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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

STATE'S ANSWERING BRIEF

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Dated: September 21, 2023

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES AND RULES

OTHER AUTHORITIES

NATURE AND STAGE OF PROCEEDINGS

On April 8, 2022, Wilmington Police arrested James McDougal ("McDougal"). (A1 at DI 1). On May 9, 2022, a New Castle County grand jury indicted McDougal for Possession of a Firearm by a Person Prohibited ("PFBPP"), Possession of Ammunition for a Firearm by a Person Prohibited ("PABPP"), and Carrying a Concealed Deadly Weapon ("CCDW"). (A3 at DI 19).

On December 12, 2022, McDougal's counsel filed a motion to suppress. (A2 at DI 8, A7-A12). On January 31, 2023, the State filed an answer to McDougal's motion to suppress. (A2 at DI 13, A13-A28). On February 3, 2023, the Superior Court held a suppression hearing and reserved judgment. (A2 at DI 12). On March 7, 2023, the court issued a memorandum opinion and order denying McDougal's motion to suppress. (A3 at DI 17).

On May 16, 2023, the court held a one-day bench trial, after which it found McDougal guilty of all charges. (A5-A6). The court immediately sentenced McDougal: for PFBPP to 15 years at Level V, suspended after five years for 18 months at Level III; for PABPP to eight years at Level V, suspended for 12 months at Level III; and for CCDW to eight years at Level V, suspended for 12 months at Level III. (A65-A66).

McDougal filed a timely notice of appeal and an Opening Brief and Appendix. This is the State's Answering Brief.

SUMMARY OF THE ARGUMENT

I. DENIED. The Superior Court did not err when it denied McDougal's motion to suppress the evidence. The officers testified that they were investigating McDougal for violating the Delaware loitering statute. The officers further testified that the loitering statute provision they relied on required them to obtain McDougal's name and give him a warning before they could issue a citation, which they complied with. The police officers had reasonable articulable suspicion that McDougal was loitering. Additionally, under 11 *Del. C.* § 1902(a), reasonable articulable suspicion that McDougal had committed, was committing, or would commit a crime permitted the officers to question McDougal and ask for his name. When McDougal refused to provide his name, 11 *Del. C.* § 1902(b) authorized the officers to detain McDougal for further investigation. McDougal's counsel conceded below that McDougal did not challenge Officer Moses's pat down, itself. Regardless, the law permitted Officer Moses to pat down McDougal because Officer Moses reasonably believed that McDougal was armed and dangerous.

STATEMENT OF FACTS

In early April of 2022, officers of the Wilmington Police Department were conducting an ongoing investigation of the area of 24th Street and Carter Street in the City of Wilmington, which is a high crime area. (A34, A39). A confidential informant had contacted police officers working as street crimes investigators. (A34). The confidential informant informed the investigators that individuals in and around the area of 24th and Carter engage in street-level drug dealing on a daily basis and that these individuals carry firearms on their persons. (A34, A42). The confidential informant then told the investigators that, due to the increased police presence in the area, the drug-dealing individuals use ground stashes[1] to conceal firearms from the police. (A34). The confidential informant provided the identity of four individuals involved in the drug dealing: Rashad Acklin, Jamir Coleman, Demy Lee, and Dashawn Smith. (A35).

Prior facts corroborated the information that the confidential informant provided to the police. (A35). Approximately within a month prior to receiving the information from the confidential informant, the police had contact with Lee and

[1] At the suppression hearing, based on his training and experience, Officer Leonard Moses testified that a ground stash is "an area where [individuals] would place [the firearm] where they have direct control over it, but they are able to distance themselves from it if they think there's going to be police contact, but they can still control it, and they can still have sight of the area." (A34). Examples of a ground stash are areas behind trash cans, under wheels, under broken stoops, or anywhere where it can be concealed from onlookers. (A34).

Smith in the area of 24th and Carter. (A35). During their contact with Lee and Smith, police officers located a firearm in a ground stash behind a trash can. (A35).

On April 13, 2022, Wilmington police officers, including Officer Leonard Moses and Officer Shauntae Hunt, were on proactive patrol of the area of 24th and Carter. (A35, A43). The officers observed three individuals at the intersection. (A35-A37). Two of the individuals were Acklin and Coleman, who had been identified by the confidential informant as belonging to the group of individuals dealing drugs and carrying firearms. (A35). McDougal was the third individual but, at the time, the officers did not know his identity. (A37). The individuals were standing idle at the corner of 24th and Carter in front of a house, they were blocking the flow of pedestrian traffic on the sidewalk, and Officer Moses knew that Acklin and Coleman did not live in the area. (A38, A41, A45).

