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IN THE SUPREME COURT OF THE STATE OF DELAWARE

MURAD DIGGS,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 282, 2020
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

Elizabeth R. McFarlan
Bar No. 3759
Delaware Department of Justice
Carvel State Office Building
820 N. French Street, 7th Floor
Wilmington, DE 19801
(302) 577-8500

DATE: February 5, 2021

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NATURE AND STAGE OF THE PROCEEDINGS

On October 26, 2018, Wilmington Police Department ("WPD") officers arrested the appellant, Murad Diggs, for carrying a concealed deadly weapon (a firearm). DI 1.[1] Diggs was released on bail pending trial. DI 1. On December 17, 2018, a New Castle County grand jury returned an indictment charging Diggs with carrying a concealed deadly weapon ("CCDW"), resisting arrest, possession of a firearm by a person prohibited ("PFBPP"), and possession of ammunition by a person prohibited ("PABPP"). DI 2.

On March 11, 2019, Diggs moved to suppress evidence seized by WPD during his apprehension. DI 10. The State opposed the motion to suppress. DI 12. On March 29, 2019, the Superior Court conducted an evidentiary hearing on Diggs' motion to suppress, and the court heard argument on the motion on April 1, 2019. DI 14. Diggs supplemented the record by letter immediately thereafter. DI 15. On April 16, 2019, the Superior Court issued a Memorandum Order denying Diggs' motion to suppress.[2] DI 17.

Diggs' trial, originally scheduled to begin on April 23, 2019, was continued to June 4, 2019. DI 20. Diggs moved to sever the PFBPP and PABPP charges, and the State responded on May 29, 2020. DI 33. Diggs then filed a motion

[1] "DI__" refers to item numbers on the Superior Court Criminal Docket in *State v. Murad Diggs*, ID No. 1810015149A, found at A1-9.

[2] *State v. Diggs*, 2019 WL 1752644, at *7 (Del. Super. Ct. Apr. 16, 2019).

seeking judicial determination of the sentencing range he potentially faced under 11 *Del. C.* § 1448(e)(9). DI 35. On June 3, 2019, the specially assigned judge held a teleconference, during which the judge ruled on the potential sentence range. DI 36.

On June 4, 2019, the day of trial, the Superior Court granted severance and the PFBPP and PABPP charges proceeded to a jury trial. DI 37. Diggs and the State stipulated at trial that Diggs was prohibited from possessing a gun or ammunition on October 26, 2018. DI 38. On June 5, 2019, the jury found Diggs guilty of both charges. DI 41. The Superior Court deferred sentencing until after the severed charges were resolved. DI 41. On November 14, 2019, the State entered a *nolle prosequi* for the CCDW and resisting arrest charges. DI** 3.[3]

Meanwhile, on April 18, 2019, while his firearm and ammunition case was pending, WPD officers arrested Diggs for multiple drug offenses.[4] DI* 1. On November 19, 2019, Diggs pleaded guilty to dealing over 100 grams of crack cocaine (Tier 4). DI* 12. On August 14, 2020, the Superior Court sentenced Diggs for both the weapons and the drug cases, as follows: For drug dealing (Tier 4), to 25 years at level 5 incarceration, suspended after 2 years for 23 years at level

[3] "DI**__" refers to item numbers on the Superior Court Criminal Docket in *State v. Murad Diggs*, ID No. 1810015149B, found at B1.

[4] "DI*__" refers to item numbers on the Superior Court Criminal Docket in *State v. Murad Diggs*, ID No. 1904013820, found at B2-4.

4 supervision, suspended after 6 months for 2 years at level 3 probation; for PFBPP, to 10 years at level 5, suspended for 18 months at level 3 probation; for PABPP, to 8 years at level 5, suspended for 18 months at level 3 probation (concurrent).[5] DI 48; DI* 13.

Diggs filed a timely notice of appeal from the Superior Court's combined sentencing order. Diggs filed an Opening Brief, raising claims related only to the suppression hearing in his firearm case. Diggs does not challenge his conviction or sentence for drug dealing. This is the State's Answering Brief.

[5] *See* Corr. Sent. Ord. 8/26/2019 (Ex. 2 to Amend. Op. Br.)

SUMMARY OF THE ARGUMENTS

I. Appellant's argument is denied. The Superior Court did not abuse its discretion when it denied Diggs' motion to suppress evidence obtained by police while investigating a citizen informant's tip. A citizen informant alerted police to a suspicious individual carrying a weapon in the City of Wilmington. Thereafter, police corroborated details of the tip – location, age, physical and clothing description – leading them to interact with Diggs. Police initially asked Diggs if he would speak to them and when, in response to this request, Diggs threw items on the floor and took a fighting stance, police seized him and conducted a pat-down, leading to the discovery of a firearm. Applying settled principles of constitutional law, the Superior Court judge found the facts established at the suppression hearing provided the police reason to question Diggs. The judge held that Diggs' actions in response to the initial police inquiry, considered from the viewpoint of a trained police officer and based on the totality of the circumstances, provided police reasonable suspicion that Diggs was armed and presented a danger to others sufficient to permit his pat-down for weapons. Because, in reaching his rulings, the judge applied settled legal principles to established facts, this Court should affirm those rulings.

