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Case Number 414,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellant,	)	No. 414, 2018
	)	
v.	)	On Appeal from the
	)	Superior Court of the
ANDRE MURRAY,	)	State of Delaware
	)	
Defendant-Below,	)	
Appellee.	)	

STATE'S REPLY BRIEF

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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Dated: November 21, 2018

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ARGUMENT[1]

I. THE SUPERIOR COURT ABUSED ITS DISCRETION IN CONCLUDING OFFICER ROSAIO LACKED REASONABLE, ARTICULABLE SUSPICION TO DETAIN MURRAY.

Murray argues the Superior Court considered all of the evidence presented by Sergeant Matthew Rosaio ("Rosaio") supporting his "inchoate and unparticularized suspicion that Murray was carrying a concealed deadly weapon," and the Superior Court "accorded Rosaio's suspicion the proper deference due under the circumstances."[2] Murray is simply incorrect. The Superior Court minimized the relevance of the uncontroverted evidence that Murray was observed in a high crime area, late at night, and exhibited nervous, evasive behavior upon observing law enforcement, labelling this evidence as "chaff" – something comparatively worthless.[3] The Superior Court also excluded Sergeant Rosaio's specific observations describing characteristics of an armed gunman, erroneously concluding, under Delaware Rule of Evidence ("DRE") 701, that the State was required to supplement Rosaio's testimony with empirical studies evidencing percentages of people who engage in evasive behavior upon sight of the police. As a result, the Superior Court did not consider the totality of the circumstances as

[1] The State has consolidated its response to Murray's Answering Brief into one argument.
[2] Op. Br. at 6.
[3] Merriam–Webster Dictionary, www.meriam-webster.com/dictionary/chaff.

viewed through the eyes of a reasonable, trained police officer in the same or similar circumstances, combining objective facts with such an officer's subjective interpretation of those facts.[4]

While an individual's presence in an area of expected criminal activity, standing alone, is insufficient to support a reasonable particularized suspicion that the person is committing a crime, "officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation."[5] The fact that Sergeant Rosaio stopped Murray in a 'high crime area' "[is] among the relevant contextual considerations in a *Terry* analysis."[6] The added fact of Murray's nervous, evasive behavior upon observing the police officer suggested wrongdoing and was another "pertinent factor in determining reasonable suspicion."[7] These two factors were crucial to establishing reasonable articulable suspicion in *Illinois v. Warldow*,[8] and here, the Superior Court afforded these factors *de minimis*, if any, weight.

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[4] *See State v. Henderson*, 892 A.2d 1061, 1064-65 (Del. 2006) (quoting *Jones v. State*, 745 A.2d 856, 861 (Del. 1999) (citing *United States v. Ortiz*, 449 U.S. 411, 417-18 (1981)) (accord *Quarles v. State*, 696 A.2d 1334, 1337 (Del. 1997)).
[5] *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000).
[6] *Id.*, citing *Adams v. Williams*, 407 U.S. 143, 144, 147-48 (1972).
[7] *Id.*, citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975), *Florida v. Rodriguez*, 469 U.S. 1, 6 (1984), *United States v. Sokolow*, 490 U.S. 1, 8-9 (1989).
[8] 528 U.S. 119 (2000).

Further, Murray fails to acknowledge that the Superior Court did not consider, and in fact, excluded, the factual basis for Sergeant Rosaio's opinion, based on the court's erroneous application of Delaware Rule of Evidence ("DRE") 701. By incorrectly concluding the police officer's testimony would not be considered because the State failed to provide empirical studies and "scientific support" for his opinion, the court did not consider the officer's observations, training and experience in its reasonable articulable suspicion analysis.[9] As noted in *Wardlow*, trial courts "do not have available empirical studies dealing with inferences drawn from suspicious behavior, and [courts] cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists."[10] In the context of reasonable articulable suspicion analysis, a trial court's judgment "must be based on commonsense judgments and inferences about human behavior."[11] The Superior Court abused its discretion by failing to do so here.