The officers approached the three individuals as a loitering investigation, and Officer Hunt cited Delaware loitering statute 11 *Del. C.* § 1321 in his report. (A45).[2]

[2] 11 *Del. C.* § 1321 states:

> A person is guilty of loitering when:
> (1) The person fails or refuses to move on when lawfully ordered to do so by any police officer; or
> (2) The person stands, sits idling or loiters upon any pavement, sidewalk or crosswalk, or stands or sits in a group or congregates with others on any pavement, sidewalk, crosswalk or doorstep, in any street or way open to the public in this State so as to obstruct or hinder the free and convenient passage of persons walking, riding or driving over or along such pavement, walk, street or way, and fails to make way, remove or pass, after reasonable request from any person; or

At the suppression hearing, Officer Moses testified that the loitering statute required police to give the individuals loitering a warning prior to giving them a citation or arresting them. (A38). Officer Moses then testified that, when giving such a warning, the officer should ask for identification from the individual. (A37, A38).

Officer Hunt made contact with Coleman and another officer made contact with Acklin. (A35, A39, A44). Officer Hunt asked Coleman for his name and date of birth, which Coleman provided. (A38, A44). Officer Hunt asked Coleman if he

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> (3) The person loiters or remains in or about a school building or grounds, not having reason or relationship involving custody of or responsibility for a pupil or any other specific or legitimate reason for being there, unless the person has written permission from the principal; or
> (4) The person loiters, remains or wanders about in a public place for the purpose of begging; or
> (5) The person loiters or remains in a public place for the purpose of engaging or soliciting another person to engage in sexual intercourse or deviate sexual intercourse; or
> (6) 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. Unless flight by the accused or other circumstances make it impracticable, a peace officer shall, prior to any arrest for an offense under this paragraph, afford the accused an opportunity to dispel any alarm which would otherwise be warranted, by requesting identification and an explanation of the person's presence and conduct. No person shall be convicted of an offense under this paragraph if the peace 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 peace officer at the time, would have dispelled the alarm.

lived in the area, Coleman answered in the negative, Officer Hunt asked Coleman if he could pat him down, Coleman gave consent to be patted down, Officer Hunt did not find any contraband on Coleman, and Officer Hunt told Coleman to move on. (A44). Acklin also provided his identity, and the officers instructed him to move on. (A38).

While Officer Hunt and the other officer interacted with Coleman and Acklin, Officer Moses made contact with McDougal, whose identity was still unknown to the officers. (A35, A37). Officer Moses immediately recognized that McDougal wore baggy clothing and appeared to be wearing multiple pants. (A35). From his training on characteristics of an armed individual, Officer Moses knew that one of the characteristics of an armed individual is to wear multilayer clothing to prevent the outline of the firearm from being seen through the clothing and to keep the firearm in place and from moving around. (A35).

Upon making contact with McDougal, Officer Moses introduced himself, informed McDougal about the tip, told McDougal that the area had a lot of crime and that the officers were trying to keep the street safe, and informed McDougal that he was not allowed to loiter. (A40). Officer Moses then mentioned his concerns about McDougal's clothing and asked McDougal if he could pat him down to make sure he did not have any weapons on him. (A40). McDougal refused consent. (A40). Officer Moses asked McDougal for his name, and McDougal refused to provide his

name. (A40). Officer Moses then asked McDougal to sit down while he tried to identify McDougal. (A40). McDougal subsequently acknowledged that he did not live in the area. (A44).