II. Appellant's argument is denied. The Superior Court did not commit any error, plain or otherwise, by failing to apply a lost or missing evidence

inference in deciding Diggs' motion to suppress. The hearing judge, acting as the factfinder at a suppression hearing, is free to consider the credibility of witnesses and, once made aware of the police failure to procure the store surveillance video or retain cell phone records, was free to consider the import of those facts in making factual determinations. Because Diggs' failed to establish that the hearing judge's factual findings were clearly erroneous, this Court need not consider this claim on appeal. Further, the record reveals that Diggs elected not to seek a lost or missing evidence jury instruction at trial, thus he waived any claim to such an inference at trial.

STATEMENT OF FACTS[6]

Suppression Hearing

State's evidence

On October 26, 2018, WPD Corporal Alexander Marino received a telephone call on his personal cellphone from a concerned citizen informing him that, in the area of the 200 block of South Harrison Street in Wilmington, a black male, approximately 30-35 years of age and wearing a camouflage jacket, had a small handgun in his waistband. A42; A45; A48. The caller also informed Marino that the individual was going into a corner store at the corner of South Harrison and Chestnut Streets. A55-56. Marino had known the caller for about 11 years and knew the caller to reside in the City of Wilmington. A43; A44. The caller had, on approximately five prior occasions, provided Marino reliable information. A43. The caller had never received any benefit from Marino and Marino was not aware of any pending charges against the caller. A44; A47. Marino was aware that the reported location was a high crime area where there had been a violent incident a few weeks prior. A45; A46. Because Marino was not on duty when he received the call, he relayed the information by phone to Officer Raymond Shupe,

[6] The facts recited here are limited to those facts adduced at the Suppression Hearing because Diggs' claims on appeal challenge only the Superior Court's decision denying his motion to suppress the evidence. *See, e.g., Diggs*, 2019 WL 1752644, at n.1.

who was on duty and working within the relevant area at that time. A46; A47; A51.

After receiving the information from Marino, Shupe and his partner, Officer Diana Agosto, headed toward the reported location. A63. They approached on South Franklin Street and looked eastbound on Chestnut Street where they saw a man, later identified as Murad Diggs, wearing a camouflage jacket heading southbound on Harrison Street. A63. Diggs was one block away from the convenience store at the corner of South Harrison and Chestnut. A63. At that time, there were four or five other black males, all dressed in black, in the area. A64-65.

Shupe and Agosto drove around to South Harrison Street at Chestnut, where they saw Diggs enter the Shop Smart corner store at Elm and South Harrison Streets. A65; A79. They parked their fully marked police vehicle and awaited backup. A65. Once backup arrived, Shupe and Agosto, along with Officers Ryan Jordan and Shavonne Gaskin,[7] exited their vehicles and walked toward the corner store. A66. All the officers were dressed in full uniform. A66. As Shupe was entering the store, Diggs was exiting, and they met in the doorway. A66. Shupe asked Diggs, who was still wearing a camouflage jacket, if he could speak with him. A67; A74. Diggs immediately threw his cell phone and a cigar on the

[7] The Suppression Hearing transcript refers to Patrolwoman Gaskin as "Gaston," but the trial transcript correctly identifies the officer. DI 54, B23.

ground, crouched, raised his arms in a defensive stance, and started backing away. A67, A93. Diggs threw the cell phone down with such force that it appeared to Shupe that Diggs might be trying to break it. A68. Diggs looked to his right and left, leading Shupe to believe Diggs was going to run or fight. A67.

At that point, Shupe took a step forward and grabbed Diggs' arm. A71. A struggle ensued. A72. Shupe, Jordan, and Diggs ended up on the ground, while Diggs continued to resist. A72. Eventually, the WPD officers were able to place Diggs in handcuffs. A72. Shupe proceeded to conduct a pat-down for weapons. A72-73. Shupe first ran his hands along Diggs' waistline and immediately felt what he believed to be a handle of a pistol just below Diggs' belt. A94. Shupe reached into Diggs' pants and found a loaded firearm just below Diggs' waistband. A73; A94. Diggs stated, "I need it for protection." A73. Diggs explained that he had been shot before. A73.

After Diggs was secured, Shupe asked the store clerk for any surveillance video the store might have of the incident, but the clerk informed Shupe that he did not know how to work the cameras. A74; A85-87. Shupe returned a few days later, but was again informed that no one knew how to obtain the footage from the cameras. A74; A89-90. Shupe later learned that the store only retained footage for two weeks and that video of Diggs' arrest could no longer be retrieved. A74.

Defense evidence

Guy Bullock, a cook at the Shop Smart, was working at the store when WPD officers arrived on October 26, 2018. A100; A101. Bullock had come to the front of the store to watch some children and to make sure that nothing was being stolen. A101. Bullock's focus was on the children and whether they were going to purchase something. A109. Bullock had worked at the store for over a year and knew Diggs as a customer of the store who came in to buy a meal almost every day. A102; A110.

Bullock saw an officer grab Diggs by the arm and pull him away. A101; A102; A111-12. There was a little tussle, so Bullock moved a small child out of the way for their safety. A112. Because the incident happened so quickly, Bullock was only able to describe the officer as a male, possibly white or Hispanic. A112-13. Initially, Bullock was not sure if the male who grabbed Diggs' arm was an officer; he was anticipating a fight breaking out. A113. It was only when Bullock went to the door that he saw that the male was a police officer. A114.

