EFiled: Aug 23 2023 04:57PM EDT
Filing ID 70704491
Case Number 170,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES McDOUGAL,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 170, 2023
	)	
STATE OF DELAWARE	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S OPENING BRIEF

NICOLE M. WALKER [#4012]
Office of Public Defender
Carvel State Office Building
820 N. French Street
Wilmington, Delaware 19801
(302) 577-5121

Attorney for Appellant

DATED: August 23, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitutional Provisions:

Statutes:

NATURE AND STAGE OF THE PROCEEDINGS

On May 9, 2022, James McDougal was indicted for Possession of a Firearm by a Person Prohibited, Possession of Ammunition for a Firearm by a Person Prohibited and Carrying a Concealed Deadly Weapon.[1] On December 12, 2022, he filed a Motion to Suppress the firearm recovered as the result of an unlawful pedestrian stop and search.[2] The State filed a response,[3] and a hearing was held on February 3, 2023. The judge issued a decision on March 7, 2023 denying McDougal's motion.[4]

On May 16, 2023, McDougal had a stipulated trial after which the judge found him guilty of all counts. He was sentenced to 15 years in prison, suspended after 5 years, followed by probation.[5] This is his Opening Brief in support of a timely-filed appeal.

---

[1] A1, 5-6.
[2] A7.
[3] A13.
[4] *State v. McDougal*, 2023 WL 2423233 (March 7, 2023 Del. Super.), Ex.A.
[5] May 16, 2023 Sentence Order, Ex. B.

SUMMARY OF THE ARGUMENT

1. The State initially argued that "Wilmington Police had reasonable articulable suspicion to stop, frisk and make inquiries from the [McDougal] when they observed him loitering in the area where the confidential informant had given information that individuals had been selling street level drugs and carrying firearms." Later, the State conceded the initial encounter was consensual. It claimed that by refusing to give police his name and declining the officer's request to conduct a pat down, it was McDougal's conduct, in addition to his clothing, who transformed the encounter into a "stop." The trial court similarly concluded that the initial "loitering" stop was consensual. Then, it inconsistently applied a loitering provision not relied upon or argued by any party and found that it provided police authority to detain McDougal beyond the consensual encounter when he refused to give his name.

There was no justification to detain McDougal based on suspicion of loitering as police failed to state with specificity the conduct and the actual crime McDougal was observed to have committed. And, to the extent the initial stop was consensual, McDougal was not required to provide his name and should have been immediately released. Finally, even if McDougal was lawfully detained, his subsequent search went beyond the scope of what was permitted. Thus, the weapon seized as a result should have been suppressed.

STATEMENT OF FACTS

During the last two weeks of March, 2022, Wilmington Police received generic information from a confidential informant whom police acknowledged was not "past proven reliable."[6] The unproven informant told them that there were individuals, who routinely carried guns, involved in street level drug sales in the area of 24th and Carter Streets. He also claimed that when the individuals were not in actual possession of the guns, they hid them in "ground stashes" located behind trash cans, car wheels, broken stoops and other similar places.[7] At some time, the unproven informant purportedly identified Jamir Coleman and Rashad Acklin as two of these individuals.[8]

At least a week after police received the generic information, at about 12:28 p.m.,[9] they patrolled the area. According to Officer Moses, "once responding to the area [they] observed three people loitering at the intersection of 24 and Carter." They recognized two of the individuals as Coleman and Acklin. However, the third man was unknown to police.[10] According to Moses, officers chose to contact the men for a "loitering investigation."[11]

---

[6] A35, 38.
[7] A34.
[8] A35.
[9] A46.
[10] A34.
[11] A36.

Officer Hunt contacted Coleman who informed him that he did not live in the area. Coleman agreed to a pat down search. When no contraband was found on him and after he gave police his name and date of birth, he was released.[12] Acklin was also released after a similar encounter with another officer.[13] However, the encounter between Moses and the third man, who was later identified as McDougal, went quite differently.

Moses told the judge that, "upon immediate contact [with McDougal he] immediately recognized that the male had on baggy clothing with a – looked to have multiple layers." Moses claimed that he learned from his training that one of the characteristics of an armed gunman is that he/she "will have multilayer clothing on." Still, his concerns only rose to the level of expressing them to McDougal and requesting an opportunity to conduct a pat down. McDougal declined.[14] Next, Moses, asked for McDougal's name. McDougal declined. Moses testified that he then relied on what he believed to be his authority inherent in the process of issuing a warning for purposes of a loitering violation. He extended McDougal's detention and sat him down on a nearby stoop while police investigated his identity.[15]

---

[12] A44, 46.
[13] A36, 45.
[14] A35-36.
[15] A36. State's Suppression Hearing Exhibit #1, Body Worn Camera Video

It was only after McDougal was made to sit on the stoop that various officers' body worn cameras were turned on.[16] While Moses' testimony paints a picture of a continued one-on-one encounter with McDougal, the videos captured by the cameras reveal that while McDougal was seated, he was surrounded by 6 or 7 officers, dressed in tactical gear, who appear to pester him to consent to a pat down. After McDougal had been seated for a while, Moses purportedly saw an "unusual bulge" in the front hoody pocket.