[9] *State v. Murray*, 2018 WL 1611268 at *3 (Del. Super. April 2, 2018). The Superior Court opined the State failed to provide evidence of the "percentage of armed gunmen walk swinging one arm but not the other," how these percentages may change depending "upon the time of day or the fact that it is a high crime neighborhood," "what percentage of the citizens turn their bodies away from the policeman," and of those citizens who turn their back to the police, "what percentage are hiding something? and of those that are hiding something, what percentage are hiding firearms?" Ex. B to Op. Brf.

[10] *Wardlow*, 528 U.S. at 124-25.

[11] *Id*. at 125.

Murray also suggests the Superior Court's analogy of these facts to a "drug courier profile in its denial of the State's Motion for Reargument demonstrated the Superior Court specifically addressed Rosaio's testimony in "great detail." That is not the case. The Superior Court summarily dismissed Rosaio's testimony as deficient, describing all of his observations as "wholly innocent conduct." And, as Murray concedes, "the court did not recognize and consider Rosaio's armed gunman evidence."[12]

Murray argues *Harris v. State*[13] supports an argument that his actions were "wholly innocent."[14] Murray's reliance on *Harris* is misplaced. In *Harris*, a police officer observed the defendant in the Wilmington train station and believed the defendant fit a "drug courier profile" because Harris (1) looked over his shoulder three times between leaving the train and descending the platform staircase into the station; (2) met another man in the lobby; (3) used a payphone; (4) "popped" his head up in the backseat of a car; and (5) looked out the rear window of the car.[15] Importantly, this Court noted the officer never stated that Harris appeared nervous or concerned about evading detection by police, and never explained how Harris' behavior matched the characteristics of the police's drug courier profile. In contrast,

[12] Ans. Br. at 10.
[13] 806 A.2d 119 (Del. 2002).
[14] Ans. Br. at 15-16.
[15] *Harris*, 806 A.2d at 129.

here, Sergeant Rosaio pointed out that Murray was in a high crime area, displayed specific nervous behaviors to conceal himself, held an object to his right side, and hid the right side of his body from the officer, displaying specific characteristics of an armed gunman. The record demonstrates Murray's conduct was specific articulable evidence of carrying a concealed deadly weapon.

Finally, Murray argues the Superior Court concluded the State was required to demonstrate probable cause to detain Murray, because Sergeant Rosaio detained Murray at gunpoint.[16] Not so. The State's burden was to demonstrate reasonable articulable suspicion to detain Murray. As Murray concedes, police officers may *forcibly* stop and detain someone if they have reasonable suspicion of criminal activity on the part of that person.[17] However, Murray misconstrues the facts and argues that Sergeant Rosaio's display of force by drawing his firearm was unreasonable under the circumstances.[18] Murray argues "there was nothing to indicate that it was reasonably necessary for police to immediately draw a weapon on Murray for protection." The record does not support Murray's claim.

In *Wiers v. Barnes*,[19] the United States District Court for District of Delaware discussed the appropriate standard to determine if a forcible detention should be

[16] Ans. Br. at 17.
[17] *Id.* at 18 (emphasis added).
[18] *Id.*
[19] 925 F. Supp. 1079 (D. Del. 1996).

treated as an arrest, requiring probable cause, for purposes of a Fourth Amendment analysis:

> The Fourth Amendment, safeguarding the right of people to be "secure in their persons ... against unreasonable seizures," has been interpreted to require application of the "reasonableness" standard to actions by law enforcement officers, with "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." The test is therefore an objective one: "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."[20]

Here, Sergeant Rosaio drew his weapon in response to Murray reaching for his waistband, when he reasonably believed Murray possessed a firearm.[21] Murray's actions demonstrated an immediate threat to the safety of Sergeant Rosaio and any other person present. Sergeant Rosaio's action in drawing his service firearm was reasonable in light of the developing circumstances confronting him, and Murray's claim is without merit.

[20] *Wiers*, 925 F. Supp. at 1087 (citing *Graham v. O'Connor*, 490 U.S. 386, 395-97 (1989)).
[21] A37-A38.

CONCLUSION

The Superior Court abused its discretion in granting Murray's motion to suppress. For the foregoing reasons, the judgment of the Superior Court should be reversed.

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