Andrea Price was also present in the Shop Smart store at the time of the incident. A118. Price was getting ready to leave the store when she saw Diggs pull open the door to exit and a police officer grab his arm. A120. Price was familiar with Diggs from the neighborhood, but did not know his name until she was contacted to testify about the incident. A119; A128; A132. Price saw Diggs

pull his arm back and then the officer move toward him; Price turned around and tried to get out of the way. A120. Price, from the corner of the store, saw Diggs put his hands up as she was standing behind the aisle. A120. Then she remembered seeing Diggs detained on the floor in the doorway. A120; A121. Everything happened very quickly. A120. Price could not describe the officers because she was focused on getting out of the store but believed at least one was a female. A131.

Na'isha Pantoja, Diggs' sister, was outside the corner store when Diggs encountered the WPD officers. A135; A136. Pantoja saw the police pulling up while she was trying to take her children to the store. A136. But when she saw an officer walk into the store, grab Diggs, and slam him on the ground, Pantoja told her children to walk back up the street. A136. Pantoja explained that she saw a lot of young black men come out of the store, one of whom was wearing a fatigue jacket similar to the jacket Diggs was wearing. A137. Pantoja estimated the man's age to be mid-twenties. A138. Pantoja took video footage with her phone during the incident, but later deleted some of them. A145-46. From her vantage point, Pantoja could not see inside the store. A149. She testified that the police conducted "about a million and one" searches of Diggs, or maybe 20-30 times. A149-50. Although Pantoja and her family, including Diggs, gathered for family

dinners 4-5 times a week, she testified that she never discussed this incident with him prior to offering her observations to the court. A143.

Julia Pantoja, Diggs' mother, was also outside the corner store at the time of Diggs' encounter with WPD officers. A153; A156. She also saw the male in his twenties with a fatigue jacket leaving the store before police approached. A154-55. Diggs' mother estimated that police searched Diggs 6-7 times. A157. She acknowledged speaking with her son about the incident several times. A158-59.

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING DIGGS' MOTION TO SUPPRESS EVIDENCE.

Question Presented

Whether the Superior Court's finding that the police had reason to seize Diggs and conduct a protective pat-down based on the totality of the circumstances, including a citizen tip that a man meeting Diggs' description was carrying a firearm in his waistband and Diggs' reaction to a police attempt to ask a question, was supported by the law and the evidence.

Standard and Scope of Review

This Court reviews a Superior Court judge's denial of a motion to suppress evidence after an evidentiary hearing for an abuse of discretion.[8] "When reviewing the findings and judgment after an evidentiary hearing on a motion to suppress, this Court will defer to the factual findings of a Superior Court judge unless those findings are clearly erroneous. 'Once the historical facts are established, the legal issue is whether an undisputed rule of law is violated. Accordingly, this Court reviews *de novo* whether police possessed reasonable articulable suspicion to stop a person.'"[9]

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[8] *Lopez-Vazquez v. State*, 956 A.2d 1280, 1285 (Del. 2008) (collecting cases).

[9] *State v. Rollins*, 922 A.2d 379, 382 (Del. 2007) (citing *Riley v. State*, 892 A.2d 370, 373 (Del. 2006) (citing *Woody v. State*, 765 A.2d 1257, 1261 (Del. 2001)) and quoting *Purnell v. State*, 832 A.2d 714, 719 (Del. 2003)).

Merits

In the Superior Court, Diggs moved to suppress the firearm police found in his waistband , arguing that the police did not have reasonable articulable suspicion to seize Diggs "because: (i) the citizen providing information to Corporal Marino did not provide detailed enough information; (ii) the citizen's information was relayed to Corporal Marino and not Officer Shupe; [and] (iii) Officer Shupe did not observe Mr. Diggs engage in any suspicious activity prior to engaging him in the Market."[10] A The State opposed the motion, arguing that the officer's initial encounter with Diggs did not amount to a seizure, and that the totality of the circumstances – tip of an eyewitness, observations of Diggs' behavior, and high crime area - supported the officer's reasonable suspicion that Diggs was carrying a concealed deadly weapon at the time of his seizure.[11] A23-24.

After considering the testimony of Officer Marino (who received the tip), Officer Shupe (who acted on the information), two witnesses (who were inside the store), and Diggs' mother and sister (who were outside of the store), the judge denied the motion. The judge found that "Officer Shupe seized Mr. Diggs at the time he grabbed Mr. Diggs' arm."[12] Further, the judge found that the tipster "falls into the category of 'citizen informant'" and that the information was sufficiently

[10] *Diggs*, 2019 WL 1752644, at *1.

[11] See id.