When Moses asked McDougal about the bulge, McDougal took a couple of items out of the pocket. Yet, Moses claimed, he could still see an unusual bulge in the waistband.[17] So, he began patting him down around his waistband area. His testimony is not quite clear. Initially, he says he did not feel anything and then lifted up McDougal's shirt and pulled a firearm out of his pants.[18] However, immediate leading question led to answers leaving an impression that he may have felt something before before he lifted up the shirt.

The firearm recovered was a fully functional 9 mm hand gun with a magazine containing 11 rounds of 9 mm ammunition.[19] Once the firearm was obtained, four officers lifted McDougal up and cuffed him.

---

[16] A45.
[17] A36, 44.
[18] A36, 37, 44. State's Suppression Hearing Exhibit #1.
[19] A56, 58-59.

I. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT FOUND THAT POLICE WERE PERMITTED TO DETAIN McDOUGAL WHILE THEY INVESTIGATED HIS IDENTITY AFTER HE REFUSED TO GIVE THEM HIS NAME DURING A CONSENSUAL ENCOUNTER.

Standard of Review

This Court reviews suppression decisions for abuse of discretion. The review of factual findings is "whether the trial judge abused his or her discretion in determining whether there was sufficient evidence to support the findings and whether those findings were clearly erroneous. To the extent that [this Court] examine[s] the trial judge's legal conclusions, [it] review[s] them *de novo* for errors in formulating or applying legal precepts."[20]

Question Presented

Whether a generic claim that police briefly observed "loitering" justifies a detention beyond a consensual encounter for an investigation into identification when the defendant refuses to provide his name to police and when police fail to state with specificity the behavior that provided suspicion or the statute prohibiting that conduct; and, if so, whether a subsequent seaerch based solely on the observation of a bulge was permissible under the circumstances.[21]

---

[20] *Williams v. State*, 962 A.2d 210, 214 (Del. 2008).
[21] A7.

Argument

The rights of individuals in Delaware to stand or walk on a sidewalk at an intersection in a city neighborhood free from arbitrary police practices are secured by two constitutional provisions. First, "[t]he Fourth Amendment to the United States Constitution guarantees to individuals the right to be 'secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' [And, second,] Article I, § 6 of the Delaware Constitution guarantees that the people of the State of Delaware 'shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures.'" [22] Courts examining these protections have recognized that there are generally three categories of pedestrian encounters that citizens may have with police: 1) consensual "or mere inquiries, 2) investigative detentions, and 3) formal arrests. The category into which an encounter fits depends on the nature and extent of the contact."[23]

In our case, the State initially argued that "Wilmington Police had reasonable articulable suspicion to stop, frisk and make inquiries from the defendant when they observed him loitering in the area where the confidential informant had given information that individuals had been selling street level

---

[22] *Jones v. State*, 745 A.2d 856, 860 (Del. 1999) (quoting U.S. Const. amend. IV; Del. Const. art. I, § 6).
[23] *Diggs v. State*, 257 A.3d 993, 1003–04 (Del. 2021).

drugs and carrying firearms."[24] However, it later argued the initial encounter was actually consensual and that by refusing to give police his name and declining the officer's request to conduct a pat down, "[i]t was the conduct of Mr. McDougal and his actions and his clothing that cause[d] them to investigate further, and then it became, you know, more of a stop."[25]

The trial court similarly concluded that the initial "loitering" stop was consensual. However, it inconsistently relied upon a loitering provision not cited by anyone in any pleadings, at the hearing or in any argument for the proposition that police were permitted to request McDougal's name and that his failure to provide his name in addition to information available to the officers prior to the encounter created reasonable suspension for a further detention.[26]

To the extent the initial stop was consensual, McDougal was not required to provide police with his name and should have been immediately released. Any claim that there was justification to detain McDougal based on suspicion of loitering also has no merit as police failed to state with specificity the conduct and the actual crime McDougal was observed to have committed.

---

[24] A20.
[25] A49.
[26] Ex. A at *3.