When McDougal sat down, Officer Moses observed a bulge in McDougal's waistband area. (A40). Referring to his training, Officer Moses recognized that the bulge was located on a place that is one of the most common places for an armed individual to carry a firearm. (A36, A40). Officer Moses asked McDougal about the bulge in his waistband, McDougal pulled some articles out of the front pocket of his hoody, but the bulge was still present. (A44). Considering all the evidence, Officer Moses believed that McDougal may have a firearm on his person. (A36). To ensure a safe encounter, Officer Moses patted McDougal down. (A36). Officer Moses felt something during the pat down, lifted McDougal's clothing, saw the firearm in McDougal's waistband area, and removed the firearm. (A36-A37, A44).[3] The officer identified McDougal, found that he did not have a "CCW" to conceal a

[3] At the suppression hearing, Officer Moses testified that prior to the pat down, he could "clearly see a bulge in his waistband area." (A36). McDougal argues that Officer Moses's testimony then caused confusion when he used a double negative in describing the subsequent pat down. Op. Br. at 28-29. Officer Moses stated: "I was patting down, and then still didn't feel nothing, and I lifted his shirt and you could see the firearm in his waistband area." (A36). Officer Moses then clarified that he did feel something before lifting McDougal's clothing and discovering the firearm. (A37). Body worn camera footage shows that Officer Moses patted McDougal down in the waistband area before patting McDougal's waistband and discovering the firearm. (A30).

firearm and that he is a person prohibited. (A37). Officer Moses then took McDougal into custody. (A37).

ARGUMENT

I. THE SUPERIOR COURT PROPERLY DENIED MCDOUGAL'S MOTION TO SUPPRESS EVIDENCE.

Question Presented

Whether the Superior Court abused its discretion by denying McDougal's motion to suppress.

Standard and Scope of Review

This Court reviews the grant or denial of a motion to suppress for an abuse of discretion.[4] To the extent that this Court examines the trial judge's legal conclusions, this Court reviews the trial judge's determinations *de novo* for errors in formulating or applying legal precepts.[5] To the extent the trial judge's decision is based on factual findings, this Court reviews for 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.[6] This Court generally declines to review arguments or questions not raised below and not fairly presented to the trial court for decision "unless the interests of justice require such review."[7]

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[4] *Lopez-Vazquez v. State*, 956 A.2d 1280, 1284-85 (Del. 2008).
[5] Id.
[6] *Id*.
[7] *Hardin v. State,* 844 A.2d 982, 990 (Del. 2004) (citing Supr. Ct. R. 8); *Chance v. State,* 685 A.2d 351, 354 (Del. 1996).

Merits of the Argument

Prior to trial, McDougal's counsel filed a motion to suppress asking the court to "suppress any and all evidence seized as a result of an illegal stop, detention, and arrest in violation of the Defendant's rights under the Fourth and Fourteenth Amendments." (A8). McDougal presented the following basis for this motion:

> In the instant case, the Officers did not see any criminal activity before demanding Mr. McDougal's name, asking him to have a seat on the steps and asking him for a pat down. At this point, Mr. McDougal was not free to leave. The fact that the other two individuals were free to leave further suggests that there was no reasonable suspicion of criminal activity at the point in which Mr. McDougal was stopped. The encounter was extended long enough for Officer Moses to observe a bulge and conduct a pat down, but based on the known facts of this case, Mr. McDougal should have been free to leave just like the other two individuals were. (A9).

In response, the State argued that the officers had reasonable articulable suspicion to stop McDougal for loitering based on the evidence available to them; it was reasonable and proper for Officer Moses to investigate further after McDougal refused to give his name; and it was reasonable for Officer Moses to believe that McDougal may be concealing a firearm and to pat him down. (A20-A24).

The trial judge conducted a pre-trial suppression hearing. (A31-A52). Two witnesses testified at the hearing: Officer Moses and Officer Hunt. McDougal did not testify. The State entered body worn camera footage as evidence. (A48).

After the testimony, the trial judge asked the parties for argument to determine the issues. (A48). The State argued that there was reasonable articulable suspicion

to stop McDougal based on all the evidence available to the officers. (A48). The State also posited that "initially" the encounter was consensual and that it was the conduct of McDougal, including his actions and clothing, that caused Officer Moses to investigate further. (A48). McDougal's counsel argued that under the loitering statute an officer can ask an individual to move on but does not provide for questioning. (A50). McDougal's counsel also argued that the encounter was consensual, and thus McDougal was free to refuse to answer questions and move on. (A50). On rebuttal, the State asserted that "the loitering statute does allow police officers to ask individuals to identify themselves, and that's what was occurring here." (A51). The trial judge asked the parties to confirm whether the focus of the motion to suppress is the "initial stop and not the continued detention when [McDougal] was asked to sit down." (A51). Defense counsel answered: "Yes, Your Honor." (A51).

