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Case Number 419,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARVIN DAVIS,	)	
	)	
Defendant—Below,	)	
Appellant	)	
	)	
v.	)	No. 419, 2022
	)	
	)	
	)	
STATE OF DELAWARE	)	
	)	
Plaintiff—Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Court Rules, Constitutional Rules, and Statutes

Other Authority

I. THE TRIAL JUDGE ERRED BY FAILING TO RULE ON DAVIS'S STATE CONSTITUTIONAL SUPPRESSION ARGUMENT EVEN THOUGH IT WAS THOROUGHLY BRIEFED, TIMELY FILED, AND PRESENTED TO THE COURT AT THE SUPPRESSION HEARING.

a. *The trial court's unexplained failure to decide the State Constitutional issue was error.*

The State agrees that the trial court "did not decide the state constitutional issue" but claims "[b]y denying the motion as a whole, [it] implicitly denied all the claims that comprised it." Answer at 12. The argument is internally sound, but factually untenable; nothing in this record suggests the trial court "denied the motion as a whole." Rather, the trial court acknowledged on the record that it did "not . . . take up th[e State Constitution] issue." A152. And elsewhere in the Answer the State recognizes that "the Superior Court . . . refused to decide the issue." Answer at 14. But even if the trial court had "implicitly denied [] the claim," that too would be error because denying a claim without explanation is an abuse of discretion.[1]

b. *This Court should not review the merits of a non-existent ruling; it should reverse.*

In *Husband M v. Wife D* this Court recognized it has "three options when faced with an order by a trial judge unsupported by reasons:" (1) affirm the decision "*if the reasons appear obvious*," (2) remand for the trial judge to provide reasons, or

[1] *See e.g.*, *Cannon v. Miller*, 412 A.2d 946, 947 (Del. 1980) ("It is an abuse of discretion not to supply reasons for a judicial decision"); Op. Br. n. 8.

(3) reverse.[2] The first two options are predicated on a ruling having been issued; but there is no ruling here, let alone a ruling whose reasons are obvious. This leaves reversal as the only appropriate option.

The Answer (at 14) misreads *Perez v. State* as supporting its position that this Court should adopt the trial court's factual findings and address the legal question *de novo*. The *Perez* Court delt with an inadequately explained ruling and found "the lack of a more detailed reasoning does not require reversal in this appeal *because the reasons for denial appear obvious*."[3] The clear implication of *Perez* is that unexplained rulings for which "reasons [do not] appear obvious" do require reversal.

Reversal is also in line with this Court's review of a problematic process used to address objections in *Alexander v. Cahill*. The Answer singles out the *Cahill* Court's concern that the process (directing counsel to try to resolve objections themselves in a separate room) could hinder this Court's ability to review matters on appeal, but that concern applies here too, and in any case, was not the only reason for reversing in *Cahill*. Answer at 12—13. The *Cahill* Court also found that the process "substantially hindered the goal of ensuring a fair trial."[4] Certainly, the "refus[al] to decide the issue"– the State's description of this record (Answer at 14) – substantially hinders the goal of ensuring a fair trial.

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[2] *Husband M v. Wife D*, 399 A.2d 847, 848 (Del. 1979) (emphasis added).
[3] *Perez v. State*, 224 A.3d 201 (Del. 2019) (emphasis added).
[4] *Alexander v. Cahill*, 829 A.2d 117, 130 (Del. 2003).

II. THE TRIAL JUDGE ERRED BY FAILING TO RULE THAT THE DELAWARE CONSTITUTION REQUIRES INDIVIDUALIZED REASONING AND ARTICULABLE FACTS TO JUSTIFY THE ADDITIONAL SEIZURE WHICH RESULTS FROM ORDERING A DRIVER OUT OF A CAR TO FRISK THEM AND TO REMAIN OUTSIDE FOR THE ENTIRETY OF A ROUTINE TRAFFIC STOP.

a. *This Court should address the issue as it was presented to the trial court, i.e., without consideration of the State's new arguments.*[5]

The State's arguments to this Court are not just new, they were deliberately forfeited below by the trial prosecutor's refusal to "argue the [state constitutional] issue further" than claiming that the *Loper* Court had already ruled on, and rejected, an analogous claim. A53—54; A126, A153. On appeal, the State appears to concede that the trial prosecutor's response misconstrues *Loper*. Answer 15—16.