Finally, even if police lawfully detained McDougal, the subsequent search of his person went well beyond the scope of what was permitted under the circumstances. Therefore, the weapon seized as a result should have been suppressed and his convictions should now be vacated.

1. Police Approached And Questioned McDougal Based Solely On Their Brief Observation Of Him Standing At An Intersection With 2 Companions In Broad Daylight.

Both Officer Moses and Officer Hunt testified that they seized McDougal as part of a "loitering investigation[.]"[27] However, they never identified for the judge which loitering provision they suspected McDougal violated. Instead, they suggested varying bases for their suspicion of "loitering." Officer Moses claimed that once police responded to the area, they observed three men loitering at the intersection of 24th and Carter. He explained that McDougal was loitering because he was "standing idle."[28]

While Hunt testified later claimed that McDougal was loitering because he was blocking pedestrian traffic, he also defined loitering simply as: "standing idle on the sidewalk[.]"[29] He explained that as he saw it, the men were loitering because, when police arrived on scene, "[t]hey were not walking. They were occupying the area. They didn't live in the area."

---

[27] A37, 45.
[28] A38.
[29] A46.

During defense counsel's cross examination of Officer Hunt, the judge attempted to clarify what loitering provision police relied upon:

> The Court: Is there a specific section that was cited in the report by Officer Hunt of the loitering statute?
> Defense Counsel: Regarding the loitering statute?
> The Court: Correct. Was it just [11 Del.C. §]1321 or was it (1) or (2) or (3)?
> Defense Counsel: I believe the whole statute is cited on page 3 of the police report, but it's – I don't know the specific.
> The Court: Okay. I just wanted to clarify whether there was a specific section of the loitering statute that was cited for there being potential for a charge.[30]

Defense counsel then sought clarification directly from Officer Hunt,

> Defense Counsel: Officer, you may have answered this already, but you did cite the whole entire loitering statute in your report; correct?
> Officer Hunt: Yes. I cited the statute in there. I don't know if it was the entire -- I mean, the text in its entirety. I'm not sure.
> Defense Counsel: Was there a specific provision of the statute that you were investigating the three individuals in this case under?
> Officer Hunt: Just blocking the flow of traffic on the sidewalk.
> Defense Counsel: Blocking traffic on the sidewalk?
> Officer Hunt: Yes. Pedestrian traffic, sir.[31]

The prosecutor made no effort to clarify what loitering provision was actually cited. In fact, nothing was entered into evidence to clarify that it was

[30] A45.
[31] A45.

even the state statute, (11 Del. C. § 1321) rather than the Wilmington City ordinance, (Sec. 36-68), that Hunt dumped in to his police report.[32]

2. The Trial Court's Finding That The Encounter Was Consensual Required The Conclusion That, After McDougal Declined To Give Officers His Name And Declined A Request To Conduct A Pat Down, He Be Immediately Free To Go About His Business.

While a "loitering investigation" was the reason for the encounter, the prosecutor, after initially arguing police had reasonable suspicion for a detention, conceded that the encounter was consensual.[33] Subsequently, in its decision, the trial court found the encounter was consensual.[34] However, the decision fails to recognize that inherent in the nature of a consensual encounter is an individual's autonomy to decline to answer police officer questions.[35] "[T]he individual has a right to ignore the police and go about his business."[36] Any refusal on his part, does not provide objective grounds for further detention.[37]

---

[32] The State made no reference to either the state statute or the city ordinance in its pleading or its argument at the hearing. Nor did the prosecutor question any witnesses about the oridance or introduce the police report.
[33] A49.
[34] Ex. A at *2
[35] *Florida. v. Royer*, 460 U.S. 491, 497–98 (1983).
[36] *Royer,* 460 U.S. at 498. *Williams v. State*, 962 A.2d at 215–16; *Illinois v. Wardlow,* 528 U.S. at 125 (noting that an individual "has a right to ignore the police and go about his business" without that activity being deemed inherently).
[37] *Royer,* 460 U.S. at 498; *Florida v. Bostick,* 501 U.S. 429, 437 (1991).

Here, both he State and the trial court bined facts available to the police prior to the consensual encounter with McDougal's choice not to speak to police during the consensual encounter to justify his detention.[38] While "[p]olice-citizen encounters [can] progress from consensual encounters" … "consistent with the Fourth Amendment," they can do so "only if the police officer has reasonable suspicion, based on articulable facts, that criminal activity is afoot." [39] Here, police did not have reasonable suspicion of any criminal activity before ordering McDougal to sit on a stoop then lifting up his shirt and reaching into his pants. Thus, he should have been permitted to go at that point. Counter the trial court's decision, once McDougal refused to provide his name, police were not permitted to detain him and investigate further.[40]

---

[38] A49.