[12] *Id.* at *4.

specific to justify Officer Shupe's attempt to speak with Diggs.[13] The judge noted: "While more corroboration is necessarily better, the Court does not find this fatal to the reasonable suspicion analysis given the source of the information, Mr. Diggs' location on the same block as first reported, and the spot-on description of Mr. Diggs' age, race and apparel."[14] After finding "that Officer Shupe had a particularized and objective basis to suspect that Mr. Diggs was committing a crime—possible possession of a firearm without a license or, if hidden, carrying a concealed deadly weapon[,]"[15] the judge concluded:

> Officer Shupe was in an area that had recently experienced a shooting and an incident involving Molotov cocktails. The citizen informant provided that Mr. Diggs had a concealed firearm. According to Officer Shupe, Officer Shupe tried to talk to Mr. Diggs but, after asking to speak with him, Mr. Diggs reacted in a manner that Officer Shupe had never seen before. Mr. Diggs threw down the items in his hands, got into a defensive position and took steps backwards. At this point, Officer Shupe believed that Mr. Diggs had a gun and grabbed him to check for weapons. A struggle ensued, other WPD officers joined in and a loaded handgun was found in Mr. Diggs' waistband.
>
> The Court finds that Officer Shupe was justified in believing that Mr. Diggs, whose suspicious behavior he was investigating at close range, was armed and presently dangerous to Officer Shupe or others. Officer Shupe was a policeman making a reasonable investigatory stop in a situation where reliable information supported the conclusion that Mr. Diggs may be armed with a handgun. Officer Shupe, therefore, should not be denied the opportunity to protect himself from possible attack when faced with situation involving suspicious

[13] *Id.* at *6.

[14] *Id.*

[15] *Id.*

> behavior. Accordingly, the Court finds that Officer Shupe did not violate Mr. Diggs' constitutional rights when Officer Shupe attempted to conduct a limited protective search for concealed weapons.[16]

On appeal, Diggs argues that the Superior Court judge erred in finding that: (i) the tipster qualified as a citizen informant;[17] (ii) the information from the citizen informant was reliable;[18] (iii) Shupe could rely upon the information relayed by Marino;[19] and (iv) Diggs' behavior justified the protective search.[20] Diggs' claims are unavailing.

The legal principles involved are well established and generally not in dispute. First, the Court must establish the point when the officers stopped Diggs and then "determine whether the officers had reasonable and articulable suspicion at that time to make the stop."[21] "A stop occurs when a police officer displays conduct that would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'"[22] "Under the Fourth Amendment to the United States Constitution, a seizure requires either

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[16] *Id.* at *7 (footnote omitted).

[17] Amend. Op. Br. at 22-26.

[18] Amend. Op. Br. at 26-31.

[19] Amend. Op. Br. at 31-33.

[20] Amend. Op. Br. at 33-37.

[21] *Purnell,* 832 A.2d at 719.

[22] *Jones v. State,* 745 A.2d 856, 862 (Del. 1999) (quoting *Michigan v. Chesternut,* 486 U.S. 567 (1988)).

physical force or submission to assertion of authority."[23] Here, the Superior Court properly found that the police seized Diggs when they grabbed his arm.[24] Under those circumstances, a reasonable person would not believe that he was free to leave. Therefore, this is the point in time when the detention occurred. Diggs does not appear to disagree as to when the seizure occurred, but rather challenges the legality of the basis for the stop and subsequent pat-down.

The Court must next determine whether the officers had reasonable articulable suspicion to stop, detain and frisk Diggs. "The Fourth Amendment of the United States Constitution protects individuals from 'unreasonable searches and seizures.'"[25] "In *Terry v. Ohio,* the United States Supreme Court held that a police officer may 'detain an individual for investigatory purposes for a limited scope and duration, but only if such detention is supported by a reasonable and articulable suspicion of criminal activity.'"[26] The stop is only justified, however, if "specific and articulable facts ... together with rational inferences" suggest that a suspect is involved in criminal activity.[27]

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[23] *Purnell,* 832 A.2d at 719 (citing *California v. Hodari D.,* 499 U.S. 621, 626 (1991)).

[24] *Diggs*, 2019 WL 1752644, at *4.

[25] *Riley,* 892 A.2d at 373. *See* U.S. Const. amend. IV; *Jones,* 745 A.2d at 860.

[26] *Jones,* 745 A.2d at 861 (quoting *Terry v. Ohio,* 392 U.S. 1 (1968)).

[27] *Riley,* 892 A.2d at 373–74 (quoting *Terry,* 392 U.S. at 20–21).

Section 1902 (Questioning and detaining suspects) of Title 11 of the Delaware Code codifies the *Terry* principles:

> (a) A peace officer may stop any person abroad, or in a public place, who the officer has a reasonable ground to suspect is committing, has committed or is about to commit a crime, and may demand the person's name, address, business abroad and destination.
>
> (b) Any person so questioned who fails to identify himself or explain his actions to the satisfaction of the officer may be detained and further questioned and investigated.
>
> (c) The total period of detention provided for by this section shall not exceed 2 hours. The detention is not an arrest and shall not be recorded as an arrest in any official record. At the end of the detention the person so detained shall be released or arrested and charged with a crime.

Further, section 1903 (Searching questioned person for weapon) of Title 11 provides:

> A peace officer may search for a dangerous weapon any person whom the officer has stopped or detained to question as provided in § 1902 of this title, whenever the officer has reasonable ground to believe that the officer is in danger if the person possesses a dangerous weapon. If the officer finds a weapon, the officer may take and keep it until the completion of the questioning, when the officer shall either return it or arrest the person. The arrest may be for the illegal possession of the weapon.