In *State v. Abel* this Court applied Supr. Ct. R. 8 to prohibit the State from advancing an argument against suppression which it had not made below. The State's Answer argues *Abel* is distinguishable because *it* was the State's Appeal. Answer at 17. This is a distinction without a difference. *Abel*, on its own terms, applied the general rule that this Court "decline[s] to address questions that were not

[5] The Answer argues that this Court should not announce a new State Constitutional rule without "meaningful adversarial testing." Answer at 17. We agree but emphasize that the absence of meaningful adversarial testing is a function of the State's choices below. To the degree this Court issues a new and broadly applicable rule, it is appropriate to consider the new arguments. But concerns about a new rule should not come at the expense of the relief Davis would otherwise receive, and which should be determined without consideration of the waived arguments.

fairly presented to the trial judge" to bar arguments which "the State failed to present . . . during the suppression hearing."[6] Nothing in *Abel* suggests its holding should be limited to the State's appeals, and elsewhere, this Court has made clear that Rule 8 and the waiver doctrine apply to the appellee in this very context: a defendant's appeal of a suppression denial.[7] And in fact, this case presents an even more compelling case for waiver or forfeiture because here, the State *twice* indicated that it was deliberately choosing not to make additional arguments. A53 n.28; A153.

b. ***Automatic exit orders in routine stops without evidence of a safety concern are inconsistent with art. I, § 6.***

The State concedes that the State Constitutional "question [is] properly before this Court," and that this Court "can decide [] Davis' substantive claim on the merits under his second argument on appeal." Answer at 17, 15. The Answer does not allege Trooper Evans' exit order was justified by specific circumstances in this case, or that it was anything but an automatic exit order divorced from individualized suspicion. *See* A79 ("I do it almost every traffic stop"). Thus, should this Court not grant relief based on the above arguments, it should determine whether the State Constitution incorporates *Mimms*' automatic exit rule.

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[6] *State v. Abel*, 68 A.3d 1228, 1232 (Del. 2012).
[7] *Lopez-Vazquez v. State*, 956 A.2d 1280, 1289 (Del. 2008) (finding State waived argument that defendant engaged in consensual encounter with police).

1. *Mimm*'s automatic exit order rule is inconsistent with our State Constitution's individualized suspicion requirement.

The State does not dispute that art. 1, sec. 6 requires individualized justifications for seizures (Op. Br. at 14—15) but argues that requirement makes no difference because individualized suspicion "is also a feature of the federal law." Answer n. 21. This response overgeneralizes federal law by failing to acknowledge the very decision at issue here: *Mimms*. No matter how compelling one views *Mimms*' reasoning, its rule, "once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle,"[8] most certainly lacks an individualized suspicion requirement.[9] In *Jones*, this Court rejected a similar attempt to establish a *de facto* officer safety concern ("having one's hands in one's pockets") because such rules fail to require "articulable suspicion, *appropriate to the circumstances*."[10] This Court should reject the State's argument and hold art. 1, sec. 6 always requires an individualized assessment of safety concerns, including to justify an exit order.

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[8] *Pennsylvania v. Mimms*, 434 U.S. 106, 111 n.6 (1977).

[9] Both dissenting opinions made this point. *Id.* at 113 (J. Marshal, dissenting) ("the Court holds that, once the officer had made this routine stop, he was justified in imposing the additional intrusion of ordering respondent out of the car, regardless of whether there was any individualized reason to fear respondent"); *id.* at 121 (J. Stevens, dissenting) ("Until today the law applicable to seizures of a person has required individualized inquiry into the reason for each intrusion, or some comparable guarantee against arbitrary harassment").

[10] *Jones v. State*, 745 A.2d 856, 872 n. 78 (Del. 1999) (emphasis added).

2. The State has not established that routine traffic stops present inherent safety concerns that justify automatic exit orders.

The *Mimms* rule, "once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle,"[11] does not just interpret the law, it does so in reliance on specific (and disputed) factual premises: (1) regardless of the circumstances of a traffic stop, there is an "inordinate risk confronting an officer as he approaches a person seated in an automobile," (2) ordering a driver out of a car necessarily allows "the inquiry [to] be pursued with greater safety," and (3) exit orders are, in all cases, *de minimis* intrusions.[12]

As the State recognizes, "officer safety is not a talisman," (Answer at 23), so similar findings are necessary to justify reading a *Mimms* like rule into art. 1, sec. 6. But the trial court made no such findings,[13] and the fact that the United States Supreme Court did so is of no moment when Delaware Courts interpret the Delaware Constitution because "Delaware's sovereignty justifies an independent construction of its constitution." Answer at 25.