[39] *United States v. McCray*, 148 F. Supp. 2d 379, 382 (D. Del. 2001) (*citing United States v. Sokolow,* 490 U.S. 1, 7 (1989)).

[40] In viewing the totality of the circumstances, Officer Moses' ability to articulate that the three men were impeding the flow of pedestrian traffic, two of the three individuals did not live in the area and had no known lawful purpose to be there, the background information provided by the CI that street level drug sales were occurring at that location, as well as the observations of Defendant's baggy, layered clothes in which it appeared he was wearing two sets of pants a "reasonable trained police officer in the same or similar circumstances" would be justified in suspecting criminal activity. Ex.A *3

3. Police Officer's Generic Claim That They Believed McDougal Was Loitering Did Not Justify His Continued Detention And Subsequent Search.

Unlike consensual encounters, there are only a few circumstances where police "have constitutional authority to conduct a limited investigatory stop[.]"[41] A brief investigatory stop is only justified when police have suspicion "based upon specific and articulable facts which, taken together with all rational inferences from those facts, reasonably suggest that a suspect has been involved in criminal activity[.]" Significantly, the officer must be able to articulate "a particularized and objective basis for believing that the particular person is suspected of criminal activity."[42] This includes "identify[ing] the crimes that an objectively reasonable police officer might suspect to a fair probability" the individual is committing.[43] It is only then, after an individual has been lawfully detained, that police may "demand the person's name, address, business abroad and destination."[44]

Prior to conceding that the Moses/McDougal encounter was consensual, the State argued, "Wilmington Police had reasonable articulable

---

[41] *Terry v. Ohio*, 392 U.S. 1, 30 (1968); *McCray*, 148 F. Supp. 2d at 386 (citing *Sokolow,* 490 U.S. at 7; *United States v. Rickus,* 737 F.2d 360 (3rd Cir.1984)); *Jones*, 745 A.2d at 861.
[42] *United States v. Brown*, 159 F.3d 147, 149 (3d Cir. 1998).
[43] *Juliano v. State*, 260 A.3d 619, 631 (Del. 2021).
[44] 11 Del. C. §1902(a)

suspicion to stop, frisk and make inquiries from the defendant when they observed him loitering in the area where the confidential informant had given information that individuals had been selling street level drugs and carrying firearms."[45] While the prosecutor gratuitously added generalities about the neighborhood provided by the unproven confidential informant, a description of McDougal's baggy clothes and information about his released companions, neither officer who testified claimed to have any reasonable suspicion of any crime beyond "loitering."

While the prosecutor never specifically relied upon any loitering provision, police sought to justify the stop and continued detention based on legal authority to provide a "warning" to individuals whom they observe to be "loitering." The State failed to place anywhere in the record what loitering provision, state or city, that police relied upon for this authority. Failure to specifically identify the criminal activity which police believe McDougal was engaged in and/or authority permitting police to stop and demand his identification requires reversal of the trial court's decision.

[45] A20.

4. Police Failed To Articulate With Specificity The Criminal Activity For Which McDougal's Observed Conduct Provided Reasonable Suspicion.

In attempting to justify the police actions in this case, the State bandied about the generic term "loitering," ignoring the fact that, because no provision was cited in the record, there are 10 specific legal definitions of "loitering" as contained in the Delaware loitering statute, 11 Del. §1321 (1) - (6) and the Wilmington City Ordinance, Sec. 36-68 (1) – (4) that might apply.

Police failed to identify which of those loitering violations "that an objectively reasonable police officer might suspect to a fair probability [McDougal] had committed" based solely on police officers' brief observation of him standing at an intersection with two individuals known not to reside in the neighborhood.[46] In other words, police testimony "fail[ed] to demonstrate any objective basis to believe that criminal activity was afoot at all."[47] Assuming this Court does not reverse based on the State's failure to cite the statute police believed it had reasonable suspicion that McDougal was violating, a review of the possible provision of the state and city provision leads to the conclusion that there needs to be reversal as not required to provide name.

---

[46] *Juliano*, 260 A.3d at 631.
[47] *McCray*, 148 F. Supp. 2d at 390–91.

in our case as the need for and nature of the "warnings" are different under different provisions. Moses incongruously claimed that once police responded to the area, they observed the three men loitering at the intersection of 24th and Carter in broad daylight. Police claimed that observation of this activity gave them authority to "order" the men to "move on." [48]Moses testified that when he gives a warning, it is his routine to ask for identification in order to make sure they do not misidentify the individual and to do a warrant check. However, he is not sure whether he has authority to do from the statute.[49]

Because the trial court relied upon the officer's claims of the need to warn McDougal and ask him to move on and that he was blocking traffic, there are arguably 6 such violations by which the officers' reasonable suspicion could be measured. An "objective review of the record required by *Whren* show[s] that" McDougal "had not violated any applicable statute or ordinance"[50] and that no provision gave police authority to detain McDougal while they investigated his identity.