Following the suppression hearing, the court reserved judgment. (A51). Subsequently, the court issued a memorandum opinion and order denying McDougal's motion to suppress.[8] The court noted that McDougal's "motion challenges the basis for his initial detention with police under *Terry v. Ohio*, arguing that the officers did not possess the required reasonable, articulable suspicion of

[8] *State v. McDougal*, 2023 WL 2423233 (Del. Super. Ct. Mar. 7, 2023).

criminal activity under both the Delaware and United States Constitutions."[9] The court went on to explain that, because "the State concedes that a detention occurred when [McDougal] was instructed to sit down on the stoop," "the analysis is limited to Officer Moses's observations prior to that point and whether the initial questioning of [McDougal] constituted a seizure."[10]

First, the court explained:

> A stop does not occur upon any encounter between a citizen and the police. Police may ask questions of or approach a citizen without it being considered a detention. This is what initially occurred here. Delaware law does not prohibit an officer from approaching a citizen and asking questions and police officers "are permitted to initiate contact with citizens on the street for the purpose of asking questions." Therefore, when the officers initially approached the group and simply asked for their names, it cannot reasonably be said that the individuals did not feel free to ignore the police presence. This is further supported by the fact that the officers did not further question or ultimately detain Coleman and Acklin.[11]

The court then concluded, "[h]owever, at the point that [McDougal] was told that if he gave his name, he would be allowed to move along, a reasonable person in [McDougal]'s shoes would not have free to ignore the police presence, due to the officer's own words.[12]

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[9] *Id*. at *1.
[10] *Id*. at *2.
[11] *Id*.
[12] *Id*.

Referring to 11 *Del. C.* § 1321(6), the court found that the section "requires an officer to give a warning prior to any arrest for a loitering violation, '[u]nless flight by the accused or other circumstances make it impracticable.'"[13] The court noted that "Officer Moses testified that it is his practice, consistent with the statute, to identify the person by name when giving a warning to ensure that, if a citation is given in the future, it was to the correct person" and that "this was his intention when approaching [McDougal]."[14] The court found that "[t]his is consistent with the evidence that the other two individuals were similarly approached and released with their warning once their names were provided."[15] The court then found that "[i]t was only upon Defendant's refusal, coupled with the observation of his clothing and a concern for officer safety, did Officer Moses require Defendant to sit on the nearby stoop."[16]

The court ultimately concluded:

> Because [Officer] Moses was investigating a potential violation of the loitering statute, 11 *Del. C.* § 1902, allows further detention if [Officer] Moses possessed a "reasonable ground to suspect" [McDougal] was "committing, has committed or is about to commit" that crime. In viewing the totality of the circumstances, Officer Moses's 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 [confidential informant] that street level drug sales

[13] *Id.* at *3.
[14] *Id.*
[15] *Id.*
[16] *Id.*

> were occurring at that location, as well as the observations of [McDougal]'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. Thus, he possessed reasonable, articulable suspicion at that point to detain [McDougal].[17]

Accordingly, the court held that "no violation under either Article I, § 6 of the Delaware Constitution, or the Fourth Amendment of the United States Constitution occurred when the officers approached, and eventually detained [McDougal]."[18] Further, the court found that "under *Terry v. Ohio* and its Delaware progeny, once reasonable, articulable suspicion is had for the initial detention, Officer Moses appropriately engaged in the pat down of [McDougal] once on the stoop, no further analysis is required."[19]

On appeal, McDougal argues that the Superior Court "inconsistently applied a loitering provision not relied upon or argued by any party and found that it provided authority to detain McDougal beyond the consensual encounter when he refused to give his name."[20] McDougal further argues that "[t]here 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

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[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] Op. Br. at 2.

committed."[21] McDougal then asserts that, "to the extent the initial stop was consensual, McDougal was not required to provide his name and should have been immediately released."[22] And finally, McDougal adds a new argument on appeal that he did not argue below, stating that, "even if McDougal was lawfully detained, his subsequent search went beyond the scope of what was permitted" and "[t]hus, the weapon seized as a result should have been suppressed."[23]

A. McDougal's Contention that the Officers Failed to Identify the Applicable Loitering Statute and Subsection is Unavailing

McDougal argues that the Superior Court's decision should be reversed because it is unclear whether the officers applied the Delaware state statute (11 *Del. C.* § 1321) or a Wilmington City ordinance when the officers initially approached him. Alternatively, McDougal contends that, if the officers suspected McDougal of violating 11 *Del. C.* § 1321, they "never identified for the judge which loitering provision they suspected [McDougal] violated."[24] McDougal's contentions are without merit for the following reasons.

