3d 487, 491 (Del. 2012) (en banc) ("We agree with the Wisconsin's court's analysis, and adopt the *Hamdan* test.").

In *Ubiles*, the Third Circuit held that a police officer in the Virgin Islands lacked reasonable suspicion for a *Terry* stop, where an older man approached the officer during a feastival and pointed out a younger man, described his clothing, and asserted that he had a concealed firearm. This informant "did not describe, at the time, anything suspect about the gun or anything unusual or suspicious about the [younger] man or his behavior."[16] There were no "articulable facts suggesting that the gun Ubiles possessed was defaced or unlicensed" or that he posed a safety risk or was involved in criminal activity.[17] A pat-down search of the suspect revealed a loaded firearm under his clothes.[18]

The Third Circuit acknowledged that "reasonable suspicion of criminal activity may be formed by observing exclusively legal activity,"[19] but what distingished *Ubiles* from the "hypothetically innocent explanation" standard in other cases before the United States Supreme Court was the presence of *other* articulable facts, e.g., whether the defendant "was standing in an area known for heavy narcotics trafficking" or the defendant "immediately fled the scene after seeing the officers arrive."[20] None of that was shown in *Ubiles*, "For all the officers knew, even assuming the reliability of the tip that Ubiles possessed a gun,

---

[16] *Ubiles*, 224 F.3d at 215 (alteration added).
[17] *Id.* at 218.
[18] *Id.* at 215.
[19] *Id.* at 217 (citations omitted).
[20] *Id.* (distinguishing *Illinois v. Wardlow*, 528 U.S. 119 (2000)).

Ubiles was another celebrant lawfully exercizing his right under Virgin Islands law to possess a gun in public."[21]

In other words, a constitutional right such as the right to keep and bear arm,[22] without more, is distinguishable from the "hypothetically innocent explanation" standard. The exercise of a constitutional right cannot furnish probable cause, without more.[23] The Third Circuit distinguished *Ubiles*, in a case whether a *Terry* stop was justified under Delaware's Carrying a Concealed Deadly Weapon statute, where, unlike Delaware law, Virgin Islands law assigns the burden of proving licensure on the government rather than on the defendant.[24] Therefore, a *Terry* stop *to ascertain whether the suspect had a concealed carry license*, was warranted.[25] However, the Third Circuit never held that such justified a warrantless arrest and Appellant has already shown that one federal court held that probable cause is lacking in that context.[26]

---

[21] *Id.* at 218.
[22] U.S. Const., amend. IV; Del. Const., art. I, § 6; *District of Columbia v. Heller*, 128 S. Ct. 2783, 2798 (2008) ("By the time of the founding, the right to have arms had become fundamental for English subjects." (citation omitted)).
[23] *See, e.g.*, *Florida v. J.L.*, 529 U.S. 266, 272 (2000) (rejecting any exceptions for firearms from the right to be secure from unreasonable searches and seizures under the Fourth Amendment).
[24] *United States v. Gatlin*, 613 F.3d 374, 379 (3d Cir. 2010), *further discussed in*, Op. Br. 24-25.
[25] Counsel in *Gatlin* apparently did not preserve on appeal whether probable cause was applicable, rather than reasonable suspicion, *see* Op. Br. 25.
[26] Op. Br. 25 (discussing *United States v. Grant*, 476 F. Supp. 400 (S.D. Fla. 1979)).

The instant case presents even less information in possession of the police than the Third Circuit cases, because Silvers only saw a partially visible handgun inside a locked vehicle, whereas the Third Circuit cases involved a firearm concealed ***on the body of the suspect***.[27] Appellant has already established in his Opening Brief that "carries" under 11 *Del. C.* § 1442 has the common sense meaning that there is some movement of the weapon, ***while*** it was "concealed" and "about" the person.[28] Trotter's firearm was not "concealed," because the proper reference point is from *the inside* and not *the outside* of the vehicle.[29] For instance, it cannot be said that a firearm inside a house is concealed merely because someone outside of the house cannot see it. But even if this Court disagrees, the State's theory still unreasonably impairs the right to keep and bear arms, because the distinction between "carries" and "possesses," and the issue of a concealed carry license, are the only things preventing officers from arresting citizens, without more, for safely *storing* a firearm not "about" the person.