The city ordinance defines "loitering" as follows:[51]

> within 50 feet of a single-family or multifamily residence, or within 50 feet of a business which is open to the general public and which serves food or drink for consumption on or off the

[48] A41.
[49]A41.
[50] *United States v. Delfin-Colina*, 464 F.3d 392, 398–99 (3d Cir. 2006).
[51] Wilmington City Ordinance, Sec. 36-68. - Loitering.

> premises or which provides entertainment, or within 50 feet of any vacant property in either a residential or commercial district; [***and***]
>
> (1)…fail[] or refuse[]to move on when lawfully ordered to do so by any police officer;
> (2)…stand[], sit[] idly or loiter[] upon any pavement, sidewalk or crosswalk, or stand[] or sit[] in a group or congregate[] with others on any pavement, sidewalk, crosswalk, or doorstep, in any street or way open to the public in this city so as to obstruct or hinder the free and convenient passage of other persons walking, riding or driving over or along such pavement, walk, street or way, and shall fail to make way, remove or pass, after reasonable request from any other person;
> (3)…loiter[] or remain[] in a public place [to solicit sex]; or
> (4)…loiter[], prowl[], wander[] or creep[] in a place at a time or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity. Unless flight by the accused or other circumstances make it impracticable, a police officer shall, prior to any arrest for an offense under this subsection, afford the accused an opportunity to dispel any alarm which would otherwise be warranted, by requesting him to identify himself and explain his presence or conduct. No person shall be convicted of an offense under this subsection if the police officer did not comply with the preceding sentence, or if it appears that the explanation given by the accused was true and, if believed by the police officer at the time, would have dispelled the alarm.

The corresponding provisions of the state loitering statute, 11 Del. C. § 1321 (1), (2), (5) & (6) respectively, are almost identical to those in the city ordinance.[52] A significant difference, however, is that a violation of the city

[52] The "loitering, congregates with others or prowling" provision in the state statute also allow for consideration o "the crime rate in the relevant area." 11 Del.C. § 1321 (6).

ordinance, unlike a violation of the statute, requires proof that the defendant is within 50' of a home, a vacant home or food, beverage or entertainment business. In other words, a violation of any provision under the city ordinance requires the State to establish an additional element than that required to be established for purposes of a violation of the statute.

As an initial matter, to the extent police relied on any provision of the city ordinance, they necessarily failed to articulate any reasonable suspicion they may have had that McDougal was within 50' of the listed buildings. Even if it had, it still failed to establish reasonable suspicion with respect to the relevant city provisions just as it did with the state provisions.

a. 11 Del. §1321 (6) and Wilmington City Ordinance Sec. 36-68 (4).

Inexplicably, the trial court based its decision on subsection 1321 (6) of the state statute even though nothing in the record pointed to any reliance by police on that provision. In fact, during argument, while the trial court never obtained clarification from the State as to which loitering provision the police were relying on, it actually focused on subsection 1 and 2 and made no mention of 6. The judge continued her error in law when she mischaracterized 1321 (6)'s "stop and identify" feature much more broadly than defined. Using the language of that subsection, she asserted that 1321, in general, "requires an officer to give a warning prior to any arrest for loitering

violation, '[u]nless flight by the accused or other circumstances make it impracticable.'"[53] The judge's articulation of the law indicates a misunderstanding of the "requisite warning" requirement of the loitering provisions. The entirety of the language in that subsection (and Sec. 36-68 (4)), allows for an officer to request identification and an explanation of the person's presence and conduct" when the "person loiters, congregates with others or prowls in a place at a time or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity, especially in light of the crime rate in the relevant area."[54]

The circumstances in our case do not add up to those described in 1321 (6) or Sec. 36-68 (4). McDougal and his two companions were standing on a sidewalk at an intersection in a residential neighborhood just past noon on a spring day. Police had 2-week-old generalities about the criminal nature of the neighborhood from an unproven informant. They had no particularized information about any criminal activity that day or about any conduct of the three men at the intersection. Purportedly, the unproven informant had at some point in the past identified McDougal's companions as being involved in

[53] Ex. A at *3.
[54] Sec. 36-68 (4), provides the same except for the consideration of the crime rate.

criminal activities. However, by the time McDougal was detained, police had already searched and released them.