This Court has interpreted the words "reasonable ground" in the Delaware statutes to be equivalent to the "reasonable and articulable" standard announced in *Terry*.[28] The officer must be able to point to specific facts, which viewed in their

[28] *Riley*, 892 A.2d at 374 (citing *Jones*, 745 A.2d at 861).

entirety and accompanied by rational inferences, support the suspicion that the person sought to be detained was in the process of violating the law in order to satisfy the "reasonable and articulable" standard.[29] The United States Supreme Court has made it clear that courts should evaluate the reasonable articulable suspicion standard under the totality of the circumstances, rather than examining each factor in isolation.[30] Both the U.S. Supreme Court and this Court have recognized that "[i]n some instances ... lawful and apparently innocent conduct may add up to reasonable suspicion if the detaining officer articulates 'concrete reasons for such an interpretation.'"[31] "The totality of the circumstances, as viewed through the eyes of a reasonable, trained officer in the same or similar circumstances, must be examined by both the trial judge and appellate court to determine if reasonable suspicion has been properly formulated."[32]

Here, information provided by a known, reliable source prompted police suspicion. "An informant's tip may provide [reasonable suspicion] for a warrantless [stop] where the totality of the circumstances, if corroborated, indicates

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[29] *Id.* (citing *Downs v. State,* 570 A.2d 1142, 1145 (Del. 1990)).

[30] *See*, e.g., *United States v. Arvizu*, 534 U.S. 266, 274 (2002).

[31] *Riley,* 892 A.2d at 375 (quoting *Harris v. State,* 806 A.2d 119, 121 (Del. 2002)).

[32] *Id.* at 374 (citing *Jones,* 745 A.2d at 861).

that the information is reliable."[33] A court should "consider the reliability of the informant, the details contained in the informant's tip, and the degree to which the tip is corroborated by independent police surveillance and information."[34] In the case of an average law abiding citizen performing a civic duty by reporting a crime, establishing the historical reliability of an informant is unnecessary.[35] "Where the informant is a known, law-abiding citizen reporting a crime, the informant is considered presumptively reliable, because the informant has no connection to the criminal world and no reason to fabricate the story."[36]

Here, the Superior Court specifically found:

> ... from the facts presented at the Hearing that Corporal Marino's citizen falls into the category of "citizen informant." Mr. Diggs attempts to have this citizen characterized as a "confidential informant;" however, the record demonstrates that the citizen informant was not a member of the criminal community, but rather an individual who occasionally telephoned police to report incidents of which he or she had knowledge. Corporal Marino's testimony that his caller was a citizen who never received compensation (money,

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[33] *Brown v. State*, 897 A.2d 748, 751 (Del. 2006) (citing *Tatman v. State*, 494 A.2d 1249, 1251 (Del. 1985) (citing *Illinois v. Gates*, 462 U.S. 213, 233 (1983))).

[34] *Id*.

[35] *Bailey v. State*, 440 A.2d 997, 999 (Del. 1982).

[36] *Brown*, 897 A.2d at 751; *see also McKinney v. State*, 107 A.3d 1045, 1048 (Del. 2014) ("There are also circumstances that increase the reliability of an informant and thus the information provided in the tip[,] ... includ[ing] the fact that the information is delivered by a citizen with no connection to the criminal underworld.").

> dropped charges, etc.) for relayed information support the finding that the caller was a citizen informant.[37]
>
> .... Corporal Marino relayed that he had facts from a reliable source that a black male, age 30-35, wearing a camouflaged jacket and having a firearm in his waistband was entering a store on the corner of Chestnut and S. Harrison Streets. When Officer Shupe arrived shortly afterwards, Officer Shupe saw a person matching that description on the same block, walking away from Chestnut Street and eventually entering the Market. The description was specific enough that the evidence demonstrates that WPD officers, including Officer Shupe, did not even stop and question another black male wearing a similar jacket. Instead, Officer Shupe went into the Market to talk to Mr. Diggs.[38]

Just as this Court found in *Bailey*, Marino's informant falls into the category of "citizen informant." "The record shows that he was not a member of the criminal community, but rather an individual who occasionally telephoned police to report minor incidents of which he had knowledge."[39] Further, the judge considered the totality of the circumstances and found sufficient detail in the information that was corroborated by police to allow Shupe to approach Diggs to investigate. The Superior Court's findings of fact are supported by the record and the court correctly applied the law based on those findings.

Marino testified that "a concerned citizen" known to him provided information by phone that "an individual in the area of the 200 block of South

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[37] *Diggs*, 2019 WL 1752644, at *6.

[38] *Id.* (footnotes omitted).

[39] *Bailey*, 440 A.2d at 999.

Harrison was in possession of a handgun." A42-43. Marino had known the citizen for eleven years and had received reliable information from the citizen during those years approximately five times. A43. Marino never provided the informant with any benefit and, to his knowledge, the informant did not have any pending charges. A44. The citizen told Marino that the individual was a "black male, approximately 30-35 years of age, was wearing a camouflage jacket, had a small handgun on his waistband." A45. Marino was aware that in the vicinity of the 200 block of South Harrison "a few weeks before that there was a shooting or shots fired in the area where a Molotov cocktail was thrown at somebody." A45. Marino knew this to be a "high crime area." A46. Almost immediately, Marino relayed this information by phone to Shupe, including "the description of the individual, what he was wearing, and he had a handgun in his waistband."[40] A47; A56. At the time of the call, the citizen said that the "individual was walking into the convenience store located at the intersection of South Harrison and Chestnut Street." A57. The convenience store where Shupe interacted with Diggs was approximately a block away. A57.