McDougal did not argue below that it is unclear whether the officers applied 11 *Del. C.* § 1321 or a municipal statute, nor does he cite to any place in the record that could reasonably cause such confusion. The record is clear that the officers

[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.* at 9.

relied on Delaware state statute 11 *Del. C.* § 1321, not a municipal ordinance. At the suppression hearing, McDougal's counsel confirmed to the trial judge that the police report cited section 1321, and Officer Hunt immediately confirmed that he cited the statute in his report (there was no mention of a city ordinance). (A45).

Furthermore, although the officers did not state the subsection number of the statute at the suppression hearing, the record establishes that they specifically relied on subsection (6) of section 1321, which is the most general provision of the statute. *Id*. Subsection (6) states:

> 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. Unless flight by the accused or other circumstances make it impracticable, a peace officer shall, prior to any arrest for an offense under this paragraph, afford the accused an opportunity to dispel any alarm which would otherwise be warranted, by requesting identification and an explanation of the person's presence and conduct. No person shall be convicted of an offense under this paragraph if the peace 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 peace officer at the time, would have dispelled the alarm.[25]

And, in *Miller v. State*, this Court interpreted subsection (6) as providing that, if an individual's activity would give a police officer "reasonable articulable suspicion

[25] 11 *Del. C.* § 1321(6).

that a person was loitering," "such activity would warrant a brief detention to investigate or warn the person to move on."[26]

Officer Moses testified that under the applicable statutory provision he attempted to give McDougal a warning and requested identification. (A37, A38). This is consistent with subsection (6), which requires the officer to "request[] identification" and with this Court's ruling in *Miller* that subsection (6) "warrant[s] a brief detention to investigate or warn the person to move on" when there is reasonable articulable suspicion of loitering.[27] Accordingly, the Superior Court reasonably understood that the officers applied subsection (6) of section 1321.[28]

Therefore, McDougal's claim that the officers never identified for the court the loitering statute and subsection is unavailing.

B. The Officers Specified Conduct on the Part of McDougal that Constituted Loitering Under 11 *Del. C.* § 1321

Next, McDougal asserts that the officers did not specify McDougal's conduct that violated the applicable loitering statute. For the following reasons, this argument is also without merit.

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[26] 922 A.2d 1158, 1162 (Del. 2007).
[27] *Id*.
[28] *McDougal*, 2023 WL 2423233, at *3 (Quoting language from subsection (6), the Superior Court noted that the provision "requires an officer to give a warning prior to any arrest for a loitering violation, '[u]nless flight by the accused or other circumstances make it impracticable.").

As the Superior Court noted in its opinion, the officers articulated specific conduct on the part of McDougal that caused them to suspect McDougal of violating the loitering statute.[29] The officers testified that there was an ongoing investigation of crime involving drugs and firearms at 24th and Carter, a firearm had previously been found in that location in a ground stash, information from a confidential informant provided that crime was taking place at that location, McDougal was standing idle at the corner of 24th and Carter in front of a house with Acklin and Coleman, they were blocking the flow of pedestrian traffic on the sidewalk, Officer Moses knew that Acklin and Coleman did not live in the area, the confidential informant identified Acklin and Coleman of dealing drugs and carrying concealed firearms, McDougal wore clothing characteristic of an armed individual, and the area was a high crime area. (A34, A35, A38, A39, A41, A45). Moreover, circumstances demonstrated the reliability of the confidential informant—the

[29] *McDougal*, 2023 WL 2423233, at *3 ("In viewing the totality of the circumstances, Officer Moses's 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. Thus, he possessed reasonable, articulable suspicion at that point to detain Defendant.").

identity of individuals who would be present at 24th and Carter who did not live in the area and the existence of a ground stash at the location. (A35).[30]

McDougal's conduct as described by the officers is consistent with the conduct that constitutes loitering in section 1321(6), which states, in pertinent part:

> 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.[31]

Acklin, Coleman, and McDougal were congregating in a manner not usual for law-abiding individuals under circumstances that warranted alarm for safety of people in the area—blocking pedestrian traffic in front of a residence, two of them (identified by a confidential informant as carrying concealed firearms) are known to not live in the area, high crime area, firearm previously been found in a ground stash at that location, and multilayer clothing. Because McDougal's conduct provided the officers with reasonable suspicion of loitering, the officers were permitted to briefly detain him for further investigation or to warn him to move along.[32]

Accordingly, McDougal's argument that the officers did not articulate conduct would lead them to reasonably suspect that he was loitering is without merit.