Nothing in the record indicates that it is unusual for law abiding citizens to stand at that intersection during the day with two other people who do not live in the neighborhood. Standing or walking in a high crime area does not, by itself, create a reasonable concern for the safety of persons or property. [55] McDougal's "presence in a high crime area" is "not a particularized basis to suspect wrongdoing, because a defendant's mere presence does not distinguish him from any other person who is in the area for a lawful purpose."[56] Certainly, law abiding citizens often stand at intersections during the day, without it being cause for alarm simply because they or their friends live in a high crime area. Stale generalities from an unproven informant and McDougal's baggy pants did not create "circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of

---

[55] *Coleman v. State*, 707 So. 2d 767, 768 (Fla. Dist. Ct. App. 1998) (suppressing evidence after finding no basis to stop for "loitering and prowling" when officer's suspicion of a drug transaction was not supported by articulable facts). See *Jaudon v. State*, 749 So. 2d 548, 549 (Fla. Dist. Ct. App. 2000).

[56] *Bradley v. State*, 2009 WL 2244455*4 (Del. July 27, 2009) (finding that, officer only had a hunch when the defendant was in a high crime area, late at night, there were several youths loitering a half block away and the defendant's car was parked in front of a dimly lit vacant home with the engine running and lights off).

persons or property in the vicinity." Thus, neither 1321 (6) nor 36-68 (4) apply. Therefore, the trial court erred as a matter of law by applying 1321 (6).

Further, courts have frowned upon the use of similar "stop and identify statutes." Such statutes and ordinances "are only constitutionally enforceable during a valid *Terry* stop" supported by "suspicion of criminal activity distinct from a person's failure to disclose h[is] identity."[57] Where, as here, the defendant's initial stop is not justified at its inception, an officer cannot create suspicion based on the defendant's "refus[al of] an identity request during a valid investigatory stop." [58] For this Court to allow the State "to criminalize a person's silence outside the confines of a valid seizure would press our conception of voluntary encounters beyond its logical limits." [59] Section 1321 (6) and Wilmington City Ordinance Sec. 36-68 (4) are

> designed to advance a weighty social objective[:] prevention of crime. But even assuming that purpose is served to some degree by stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity, the guarantees of the Fourth Amendment do not allow it. When such a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits.[60]

---

[57] *Wingate v. Fulford*, 987 F.3d 299, 310 (4th Cir.) (citing *Hiibel v. Sixth Judicial Dist Court*, 542 U.S. 177, 188–89 (2004) (cautioning against using an identity request to create suspicion of criminal activity)).
[58] *Wingate*, 987 F.3d at 310.
[59] *Id.*
[60] *Brown*, 443 U.S. at 52.

The Delaware District Court previously commented on Wilmington Police Officers, stating that it was "troubled by the officers' admitted practice of stopping and pursuing individuals simply because they are in a high drug area even if there are no other particularized and articulable facts that criminal activity is afoot." Of particular concern was the testimony of officers that they "often stop individuals in 'high drug neighborhoods' to determine their identity and 'business abroad[]' and "that if an individual did not want to talk with the police and turned away, that 'we would still ask you.'"[61]

Therefore, Moses was not justified pursuant to 11 Del. §1321 (6) or Wilmington City Ordinance Sec. 36-68 (4) to detain McDougal to investigate his identity.

b. 11 Del. §1321 (1) and Wilmington City Ordinance Sec. 36-68 (1).

Moses testified that the reason he asked McDougal for his name was so that he could "give him his warning and then send him on his way[.]"[62] He wanted to make sure he identified the right person in case he needed to cite him in the future and so he could check to see if he had any warrants.[63] Neither of these purposes are consistent with that in 1321 (6) which is to dispel any

[61] *McCray*, 148 F. Supp. 2d at 382.
[62] A36.
[63] A38.

alarm which would otherwise be warranted for the safety of people or property in the area.

Pursuant to 1301 (1) and Sec.36-68 (1), an individual is loitering if he "fails or refuses to move on when lawfully ordered to do so by any police officer."[64] Nothing in either the state or city "move along" provision requires an individual to provide police with identification. In fact, Moses conceded he was not sure he had the authority to ask for identification under the "statute."[65] Thus, regardless of Moses' motive for asking, a defendant is not required to provide identification when being warned to move on.

He was not permitted to do any more than to "simply dispers[e] the group of which [McDougal] was a part[.]"[66] Thus, Officer Moses had no need to "come into close contact with the defendant, or any other member of the group."[67] Therefore, McDougal's continued detention was not justified pursuant to 1301 (1) or Sec.36-68 (1).