First, the essential element of "carries" presents no conflict to the reasonable and prudent person standard of probable cause.[30] Reasonable and prudent police officers know what *carrying* means — and the distinction that it fairly imports where a gun is not physically on the body of the person. Reasonable and prudent

[27] *See Ubiles*, 224 F.3d at 215; *Gatlin*, 613 F.3d at 376-77.
[28] Op. Br. 17-23.
[29] Op. Br. 23-24 and authorities discussed therein.
[30] *See Darling v. State*, 768 A.2d 463, 466 (Del. 2001) (en banc).

police officers are not entitled to treat the offense of Carrying a Concealed Deadly Weapon as another form of *possession*,[31] and may not claim any "good faith" exceptions to the exclusionary rule.[32] Simply put, Corporal Silvers is chargeable with knowledge of the law and ignorance is no more a defense for him than it is for Trotter.

Second, in the context of storing a firearm inside a locked vehicle, simply alighting or re-entering one's vehicle cannot furnish grounds for "carries" without unreasonably impairing the right to keep and bear arms. A lawful gun owner cannot bear arms at all times. At some point, a lawful gun owner will need to *keep* the firearm, by safely storing it away from other people. Safe storage entails reasonable precautions to prevent the danger of theft. If Trotter is guilty of an offense, because he failed to leave a firearm inside his vehicle *in full view of the public outside of the vehicle*, then that is an unreasonable impairment of lawful gunownership, because it increases the danger of theft. Such is also an irrational enforcement of the law, because a stolen firearm does not decrease but increase the danger to public safety.

This Court agrees that always requiring a gun owner to "carry a gun openly

---

[31] *Gallman v. State*, 14 A.3d 502, 505 n.6 (Del. 2011).

[32] *Jones v. State*, 745 A.2d 856, 871 n.72 (Del. 1999) (en banc) (reasonable suspicion to conduct a *Terry* stop); *Dorsey v. State*, 761 A.2d 807, 820-21 (Del. 2000) (en banc) (probable cause for a search warrant); *Mason v. State*, 534 A.2d 242, 254-55 (Del. 1987) (probable cause and statutory requirements for a nighttime search warrant).

or in a holster is simply not reasonable. Such practices would alert criminals to the presence of the weapon," and frighten other people.[33] Accordingly, an incident to lawful gunownership is to lock a firearm within a vehicle, while alighting or re-entering. Here, Trotter did not wish to bring his firearm into Club Lavish and to have forced an open display of the firearm inside either Club Lavish, or his parked and vacant vehicle, is unreasonable. He therefore safely stored the firearm inside a locked vehicle, partially visible under the front-passenger seat, where it was less likely to have been stolen, because visible to persons *inside* but not *outside* the vehicle. That, without more, cannot furnish grounds for probable cause.[34]

C. The State Concedes There are No Reasonable and Articulable Facts of a Stolen Vehicle.

On pages 29 to 31 of the Opening Brief, Trotter cited and discussed this Court's decision in *Holden v. State*, among other authorities, that there was no reasonable basis to conclude that a vehicle was stolen.[35] The State offers no counter-argument on this point and seemingly concedes the issue.[36]

---

[33] *Griffin*, 47 A.3d at 491 (quoting *Hamden*, 665 N.W.2d at 809).
[34] Op. Br. 25-26.
[35] Op. Br. 29 (quoting and discussing *Holden v. State*, 23 A.3d 843 (Del. 2011)).
[36] *See Flamer v. State*, 953 A.2d 130, 134 (Del. 2008).

D. The State Does Not Cite Any Pertinent Authority Supporting Its Position that a Firearm is "About" the Person Where, as Here, Inside a Locked Vehicle and the Person is Outside the Vehicle.

