



IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANTHONY CALM,)
)
 Defendant Below,)
 Appellant,)
) No. 577, 2018
 v.)
)
 STATE OF DELAWARE,)
)
 Plaintiff Below,)
 Appellee.)

APPELLANT'S OPENING BRIEF

**ON APPEAL FROM THE SUPERIOR COURT IN AND OF NEW
CASTLE COUNTY**

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DATE: May 6, 2019

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SUMMARY OF THE ARGUMENT

There was no reasonable articulable suspicion that Anthony Calm was armed and presently dangerous when he was handcuffed and patted down on the evening of December 12, 2017. Calm was not holding a gun and there was no weapon in plain view. His clothes did not show a bulge indicating that he may be carrying a weapon. Calm did not act suspicious, made no threatening gestures or sudden movements and did not reach into any areas believed to be suspicious. Yet, police still searched him for officer safety. This Court should reverse the Superior Court and hold that the evidence was obtained in violation of Calm's Fourth Amendment rights and Article I, § 6 of the Delaware Constitution.

NATURE AND STAGE OF THE PROCEEDINGS

Anthony Calm (“Calm”) was indicted on charges of carrying a concealed deadly weapon (“CCDW”), possession of a firearm by person prohibited (“PFBPP”), possession of ammunition by person prohibited (“PABPP”), possession of a weapon with a altered serial number and resisting arrest. A6. A suppression hearing was conducted on June 12, 2018 and the trial judge orally denied the motion from the bench. A42. (See oral ruling, attached as Exhibit A).

A jury trial was held on the same day as the suppression hearing and Calm was convicted on all counts except for possession of a weapon with a altered serial number, which was *nolle prossed*. Calm was sentenced to 21 years at Level 5 followed by various levels of probation. (See Sentence Order, attached as Ex. B).

Calm filed a timely notice of appeal. This is his opening brief in support of that appeal.

STATEMENT OF FACTS

On December 12, 2017, Corporal Tim O'Connor ("O'Connor") and his partner Officer Metzner ("Metzner") of the Wilmington Police were on routine patrol near Thatcher Street. A17. Nothing in the record indicates that this is a high crime area. Sometime between 10:00 and 11:00 p.m. the officers were stationary at a stop sign when they observed a vehicle traveling 35 miles per hour in a 25 mile per hour zone. A19-20. After following the vehicle for several blocks, the officers effectuated a traffic stop after conducting a registration check and learning that the vehicle did not have a window tint waiver. A21.

Metzner made contact with the driver and O'Connor made contact with Calm, the passenger. A21. The officers learned that the driver was on Level III probation. Calm had no capiases or warrants. A23. Upon request, the driver provided consent to search the vehicle. Calm proceeded to open the door and placed one leg out before he was directed to stay in. A24. The driver was first patted down and nothing was found on his person. A26.

O'Connor testified that he was personally suspicious of Calm and decided to pat him down based on a culmination of factors. They included Calm initially questioning why his identification was requested, lack of eye

contact, attempting to exit the vehicle after consent to the search was provided and observation of anxiety. A28.

Before he was frisked, Calm made no threatening gestures or sudden movements, did not reach into any areas believed to be suspicious, was not asked if he had any weapons on him, was not holding a weapon and there was no weapon in plain view. Moreover, none of the officers noticed a bulge indicative of a weapon. During the pat-down search, a handgun was recovered and Calm was arrested. A31.

I. BECAUSE OFFICERS HAD NO REASONABLE ARTICULABLE SUSPICION THAT MR. CALM WAS ARMED AND DANGEROUS WHEN HE WAS DETAINED, THE ADDITIONAL INTRUSION OF THE TERRY PAT-DOWN WAS UNJUSTIFIED. THUS, THE SUPERIOR COURT ERRED WHEN IT FAILED SUPPRESS EVIDENCE OBTAINED FROM THE UNLAWFUL SEARCH.

Question Presented

Were officers justified to search Calm where they failed to demonstrate a reasonable articulable suspicion that he was armed and presently dangerous? The issue was preserved by a motion to suppress. A9.

Standard And Scope Of Review

When reviewing a denial of a motion to suppress evidence, this Court reviews the trial court's legal conclusions *de novo*. When reviewing the trial court's factual findings, this Court determines whether the trial court abused its discretion in deciding whether there was sufficient evidence to support the findings and whether those findings were clearly erroneous.¹

Argument

This Court, on *de novo* review, should reverse the Superior Court's finding that the officers' actions were not violative of the Delaware or U.S. Constitution based on an unjustified arrest and pat-down. The United States Constitution provides that individuals are to be free from unreasonable searches

¹ See *Lopez-Vazquez v. State*, 956 A.2d 1280 (Del. 2008).

and seizures.² The Due Process Clause of the Fourteenth Amendment applies this right to the states.³ Article I, § 6 of the Delaware Constitution also provides protection against unreasonable searches and seizures.⁴ The Delaware Constitution even provides greater protections than the Federal Constitution.⁵

The Fourth Amendment of the United States Constitution allows police officers to stop an individual for investigatory purposes if the officer has a “reasonable articulable suspicion that the individual to be detained is committing, has committed, or is about to commit a crime.”⁶ “A police officer may not conduct a pat-down search of a person during a traffic stop unless the officer has reasonable suspicion that the person subject to the frisk is armed and dangerous.”⁷ Moreover, the actions of an officer may not exceed the proper scope of the seizure and any additional intrusive measures must be supported by independent facts, known to the officer at the time.⁸

A reasonable suspicion has been defined by the United States Supreme Court as an officer's ability to “point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant[s]

² U.S. Const. amend. IV.