[40] Diggs asserts that Marino's testimony that the citizen said the gun was "on" the waistband and that Marino told Shupe it was "in" the waistband evidences unreliability. Amend. Op. Br. at 28 & n.41. This discrepancy does not lead to a conclusion that the information was unreliable or that the judge's findings of fact are clearly erroneous.

As an initial matter, it is well settled that Shupe was justified in acting on information relayed to him by Marino. "Relevant to this appeal, this Court held in *Cooley* that arresting officers are 'entitled to rely on information relayed to [them] through official channels' when making an arrest."[41] "Under the [collective knowledge] doctrine, '[t]he arresting officer himself need not be apprised of the underlying circumstances which give rise to a conclusion of probable cause .... [Instead, he can] act in the belief that his fellow officer's judgment is correct.'"[42] Just as in *Gordon v. State*, Marino conveyed the information he learned from a citizen informant to Shupe and thus Shupe could rely upon Marino's communication as part of his reasonable suspicion calculation.[43]

Shupe testified that Marino informed him "that there was possibly a black male with a camouflage jacket in the area of the 200 block of South Harrison armed with a handgun, and it was in his waistband." A61. Shupe also reported having received reliable information from Marino's citizen informants in the past.

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[41] *Gordon v. State*, __A.3d__, 2021 WL 48208, at *9 (Del. Jan. 6, 2021) (reaffirming collective knowledge doctrine and quoting *Cooley v. State*, 457 A.2d 352, 355 (Del. 1983)).

[42] *Id.* (quoting *State v. Holmes*, 2015 WL 5168374, at *4 (Del. Super. Ct. Sept. 3, 2015)). *See also Purnell v. State,* 832 A.2d 714, 720 (Del. 2003) (officers had reasonable articulable suspicion to stop defendant to investigate reliable informant's tip that he and another person possessed drugs and handguns; defendant matched description provided by the informant and was in the vicinity stated by the informant).

[43] *See Gordon*, 2021 WL 48208, at *9.

A61-62. Marino told Shupe that the informant was reliable.[44] A61; A77; A92. Shupe was also aware that the location was a high crime area where "there was a shooting within the last two weeks." A62. Shupe responded to the location "very quickly" from the west side of the city. A63. Shupe spotted an individual matching the description walking southbound on Harrison Street a block away from the convenience store at the corner of South Harrison and Chestnut Street. A63. There were four or five other black males dressed all in black present. A64. Shupe watched the man in the camouflage jacket enter the corner store at South Harrison and Elm Street. A65. Shupe parked and waited for backup; then approached the store. A65-66. As Shupe entered the store, Diggs, wearing a camouflage jacket, was exiting, and they met in area of the doorway. A66.

Shupe testified that he attempted to engage Diggs, asking him if he could speak with him.[45] A67. Diggs responded by throwing his phone to the floor,

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[44] Contrary to Diggs' assertion (Amend. Op. Br. at 31), Marino's testimony on this point did not contradict Shupe's testimony. Marino was asked only if he conveyed information about the citizen by "text," to which Marino responded that he had not. A52. This was not inconsistent with Shupe's testimony that Marino "told" him the relayed information came "from a reliable witness." A61. When asked what exactly he relayed to Shupe, Marino responded that he "told him exactly what the individual told me." A46. At no time did either the prosecutor or Diggs' counsel ask Marino if he told Shupe by phone that the tip was from a reliable source.

[45] Law enforcement officers are permitted to initiate contact with citizens on the street for the purpose of asking questions. *See Florida v. Royer,* 460 U.S. 491, 498 (1983); *Terry,* 392 U.S. at 32–33 (Harlan, J. concurring); *United States v. Hernandez,* 854 F.2d 295, 297 (8th Cir. 1988). A consensual encounter between law enforcement officers and members of the public does not amount to a seizure

backing up, scanning left and right as if "weighing his options," and raising his arms to chest height in what appeared to Shupe to be a defensive stance facing Shupe. A70. Shupe had never experienced such a reaction to a request to speak with someone. A71. At that point, based on the totality of the circumstances, including the information relayed by the informant and corroborated by Shupe's personal observations, Shupe had reasonable articulable suspicion that Diggs was committing a crime.

Moreover, because Shupe had information from a reliable source that Diggs might be in possession of a handgun, resisted arrest, and was in a high-crime area with a recent shooting, Shupe had reasonable articulable suspicion to conduct a pat-down for his and the other store occupants' safety.[46] The Superior Court did not err in finding "that Officer Shupe was justified in believing that Mr. Diggs, whose suspicious behavior he was investigating at close range, was armed and presently dangerous to Officer Shupe or others."[47]

The suppression hearing testimony supports the Superior Court's factual findings. The judge found "Mr. Diggs' location on the same block as first

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and therefore does not implicate the Fourth Amendment. *See* ***Quarles v. State,*** 696 A.2d 1334, 1337 n.1 (Del. 1997). An individual has no obligation to answer the officer's inquiry and may go about his or her business. *See* ***Royer,*** 460 U.S. at 498. Law enforcement officers must have an objective justification for their actions if the individual is detained. *See id.*

[46] 11 *Del. C.* § 1903.