The State offers a perfunctory and nonresponsive counter-argument why the firearm was "about" Trotter's person for purposes of probable cause to arrest under 11 *Del. C.* § 1442. Citing *Dubin v. State*, the State argues, "By walking to the 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."[37] However, the *Dubin* Court defined the test as the "***immediate*** availability and accessibility of the weapon to the person."[38] In the Opening Brief, Appellant distinguished *Dubin* as applying to a defendant *inside* the vehicle with the firearm; whereas, here, Trotter was outside.[39] Appellant also pointed out the absence of case law stretching "about" the person to mean outside of a locked vehicle and that doing so encroaches on the legislature by rewriting the statute,[40] and Appellant cited case law from other jurisdictions that outside an *unlocked* vehicle is insufficient as a matter of law.[41]

The State's argument does not respond to Trotter's argument. Indeed, the State does not cite any pertinent authority supporting its position that a firearm is

---

[37] Answering Br. 8-9 (citing *Dubin v. State*, 397 A.2d 132, 134 (Del. 1979)).
[38] *Dubin v. State*, 397 A.2d 132, 134 (Del. 1979) (emphasis added).
[39] Op. Br. 19.
[40] *Id.* at 19-20 (discussing the Uniform Firearms Act).
[41] *Id.* at 21-22 (discussing *Pruitt v. Commonwealth*, 650 S.E.2d 684, 687 (Va. 2007), among other cases).

"about" the person where, as here, it is inside a locked vehicle and the person is outside the vehicle. Consequently, the State should be deemed to have waived the issue of whether there was no fair probability that the firearm was "about" Trotter, by its failures to locate pertinent authorities supporting its position, to rebut pertinent authorities cited in Appellant's Opening Brief, and to develop a reasoned counter-argument responsive to those authorities.[42]

Instead, the State faults Trotter for arguing that Corporal Silvers *thwarted* the offense of Carrying a Concealed Deadly Weapon, because he effectively prevented Trotter from entering his vehicle and putting the vehicle in motion. The State argues, "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 investigaitons and safety concerns."[43]

The State is mistaken. It is Appellant's theory that Corporal Silvers was free to conduct a *Terry* stop and to inquire how Trotter had transported the weapon and

---

[42] *Flamer v. State*, 953 A.2d 130, 134 (Del. 2008); *Gonzalez v. Caraballo*, 2008 WL 4902686, at *3 (Del.Super. Nov. 12, 2008) ("[C]ounsel is required to develop a reasoned argument supported by pertinent authorities."); *United States v. Holm*, 326 F.3d 872, 877 (7th Cir. 2003) ("We have repeatedly warned that perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived (even where those argument raise constitutional issues)." (citations and internal quotations deleted)).

[43] Answering Br. 9.

if he possessed a concealed carry license.[44] Carrying a Concealed Deadly Weapon is an "investigatible" offense, and the police could have approached Trotter without their guns drawn before he reached his vehicle, in accordance with 11 *Del. C.* § 1902. In the court below, the State conceded that, had Corporal Silvers performed a DELJIS inquiry after learning Trotter's name, that inquiry would have informed Silvers that Trotter did not possess a concealed carry license.[45] A *Terry* stop allows for instances of a protective pat-down for weapons; but, that did not happen here. There was no probable cause to have arrested Trotter, because (among other things) there were no facts justifying a fair probability of "***immediate*** availability and accessibility of the weapon to the person,"[46] and possession of a firearm, without more, is a fundamental constitutional right.[47] Consequently, relief is due here.