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[11] *Mimms*, 434 U.S. at 111 n.6.

[12] *Id*. at 110—111 (citing the Bristow Study).

[13] Safety concerns specific to this particular traffic stop (A140, 149) are inapposite to the rule the State asks this Court to adopt, which would dispense with an individualized assessment of safety concerns and treat the traffic stop itself as a *de facto* safety concern that justifies an exit order. This record –which contains no evidence of heightened safety concerns inherent to traffic stops, or that exit orders would effectively address such concerns— cannot support such a rule.

3. An exit order is a constitutionally significant show of authority which requires justification.[14]

The State has not responded to Davis' argument that the impact of an exit order on a driver's privacy varies with individual circumstances, and it makes little sense to presumptively treat all exit orders as constitutional nullities. Op. Br. at 12—13. This is especially so when *the rule the State advances would prohibit courts from considering any individual circumstances* and produce concerning results: for example, the State's rule would treat an exit order of a fully cooperative elderly driver, driving safely with her grandchildren in the back seats, with no criminal or driving record, pulled over in the middle of a snow storm, without a coat, for failing to renew her registration, as a trivial and constitutionally "reasonable" "intrusion." This example is admittedly quite different than Davis's circumstances, but given that the State's rule would bind the courts in both scenarios, such differences illustrate why individual circumstances must be considered.

Instead of addressing the concerning practical implications of its position, the State argues that the *Loper* Court already decided that a driver is "not subject to a

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[14] In response to Davis's position that even *Mimms* treated exit orders as (permissible), additional seizures (Op. Br. at 24), the State notes that *Mimms* labeled the action an "intrusion." Answer at 29. This is semantics. Whether characterized as an "intrusion," or "seizure," the *Mimms* decision reflects that an exit order requires justification which the *Mimms* Court held to be satisfied based on findings not supportable in this record. *See supra* sec. II(b)(2).

second seizer when the police order [] him to exit his car." Answer at 30. This is a misreading of *Loper*.[15] The *Loper* Court held, in accordance with *Mimms*, that an exit order does not subject a driver to a second seizure for purposes of the federal constitution; but, the Court did not reach the merits of the question as to State Constitution because the *Loper* Defendant did not adequately brief the issue.[16] Unlike the *Loper* Defendant, and as recognized by the Answer, "Davis [] fairly presented his state constitutional question." Answer at 14; Op. Br. at 11—14.

4. Racial Equality is a Matter of Local Concern.

Even though the State's merits argument was not made below, it asks this Court to consider it because the important question presented "will ultimately benefit from consideration of the competing arguments." Answer at 17. But the State's concern for the adversarial process is absent when it comes to this Court's consideration of racially biased policing. If this Court considers the State's new arguments, it should also consider those made by Davis. Concern for racial bias is an extremely significant factor such that its absence in the *Mimms* majority opinion

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[15] The State also misreads *Loper* as observing that "the concern in *Jones* – that police may use attempted unlawful exercises of authority to manufacture a lawful detention –is not present in the circumstances of exit orders." Answer at 30 and 24. The *Loper* Court made no such statement. Op. Br. at 13—14.

[16] *Loper v. State*, 8 A.3d 1169, 1173—74 (Del. 2010). The *Loper* Court also found that a second seizure was justified in its circumstances. Had the *Loper* Court intended to convey that an exit order is, as a matter of law, not a second seizure, then its discussion of that order's justification would have been ill-fitting.

was noted by three United States Supreme Court Justices in dissent.[17] Op. Br. at 19—20.

But even if this Court does not consider evidence of *the extent of* racial bias in Delaware policing, it still can and should find that combatting racially biased policing, generally, is a particular concern in our state. This conclusion primarily flows from the recent adoption of our equal rights amendment which evinces that the legislature and the people of Delaware were not satisfied with existing federal protections. Op. Br. at 19. In the absence of any evidence that the traditional individualized means of identifying safety concerns are inadequate to protect our police officers, this Court should decline to read an automatic exit rule into our State Constitution.

[17] *Mimms*, 434 U.S. at 122 (Justices Stevens, Brennan, and Marshall, dissenting) ("Some citizens will be subjected to this minor indignity while others—perhaps those with more expensive cars, or different bumper stickers, or different-colored skin—may escape it entirely.").

CONCLUSION

Because Defendant could not have been convicted without the disputed evidence, and for the reasons and upon the authorities cited herein, Defendant's aforesaid convictions should be vacated.

Respectfully submitted,

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