[47] *Diggs*, 2019 WL 1752644, at *7.

reported, and the spot-on description of Mr. Diggs' age, race and apparel" provided sufficient corroboration of the citizen informant's tip.[48] And, applying the law to those facts, the judge reasonably concluded that "Officer Shupe had a particularized and objective basis to suspect that Mr. Diggs was committing a crime—possible possession of a firearm without a license or, if hidden, carrying a concealed deadly weapon."[49]

[48] *Diggs*, 2019 WL 1752644, at *6. *See Purnell*, 832 A.2d at 720.

[49] *Id.* Diggs points out that it is not a crime to possess a firearm without a license as a basis for this Court to find that the Superior Court made a mistake of law. Amend. Op. Br. at 28 n.42. To the extent the hearing judge erred, the error does is not material to the analysis, because (as Diggs also pointed out), the handgun was concealed and the informant had intimated as such by stating that the individual had a handgun in his waistband. In fact, the Superior Court presented Diggs' concealed carrying of a weapon as an alternate (and legitimate) suspicion to unlicensed carrying.

II. THE SUPERIOR COURT DID NOT ERR BY NOT *SUA SPONTE* INFERRING THAT MISSING EVIDENCE SUBSTANTIALLY PREJUDICED DIGGS AT THE SUPPRESSION HEARING.

Question Presented

Whether the Superior Court committed plain error by not *sua sponte* inferring at the suppression hearing that missing video surveillance and cell phone records substantially prejudiced Diggs.

Standard and Scope of Review

Issues not adequately raised below are reviewed only for plain error.[50] This Court "'generally decline[s] to review contentions not raised below and not fairly presented to the trial court for decision' unless [this Court] find[s] 'that the trial court committed plain error requiring review in the interests of justice.'"[51] "Plain error is limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice."[52]

Merits

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[50] Supr. Ct. R. 8.

[51] *Hoskins v. State*, 102 A.3d 724, 728 (Del. 2014) (quoting *Banks v. State*, 93 A.3d 643, 651 (Del. 2014) (quoting *Turner v. State*, 5 A.3d 612, 615 (Del. 2010)) and citing Supr. Ct. R. 8)).

[52] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

Diggs contends for the first time on appeal, that the Superior Court committed plain error by failing to apply a lost/missing evidence inference in its assessment of facts elicited during Diggs' suppression hearing. Thus, he contends, the absence of such an inference resulted in the deprivation of Diggs' due process right to a fair suppression hearing.[53] Specifically, Diggs complains that the police (1) failed to preserve the text messages and call logs on their personal cell phones used by Shupe and Marino to communicate about the informant's tip, and (2) failed to obtain the video footage from the store where they detained him.[54] Diggs argues that the court should have *sua sponte* incorporated "a 'lost/and/or missing evidence' inference when making the Court's suppression hearing factual determinations.[55] He is wrong.

When the State is charged with failure to preserve evidence that could be favorable to the defendant, the Court must engage in an analysis that draws a balance between the nature of the State's conduct and the degree of prejudice to the defendant.[56] "[F]undamental fairness, as an element of due process, requires the State's failure to preserve evidence that could be favorable to the defendant

[53] Amend. Op. Br. at 42, 47.

[54] Amend. Op. Br. at 41.

[55] Amend. Op. Br. at 42.

[56] *Hammond v. State*, 569 A.2d 81, 86 (Del. 1990).

'[to] be evaluated in the context of the entire record.'"[57] Here, in the context of a pre-trial suppression hearing, the Superior Court did precisely that.

Delaware courts address missing evidence claims under the *Deberry* standard:

> 1) would the requested material, if extant in the possession of the State at the time of the defense request, have been subject to disclosure under Criminal Rule 16 or *Brady* [*v. Maryland*[58]]?
>
> 2) if so, did the government have a duty to preserve the material?
>
> 3) if there was a duty to preserve, was the duty breached, and what consequences should flow from a breach?[59]

The consequences that should flow from a breach of the duty to gather or preserve evidence are determined in accordance with a separate three-part analysis which considers:

> 1) the degree of negligence or bad faith involved,
>
> 2) the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available,[60] and
>
> 3) the sufficiency of the other evidence produced at the trial to sustain the conviction.[61] [62]

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[57] *Id.* at 87 (quoting *United States v. Agurs*, 427 U.S. 97, 112 (1976) and citing *Deberry v. State*, 457 A.2d 744, 752 (Del. 1983); Del. Const. art. I, § 7).

[58] *Brady v. Maryland*, 373 U.S. 83 (1963).

[59] *Deberry*, 457 A.2d at 750.

[60] The consideration of secondary or substitute evidence was added by this Court in *Bailey v. State*, 521 A.2d 1069, 1091 (Del. 1987).

[61] *Bailey v. State*, 521 A.2d at 1091 (citing *Deberry v. State*, 457 A.2d at 752).

Based upon the testimony presented at Diggs' pretrial suppression hearing and the arguments offered by the parties, the Superior Court determined that the State had met its burden to overcome the motion to suppress. The judge knew the police failed to obtain video surveillance from the store and that the police had deleted cell phone records of their communications about the citizen informant's information.[63] The missing cell phone records and video surveillance were ultimately not material to the court's decision. That determination is supported by competent evidence and is not clearly erroneous. Diggs "cannot meet 'the standard for materiality by merely positing the existence of evidence and speculating about its nature.'"[64]

In his written opinion denying Diggs' suppression motion, the Superior Court judge specifically noted:

> - Corporal Marino did not keep any messages or phone log from October 26, 2018. Corporal Marino testified that he bought a new phone and no longer had the old phone which was wiped as part of the upgrade.[65]
> - After the arrest, Officer Shupe asked a person for the footage from a camera located in the Market. Officer Shupe was told by a person working at the Market that he

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[62] *Johnson v. State*, 27 A.3d 541, 545-46 (Del. 2011) (footnotes renumbered).