E. As to the Search Warrant, the Authorities Cited by the State are Distinguishable.

Concerning probable cause for a search warrant, the State cites authorities which are inapposite or distinguishable.[48] First, this is not a case where a firerm

---

[44] Op. Br. 24-25 (discussing *United States v. Gatlin*, 613 F.3d 374 (3d Cir. 2010)).
[45] State's Resp. 5 n.11; A29.
[46] *Dubin v. State*, 397 A.2d 132, 134 (Del. 1979) (emphasis added).
[47] U.S. Const., amend. IV; Del. Const., art. I, § 6; *District of Columbia v. Heller*, 128 S. Ct. 2783, 2798 (2008) ("By the time of the founding, the right to have arms had become fundamental for English subjects." (citation omitted)).
[48] *See* Answering Br. 10-12 (citing *Starkey v. State*, 2013 WL 4858988 (Del. Sept. 10, 2013), *Baxter v. State*, 2002 WL 27434 (Del. Jan. 3, 2002), and *Ledda v. State*,

was used as a means to commit some other criminal offense, but whether the firearm itself was carried in violation of 11 *Del. C.* § 1442. Thus, the State's reliance on *Starkey v. State* is misplaced for that reason, because it involved: (1) a search warrant issued in context of a reported home invasion and robbery, (2) the victim identified two of the robbers by name,[49] and (3) the defendant was already wanted by police for an earlier robbery and shooting; therefore, possession of a firearm in the house where the defendant was residing was a relevant link in the causal nexus.[50]

Second, the instant case was not a motor vehicle stop, which distinguishes *Baxter v. State*.[51] This factual distinction relates to the essential element of "carries,"[52] because in motor vehicle stops an officer may reasonably infer that a weapon was moved or transported *in the same condition* of concealment and where found in proximity to any person observed in the vehicle. Thus, in *Baxter*, the defendant "withdrew from beneath the front passenger seat a fully loaded handgun," and handed it to the police officer.[53] That officer therefore had a reasonable inference that the firearm was so situated while the vehicle was *in*

---

564 A.2d 1125 (Del. 1989)).

[49] *Starkey v. State*, 2013 WL 4858988, at *1-2 (Del. Sept. 10, 2013).

[50] *See id.* at *3.

[51] 2002 WL 27434 (Del. Jan. 3, 2002).

[52] 11 Del. C. § 1442 ("A person is guilty of carrying a concealed deadly weapon where the person ***carries*** concealed a deadly weapon upon or about the person without a license . . ." (emphasis added)).

[53] *Baxter v. State*, 2002 WL 27434, at *1 (Del. Jan. 3, 2002).

motion. But a motor vehicle stop did not happen here, and Trotter safely stored a firearm within a locked vehicle. Corporal Silvers therefore had no grounds for inferring the condition of the firearm while the vehicle was in motion — whether it was concealed or "about" Trotter's person during that point in time.

Finally, *Ledda v. State* is distinguishable on multiple grounds.[54] Whether or not the accused did not preserve the issue on appeal, that case did not involve *any* analysis of probable cause for Carrying a Concealed Deadly Weapon. Indeed, the *Ledda* Court nowhere cites the statute, strongly suggesting that the accused did not contest whether there was a fair probability of the essential elements which Trotter contests here. *Ledda* was also decided in 1989, without the benefit of later United States Supreme Court guidance that probable cause is contextual and does not create a free-for-all to search the entire vehicle.[55] Finally, *Ledda* involved the propriety of a consent form which authorized a search of the entire vehicle.[56] That did not happen here.

---

[54] 564 A.2d 1125 (Del. 1989).

[55] *Compare California v. Acevedo*, 500 U.S. 565, 580 (1991) ("The facts in the record reveal that the police did not have probable cause to believe that contraband was hidden in any other part of the automobile and a search of the entire vehicle would have been without probable cause and unreasonable under the Fourth Amendment.") (limiting *United States v. Ross*, 456 U.S. 798, 824 (1982)) *with Ledda*, 564 A.2d at 1129 ("If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." (quoting *United States v. Ross*, 456 U.S. 798, 825 (1982)).

[56] *Ledda*, 564 A.2d at 1128-29.

F. The State Concedes the Application of the Fruit of the Poisonous Tree Doctrine.

Finally, on page 31 of the Opening Brief, Trotter cited and discussed *Wong Sun v. United States*,[57] among other authorities, that evidence obtained against him was the fruit of the poisonous tree.[58] The State offers no counter-argument on this point and thereby concedes the issue.[59] Consequently, if this Court rules in favor of Trotter on the absence of probable cause for a warrantless arrest of Trotter and to have searched his vehicle, then all evidence of his statements, the firearm and controlled substances found within the vehicle, and all other direct and derivative evidence, must be suppressed.