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[30] *See State v. Holden*, 60 A.3d 1110, 1115 (Del. 2013) ("A tip from a confidential informant can provide probable cause, if the totality of the circumstances demonstrates the tip's reliability….").
[31] 11 *Del. C.* § 1321(6).
[32] *Miller*, 922 A.2d at 1162.

C. Under 11 *Del. C.* § 1902, The Officers Lawfully Asked McDougal for His Name and Detained Him to Investigate When He Refused to Provide His Name

In addition, 11 *Del. C.* § 1902(a)-(b) also authorized the officers' conduct. For the reasons stated below, Officer Moses properly acted under section 1902(a) when he asked McDougal for his name and under section 1902(b) when he briefly detain McDougal to investigate further after McDougal refused to identify himself.[33]

Section 1902(a) states: "A peace officer may stop any person abroad, or in a public place, who the officer has 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."[34] "The term 'reasonable ground' has the same meaning as reasonable and articulable suspicion."[35] "In order to satisfy the 'reasonable and articulable' standard, the officer must point to specific facts which, viewed in their entirety and accompanied by rational inferences, support the suspicion that the person sought to be detained was violating the law."[36] "The totality of circumstances, as viewed through the eyes of a reasonable, trained officer in the same or similar circumstances, must be examined to determine if reasonable suspicion has been properly formulated."[37] Reasonable articulable suspicion is

[33] *See Jones v. State*, 745 A.2d 856, 861 (Del. 1999).
[34] 11 *Del. C.* § 1902(a).
[35] *Miller*, 922 A.2d at 1161.
[36] *Id.*
[37] *Id.*

"'considerably less' than proof by a preponderance of the evidence and less demanding than probable cause, which is necessary to support an arrest."[38]

Part two of the statute, section 1902(b), provides that "[a]ny person so questioned [pursuant to section 1902(a)] who fails to give identification or explain the person's actions to the satisfaction of the officer may be detained and further questioned and investigated."[39] This Court has stated that "the thrust of the statute is that a detention is authorized if a person fails to adequately identify himself or, in a limited way, explain his actions."[40] "However, officers should use the least intrusive means of detention reasonably necessary to achieve the purpose of the detention."[41]

Here, the State presented evidence to the Superior Court showing that Officer Moses properly acted within the confines of section 1902(a) when he stopped McDougal and asked for his name. (A35-A40). The initial stop did not require Officer Moses to have probable cause that McDougal was violating the loitering statute, nor did it even require proof by a preponderance of the evidence.[42] Indeed, section 1902(a) required "considerably less" under the reasonable articulable

[38] *Diggs v. State*, 257 A.3d 993, 1004 (Del. 2021).
[39] 11 *Del. C.* § 1902(b).
[40] *Buckingham v. State*, 482 A.2d 327, 333 (Del. 1984).
[41] *Womack v. State*, 296 A.3d 882, 892 (Del. 2023).
[42] *Diggs*, 257 A.3d 993 at 1004.

suspicion standard.[43] The officers articulated why they reasonably suspected McDougal of violating the loitering statute—the group was blocking pedestrian traffic, the identified individuals did not live in the area, the location was a high crime area, and the officers had information that drug activity was taking place at that exact location. (A34, A35, A38, A39, A41, A45). As such, section 1902(a) authorized the officers to stop McDougal and ask him for his name.[44]

The evidence further shows that Officer Moses properly acted within the confines of section 1902(b) when he detained McDougal for further investigation after McDougal refused to provide his name. "Where suspects can neither give identification nor explain their actions 'to the satisfaction of the officer,' the police are justified in detaining them for further investigation."[45] Here, McDougal concedes that he refused to provide identification to Officer Moses upon request.[46] It does not matter whether Officer Moses asked McDougal to state his business

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[43] *Id*.