---

[64] *Carter v. State*, 814 A.2d 443, 445 (Del. 2002) ("for the officers to have probable cause to arrest a person of loitering under subsection [1321](1), the person must have refused to move on after being ordered to do so").
[65] A41.
[66] *Com. v. Pierre P.*, 757 N.E.2d 1131, 1133 (2001).
[67] *Id.*

c. 11 Del. §1321 (2) and Wilmington City Ordinance Sec. 36-68 (2).

At the suppression hearing, Hunt claimed that, although he dumped the entire text of some unidentified loitering provision into his police report, he observed McDougal blocking the flow of pedestrian traffic on the sidewalk. However, no facts, specific or otherwise were ever provided that supported any reasonable suspicion that McDougal was obstructing, hindering, or preventing others from passing. Further, a loitering violation under either 1321 (2) or Sec. 36-68 (2), requires a showing that the individual failed to move out of the way "after [a] reasonable request from any person[.]" Here, police provided no evidence that anyone asked him to move out of the way or that he refused anyone's request to move out of the way. Thus, McDougal had the right to refuse to provide his name to police and should have been allowed to go about his business.

4. McDougal's Stop And Subsequent Search Was Not Objectively Grounded In The Governing Law Because The Officers' Failure To Understand The Law They Were Charged With Enforcing

The State's varying approach in its attempt to justify the stop and the officers' inability to state with certainty the legal provisions upon which their actions were taken render it unclear to what extent the officers understand the law they are charged with enforcing. Here, upon specific questioning by defense counsel and the trial judge, the officers failed to identify which law

they believed McDougal to be violating. Further, they provided their own subjective definitions of the general term, "loitering." And, Moses testified that he was not even sure if the statute gave him authority to engage in the conduct of investigating the identity of those he believes are loitering.

"Failure to understand the law by a person charged with enforcing it is not objectively reasonable."[68] Due to the significant "mistakes of law" involving a minor loitering violation that resulted in a serious intrusion into McDougal's privacy, the stop and subsequent search "was not objectively grounded in the governing law[.]"[69] Delaware citizens are entitled to be free,

---

[68] *State v. Coursey*, 906 A.2d 845, 848 (Del. Super. Ct. 2006).

[69] *United States v. Miller,* 146 F.3d 274, 279 (5th Cir.1998) (holding there was no objective basis for stop the reason – having a turn signal on- was not a violation of Texas law); *United States v. Tibbetts,* 396 F.3d 1132, 1138 (10th Cir. 2005) ("failure to understand the law by the very person charged with enforcing it is *not* objectively reasonable"); *United States v. Lopez–Valdez,* 178 F.3d 282, 288–89 (5th Cir.1999) (holding stop unconstitutional when trooper pulled over car on the mistaken belief that driving with a broken taillight violated state law); *United States v. Lopez–Soto,* 205 F.3d 1101, 1106 (9th Cir. 2000) (holding traffic stop "not objectively grounded in the governing law" when officer pulled over car on mistaken blief that absence of a car registration sticker visible from the rear when actually required to be displayed in front); *United States v. Chanthasouxat*, 342 F.3d 1271, 1277–79 (11th Cir. 2003) (holding officer's "mistake of law cannot provide reasonable suspicion or probable cause to justify a traffic stop" when he incorrectly but reasonably believed a truck without a rearview mirror in the car was in violation of state and city codes).

at a minimum, of being stopped by police who are not sure whether they have authority to ask for identification and do it anyway.[70]

5. Assuming, *Arguendo*, This Court Finds That McDougal's Continued Detention Was Lawful, It Must Conclude That Officer Moses Unlawfully Reached In And Searched Inside His Pants.

The relevant inquiry into whether a pat down for officer safety is justified is "whether a reasonably prudent man in the circumstances could be warranted in the belief that his safety or that of others was in danger." The relevant circumstances include, the "nature of the suspected crime, a sudden reach by the individual, a bulge, or a history with the specific individual."[71] Moses testified that he had McDougal sit on a stoop while police investigated his identity because he wanted to "try and keep this as safe a situation as possible[.]"[72] He acknowledged that, at that point, he still did not have justification to search McDougal:

> The engagement -- the encounter continued, and in my head I'm, like, all right, I got all this previous information, I have a characteristic know is consistent with a person that's -- that can conceal a firearm on their person, but I didn't think necessarily I was already there, so I asked him to -- I asked him to sit down while we was -- while we try to identify him and make it a safe encounter, at least safe for us and him[.][73]

---

[70] A37, 45. *Pierre P.*, 757 N.E.2d at 1132–34.
[71] *Holden v. State*, 23 A.3d 843, 850 (Del. 2011).
[72] A36.
[73] A40.