[63] *See Diggs*, 2019 WL 1752644, at *2.

[64] *Blenman v. State*, 2016 WL 889551, at *3 (Del. Mar. 8, 2016) (quoting *Saunders v. State*, 1989 WL 136937, at *6 (Del. Sept. 29, 1989)).

[65] *Diggs*, 2019 WL 1752644, at *2.

did not know how to retrieve the footage. At a later date, Officer Shupe went back and tried again to retrieve the footage but, once again, was told that no one could retrieve the footage and give it to him.[66]

- Officer Shupe testified that he did not keep any call log or text messages from October 26, 2018 as he has to use his personal phone and that he needs to erase items for memory reasons.[67]
- On cross-examination, Na'Isha [Diggs' sister] stated that she took video of the incident, but that the phone somehow deleted the "front end" and the "back end" of the incident but retained the middle portion of the event. No part of the video was played at the Hearing.[68]

The judge's recitation of relevant facts in his opinion demonstrates that the court considered the missing evidence, but ultimately concluded that the law enforcement witnesses were credible and, although there were discrepancies, the discrepancies were not material. The judge noted that the entire incident took place very quickly and in the confined space of the convenience store entrance, contributing to the testifying witnesses' different recollections. Notably, Diggs did not ask for a missing evidence instruction at the suppression hearing. And, at trial, Diggs elected to argue that there was reasonable doubt of his guilt due to law

[66] *Id.* at *3.

[67] Id.

[68] Id.

enforcement's failure to obtain the video surveillance or to retain their cell phone records.[69]

Assuming that the evidence would have been discoverable under Criminal Rule 16 and that the police had a duty to preserve the evidence, the focus shifts to what consequences, if any, should flow from the breach of those duties.[70] Here, Diggs cannot establish any of the three factors considered under the second prong of *Deberry*. First, Diggs has not shown that the police acted in bad faith by deleting text messages on their personal cell phones or by failing to retain an old cell phone. Although Diggs contends that this was "grossly negligent,"[71] the officers testified as to the general content of the communications and there was no indication that the substance of the communications was exculpatory.

The testimony of Marino and Shupe rendered the absence of cell phone evidence meaningless. Diggs thoroughly cross-examined the officers at the suppression hearing and their recollections of the substance of the communications were materially consistent. Because Marino communicated both by phone call and

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[69] Indeed, the suppression hearing judge *sua sponte* considered *Deberry* to some extent during closing arguments after the evidentiary hearing. *See* B5-20.

[70] *See Wainer v. State*, 2005 WL 535010, at *2 (Del. Feb. 15, 2005).

[71] Amend. Op. Br. at 45.

text message, there is no reason to believe that the records would confirm or disprove that Marino informed Shupe the tip was reliable.[72]

And, the testimony from witnesses in and around the convenience store rendered the absence of the store video largely inconsequential. Shupe testified at length about his attempts to obtain the store surveillance footage. Shupe made several attempts to obtain the video, even while under the belief that a detective assigned to the case would subpoena the materials. *See* A74; A85-88. The witnesses testifying to the interaction between law enforcement and Diggs all had some inconsistencies with each other, but the judge considered the witnesses' vantage and credibility to determine what happened during that encounter.[73] The officers encountered Diggs in a cramped space, thus the likelihood that the video recording would have captured the relevant parts of the encounter is small. And, Diggs declined to offer video of the event recorded by his sister. Civilian witnesses inside the store did not have clear lines of sight or were focused elsewhere. Civilian witnesses outside the store also had limited ability to see the actual encounter and had credibility issues. Shupe testified that when he

[72] In fact, Marino stated that that information was not relayed by text. A52. *See Thomas v. State*, 8 A.3d 1195, 1198 (Del. 2010) ("This Court has held that a police officer may conduct a *Terry* stop of an individual who matches the description of a suspect provided to the officer either by a reliable informant or over a police radio broadcast.").

[73] *Diggs*, 2019 WL 1752644, at *6.

approached Diggs, Diggs backed up and took a defensive stance with arms raised to chest level, Shupe grabbed Diggs, and, after conducting a pat-down, Shupe found a loaded handgun on Diggs' person. All witnesses agreed that Diggs was wearing a camouflage jacket.

Diggs has not shown substantial prejudice from any missing evidence. As a result, the Superior Court did not commit plain error by failing to infer that the missing evidence was material and potentially exculpatory such that Diggs was substantially prejudiced. The Superior Court's suppression decision should be affirmed.

CONCLUSION

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

/s/*Elizabeth R. McFarlan* (#3759)
Deputy Attorney General
Delaware Department of Justice
Carvel State Office Building
820 N. French Street, 7th Floor
Wilmington, DE 19801
(302) 577-8500

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MURAD DIGGS,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 282, 2020
	)	
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 Times New Roman 14-point typeface using Microsoft Word.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 7,578 words, which were counted by Microsoft Word.

Dated: February 5, 2021 /s/ *Elizabeth R. McFarlan*