[57] 371 U.S. 471 (1963).
[58] Op. Br. 31.
[59] *See Flamer v. State*, 953 A.2d 130, 134 (Del. 2008).

II. CASE LAW CITED BY THE STATE IS DISTINGUISHABLE AND DEMONSTRATES ALL THE MORE WHY EVIDENCE OF CARRYING A CONCEALED DEADLY WEAPON IS INSUFFICIENT AS A MATTER OF LAW.

The State asserts that evidence of Carrying a Concealed Deadly Weapon under 11 *Del. C.* § 1442 was sufficient as a matter of law, relying on *Lively v. State* and *Robertson v. State*.[60] Both cases are readily distingishable and their juxtaposition with the instant case demonstrate all the more why evidence is insufficient as a matter of law.

In *Lively*, the accused was arrested at a department store for the fraudulent use of a stolen credit card. The accused admitted during a post-arrest interview to driving a Cadillac to the store and the car keys were on his person.[61] After impounding this vehicle, the police discovered a firearm under the floormat by the driver's seat.[62] This Court therefore concluded that evidence was sufficient, because it is a reasonable inference that the condition of concealment *remained the same* while the defendant was driving the vehicle.[63] Consequently, the essential element of "carries" was met, as well as "concealed" because the firearm was *completely* under a floormat.

---

[60] Answering Br. 15 (discussing *Lively v. State*, 427 A.2d 882 (Del. 1981) and *Robertson v. State*, 704 A.2d 267 (Del. 1997)).
[61] 427 A.2d at 882.
[62] *Id.* at 882-83.
[63] *Id.* at 884 ("[T]he gun was sufficiently available and accessible to the defendant, ***when he drove the car***, to have been 'about his person' for purposes of Section 1442." (emphasis added)).

Here, by stark contrast, Trotter admitted that he placed the firearm on the floor of the vehicle *after* he parked the vehicle. Thus, there is no basis to infer that the firearm remained in that condition while the vehicle was *in motion*. As such, nothing in the record supports that the essential element of "carries" co-occurred with the other elements.[64] Additionally, as previously noted in the Opening Brief and which the State here ignores, the Delaware statute lacks the operative language "concealed in whole or in part" found in other jurisdictions.[65] *Partial concealmen*t is therefore not a crime where the circumstances would warrant that someone *inside the vehicle* would know that a gun was in their presence.[66] The State cannot meet that standard; therefore, evidence of "concealed" is likewise insufficient as a matter of law.

Robertson is also distinguishable, because it involved a motor vehicle stop.[67] Consequently, the jury could reasonably infer that the firearm remained *in the same condition* where it was found and while the vehicle was in motion.[68] Nothing comparable is seen in the instant case. Trotter was not observed inside the car with

---

[64] 11 Del. C. § 1442 ("A person is guilty of carrying a concealed deadly weapon where the person ***carries*** concealed a deadly weapon upon or about the person without a license . . ." (emphasis added)).
[65] Op. Br. 23-24, *incorporated by reference under Argument II*, *in* Op. Br. 33-34.
[66] *Id.*
[67] *Robertson*, 704 A.2d at 268.
[68] *Id.* ("When they approached Robertson's car to hand him the tickets, one of the officers shone a flashlight into the car and observed the butt of a pistol protruding from under the passenger seat.").

the firearm in that condition and the firearm was not in that condition while the vehicle was in motion. Consequently, nothing in the record supports a concurrence of "carries," "concealed," and "about" the person of Trotter. Alternative relief in the nature of vacatur is due, if this Court will not award relief that probable cause to arrest and to search was lacking and evidence should be suppressed as a matter of law.