He then explained that while McDougal was sitting down, "he's not readily available to try and injure us, his hands are open, I could see."[74] In fact, while Moses' testimony paints a picture of a continued one-on-one encounter with McDougal, the videos captured by body worn cameras reveal that while McDougal was seated, he was surrounded by 6 or 7 officers, dressed in tactical gear. Thus, there was no justification for a pat down based on officer safety. They were investigating a loitering violation, McDougal had made no furtive gestures, police outnumbered and towered over him.

In this case, the observation of a bulge in McDougal's clothing alone was insufficient to warrant a pat down. Here, police essentially conceded that they believe they have the authority to stop anyone they briefly observe standing at an intersection during the day and ask them for their name and to conduct a pat down. This "evinces the routine nature of their arresting and searching private citizens without any indication that the citizen poses a threat to anyone and without any articulable suspicion of criminal activity."[75]

---

[74] A40.

[75] *People v. Surles*, 963 N.E.2d 957, 966 (Ill.App (1st) 2011) (considering officers' own testimony that they basically do a protective search on everybody when holding that the presence of a bulge in defendant's clothing alone is insufficient to warrant a search). See *People v. Harris*, 122 A.D.3d 942, 944 (2014) (holding unidentifiable bulge susceptible to innocent as well as guilty explanation not sufficient to justify a pat down search when there was no suspicion that criminality was afoot, no threatening or menacing

McDougal exercised his right not to answer the officer's questions or to allow them to pat him down. Police persisted. After there were 6 or 7 officers in tactical gear surrounding him, he was searched because he had a bulge even though Moses could see that McDougal was "not readily available to try and injure" police and "his hands [we]re open[.]"

When Moses eventually asked McDougal about the purported bulge, McDougal took a couple of items out of the pocket. Yet, Moses claimed, he could still see an unusual bulge in the waistband.[76] So he began patting him down around his waistband area. His testimony is not quite clear. Initially, he says he did not feel anything before he lifted up McDougal's shirt and pulled out a firearm from inside his pants.[77] However, with leading questions, he responded differently to the prosecutor's leading questions.

> Prosecutor: When you say you reached down, could you describe more of what you do? Are you going in his pants? Are you going over the top of his pants to feel it? What are you doing?
> Moses: I believe what happened is I reached down and I was patting it down, and ***then still didn't feel nothing***, and I lifted up his shirt, and you could see the firearm in his waistband area.
> Prosecutor: Okay. So when you pat, could you still feel something?
> Moses: Yes.
> Prosecutor: All right. And because you felt something, then you lifted his shirt?

---

gestures); *Golden v. United States*, 248 A.3d 925, 941 (D.C. 2021) (assessing factors in finding that bulge alone not sufficient to justify pat down).

[76] A36, 44.

[77] A36, 37, 44. video

Moses: Correct.A36-37

If Moses did not feel anything during the pat down, any further intrusion upon McDougal was prohibited because there was no longer the same suspicion that McDougal was armed and dangerous. And, "the right to conduct a Terry [frisk] does not give the police the right to make absolutely sure that no weapon is present." [78] Alternatively, a review of the video shows that the pat down was minimal at best. Assuming Moses was warranted in conducting a pat down, there was no valid reason for him to do a pseudo pat down then reach inside McDougal's pants. "This was not a rapidly evolving situation where McDougal made a furtive gesture which may have given [Moses] reason to believe his safety was threatened by a readily accessible weapon."[79] As a result, Moses "transformed the investigatory Terry detention into an arrest when he lifted [McDougal's shirt]. Under the well-established principles of law discussed above, [Moses] thus needed probable cause to support [McDougal]'s arrest and the subsequent non-consensual search of his

[78] *State v. Aguilar*, 594 A.2d 1167, 1172 (Md App. 1991).
[79] *United States v. Aquino*, 674 F.3d 918, 926–27 (8th Cir. 2012).

person."[80] "[A]n officer's observation of a concealed bulge, without more, does not suffice for probable cause." [81]

[80] *Id.*

[81] *Id.* ("an officer's initial observation of a concealed bulge was buttressed by his subsequent touching of the bulge with the suspect's consent which then confirmed the presence of contraband").

CONCLUSION

For the reasons and upon the authorities cited herein, McDougal's conviction must be vacated.

Respectfully submitted,

/s/ Nicole M. Walker
Nicole M. Walker [#4012]
Carvel State Building
820 North French Street
Wilmington, DE 19801

DATED: August 23, 2023