³ *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

⁴ See also *Jones v. State*, 745 A.2d 856, 860 (Del. 1999).

⁵ See generally *Dorsey v. State*, 761 A.2d 807 (Del. 2000).

⁶ *State v. Henderson*, 892 A.2d 1061, 1064 (Del. 2006) (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)).

⁷ *Holden v. State*, 23 A.3d 843, 847 (Del. 2011).

⁸ *Caldwell v. State*, 780 A.2d 1037, 1046 (Del. 2001).

the intrusion.”⁹ To determine if reasonable articulable suspicion exists, the Court “must examine the totality of the circumstances surrounding the situation as 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.”¹⁰

In the instant case, Calm should not have been subjected to an elevated legal detention by being subjected to a *Terry* pat-down by the police. The officers involved never pointed to specific and articulable facts to warrant this intrusion upon Calm. Calm did not act nervous or suspicious, made no threatening gestures or sudden movements and never exhibited a bulge that would show he may have been carrying a weapon. Because the police never articulated a reason to believe Calm was armed and presently dangerous, he was unreasonably searched. Therefore, this Court should reverse the Superior Court's decision.

In the case at bar, police had reasonable articulable suspicion to effectuate the initial traffic stop. The record reflects that officers encountered the vehicle travelling 10 mph over the speed limit and had unregistered window tint. Therefore, the officers had a right to stop the car and investigate further.

⁹ *Terry*, 392 U.S. at 21.

¹⁰ *United States v. Cortez*, 449 U.S. 411, 417-18 (1981).

The fact that the initial stop was justified, however, does not mean that Calm's subsequent *De facto* arrest and *Terry* pat-down was also justified. To satisfy the *Terry* standard, Police must still articulate specific facts that they believe an individual is armed and presently dangerous. To justify any additional intrusive measures, e.g., the use of handcuffs and a pat-down search, police action must be supported by independent facts, known to the officer at the time.

This Court and the United States Supreme Court have continually held since *Terry* that an officer may only conduct a protective pat-down if they have reasonable articulable suspicion that the detained individual is armed and presently dangerous.¹¹ Police do not have a right as a matter of policy to frisk every individual they encounter on the street for their safety. Police must point to and articulate specific facts to support their notion that a person is armed and presently dangerous.¹²

This Court in *Holden* condemned a police officer's actions that were similar to those taken in the case at bar. In its analysis, this Court noted: (1) that officers saw no weapons in the vehicle or (2) any bulge on Holden's body indicating a weapon¹³; (3) Holden made no sudden reaches or movements¹⁴; (4)

¹¹ *Henderson*, 892 A.2d at 1064-1065.

¹² *Id.*

¹³ *Id.* at 848.

police did not believe Holden was armed and dangerous before ordering him back in the vehicle following his initial exit from the traffic stop¹⁵; (5) police were not outnumbered; and (6) nothing in the record indicated that it was a high crime area.¹⁶ This Court found that “the police were unable to articulate facts that reasonably suggested Holden posed a threat to officer safety.”¹⁷ Thus, this Court concluded that “[b]ecause under the totality of the circumstances, the police did not have an objectively reasonable belief that Holden was armed and presently dangerous, the pat down was illegal and any evidence seized must be suppressed.”¹⁸

Here, the record is equally devoid of any articulable facts from which to suggest that Calm posed a threat to officer safety. O'Connor's suspicion stemmed from Calm questioning why his identification was requested, lack of eye contact, general anxiety and attempting to exit the vehicle after consent to the search was provided. A28. In denying suppression, even the Superior Court concluded that these factors testified by O'Connor "in and of itself [] would [not have] justified the moving of the defendant and patting him down." A42. The fact that O'Connor testified that he conducted the pat-down for his

¹⁴ *Id.* at 850.

¹⁵ *Id.* at 848.

¹⁶ *Id.* at 850.

¹⁷ *Id.*

¹⁸ *Id.* at 851.

safety is insufficient because “the mere incantation of ‘officer safety’ [does not] provide the necessary reasonable suspicion for a frisk.”¹⁹

Calm's arrest and pat-down violated his Fourth Amendment Right under the United States Constitution to be free from unreasonable searches and seizures and his similar right under Article I, § 6 of the Delaware Constitution. Therefore, any evidence seized as a result of the illegal search and seizure must be suppressed.

¹⁹ *Id.* at 850.

CONCLUSION

For the foregoing reasons and upon the authority cited herein, the undersigned respectfully submits that Anthony Calm's convictions should be reversed.

\s\ Santino Ceccotti
Santino Ceccotti, Esquire

DATE: May 6, 2019