III. THE STATE MISUNDERSTANDS THE RECORD AND MISAPPLIES THE STANDARD GOVERNING MISTAKE-OF-FACT JURY INSTRUCTIONS.

By Answering Brief, the State maintains that the record does not warrant a mistake-of-fact jury instruction, because Detective Silva's testimony demonstrates that Trotter "told Det. Silva that when he exited the Lincoln, the seat moved back exposing the gun"; therefore, the State concludes "the gun was concealed prior to the seat moving."[69] Respectfully, the State misunderstands the record. It was shown on Page 11 of the Opening Brief, "Silva clarified that he [Silva] could not recall when, precisely, Trotter placed the gun where it was found: *before* or *after* the driver's seat had moved back."[70] As shown in the record, Detective Silva testified:

> Q. So prior to turning off the car, did he [Trotter] indicate when he put the gun underneath the seat?
>
> A. I honestly don't recall when he put it — or I don't think he told me what time he put in there or when prior to.[71]

The law only requires "that some credible evidence supporting the defense has been presented in order to warrant a jury instruction."[72] Neither the State, nor the court below, is entitled to weigh the evidence and decide whether it comports with the State's theory of the case. Rather, the statutory term "credible" means "capable

---

[69] Answering Br. 18.
[70] Op. Br. 11 (citing A68) (emphasis in original) (alteration added).
[71] A68; T09/09/2015 — 105.
[72] 11 Del. C. § 303(a).

of being believed" by the jury.[73]

Here, Silva's testimony was equivocal on the timing of the placement of the firearm and, therefore, a rational trier of fact was entitled to determine whether the driver's seat automatically moved back, leaving the firearm partially visible, *after* the firearm was placed there by Trotter. Additionally, the record presents additional facts that: (1) the firearm was not "upon" but "about" Trotter's person when he placed the firearm on the floor of the vehicle, (2) the vehicle was parked and not in motion, and (3) the gun was not "concealed" from the vantage point of someone *inside the vehicle*.[74] Consequently, there was ample credible evidence in the record, capable of being believed by the jury, that warrants a mistake-of-fact defense negating Trotter's state-of-mind of knowingly concealing a firearm for purposes of 11 *Del. C.* § 1442. Trotter is entitled to relief on this ground as well, if the Court disagrees with him as to the aforementioned grounds on appeal.

[73] *Gutierrez v. State*, 842 A.2d 650, 653 (Del. 2003) (discussing 11 *Del. C.* § 303(a)).
[74] Op. Br. 23-24.

CONCLUSION

For the forgoing reasons, and for those raised in the Opening Brief, 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,

/s/ John S. Malik

JOHN S. MALIK
ID No. 2320
100 East 14th Street
Wilmington, Delaware 19801
(302) 427-2247
Attorney for Defendant,
Devin Trotter

Dated: January 17, 2017

IN THE SUPREME COURT OF THE STATE OFDELAWARE

DEVIN 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) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word and reviewed by Microsoft Word for Mac 2011 Version 14.5.3.

2. This brief complies with the type-volume limitation of Rule 14(d) because it contains 4,804 words, which were counted by Microsoft Word for Mac 2011 Version 14.5.3.

Respectfully submitted,

/s/ John S. Malik

JOHN S. MALIK
ID No. 2320
100 East 14th Street
Wilmington, Delaware 19801
(302) 427-2247
Attorney for Appellant,
Devin Trotter

Dated: January 17, 2017

IN THE SUPREME COURT OF THE STATE OFDELAWARE

DEVIN 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 17th day of January A.D., 2017, I have had forwarded via Lexis Nexis File and Serve electronic delivery a copy of Appellant Devin Trotter's Reply Brief to the following individual at the following address:

Andrew J. Vella, Esquire
Deputy Attorney General
Department of Justice
Carvel State Office Building
820 North French Street
Wilmington, Delaware 19801

/s/ John S. Malik
JOHN S. MALIK
ID No. 2320
100 East 14th Street
Wilmington, Delaware 19801
(302) 427-2247
Attorney for Appellant,
Devin Trotter