[44] *See Buckingham v. State*, 482 A.2d 327, 332 (Del. 1984) (quoting *Adams v. Williams*, 407 U.S. 143, 146 (1972)) (The "brief stop of a suspicious individual in order to ... maintain the *status quo* momentarily while obtaining more information may be most reasonable in light of the facts known to the officer at the time."). *See also Diggs v. State*, 257 A.3d 993, 1004 (Del. 2021) ("In one effort to define the contours of reasonable suspicion, the United States Supreme Court observed that 'the concept ..., like probable cause, is not 'readily, or even usefully, reduced to a neat set of legal rules.'").

[45] *Bunting v. State*, 860 A.2d 809 (Del. 2004).

[46] Op. Br. at 4.

abroad.[47] Moreover, Officer Moses detained McDougal in the least intrusive means by having him sit, unrestrained, while Officer Moses investigated further. As such, Officer Moses's detention of McDougal was lawful.

Therefore, the Superior Court's decision that Officer Moses did not violate McDougal's rights by stopping him, asking him for name, and detaining him after he refused to provide his name should be affirmed.

D. McDougal's Contention that the Encounter was Consensual and Required the Officers to Let Him Leave When He Refused to Give His Name is Without Merit

Next, McDougal argues that the trial court found that the encounter between the officers and McDougal was consensual and that such a finding required the court to conclude that McDougal was free to go after declining the pat down and refusing to provide his name.[48] McDougal's argument is without merit for the following reasons.

"During a consensual encounter, a person has no obligation to answer the officer's inquiry and is free to go about his business."[49] "Only when the totality of the circumstances demonstrates that the police officer's actions would cause a reasonable person to believe he was not free to ignore the police presence does a

[47] *See Montgomery v. State*, 227 A.3d 1062 (Del. 2020) (holding that 11 *Del. C.* § 1902 is permissive and does not require the officer to ask the individual's name, purpose, and business abroad).
[48] Op. Br. at 11-12.
[49] *Williams v. State*, 962 A.2d 210, 215 (Del. 2008).

consensual encounter become a seizure."[50] "Police-citizen encounters often progress from consensual encounters to stops, where a citizen is detained briefly for investigative purposes."[51] "But this may occur, consistent with the Fourth Amendment, only if the police officer has reasonable suspicion, based on articulable facts, that criminal activity is afoot."[52]

McDougal writes that the State "conceded that the encounter was consensual" and that "the trial court found the encounter was consensual," but McDougal misapprehends the record.[53] At the suppression hearing, counsel for the State explained that she "would say initially it's a consensual encounter" but that the officers investigated further due to the conduct and suspicious clothing of McDougal. (A49). In its opinion, the Superior Court stated that "[a] stop does not occur upon any encounter between a citizen and the police" and that the "[p]olice may ask questions of or approach a citizen without it being considered a detention."[54] The court noted that this appears to have been what happened initially in this case, but, "at the point that [McDougal] was told that if he gave his name, he would be allowed to move along, a reasonable person in [McDougal]'s shoes would not have

[50] *Id*.
[51] *United States v. McCray*, 148 F. Supp. 2d 379, 390 (D. Del. 2001).
[52] *Id*.
[53] Op. Br. at 11.
[54] *McDougal*, 2023 WL 2423233, at *2.

[felt] free to ignore the police presence, due to the officer's own words."[55] As such, even if the encounter may have had a consensual nature initially with some of the individuals, the State did not concede and the Superior Court did not accept, McDougal's claim that he was prevented from leaving a consensual encounter.

Despite McDougal's contention, the State argued that, based on the evidence available to them, the officers had reasonable articulable suspicion to obtain McDougal's name, and, at that point, Officer Moses's words showed McDougal that he was not free to leave unless he provided his name. (A49). The Superior Court agreed that sufficient evidence emerged to detain McDougal and that McDougal would have been aware that he was not free to ignore Officer Moses's request to provide his name.[56]

As such, McDougal's argument that the officers prevented him from leaving during a consensual encounter and that the Superior Court should have found that he was free to leave is meritless.

E. McDougal Waived the Issue of Whether the Pat Down was Illegal

Alternatively, McDougal argues in this appeal that Officer Moses's search was, itself, unlawful, *assuming arguendo* the stop and detention were legal.[57] McDougal asserts that Officer Moses conducted a "pseudo pat down" with "no valid

[55] *Id.*
[56] *Id.*
[57] Op. Br. at 26-30.

reason" and that this Court must conclude that Officer Moses unlawfully reached in and searched McDougal's pants.[58] McDougal, however, did not challenge the pat down or retrieval of the gun in his motion to suppress or at the suppression hearing. In fact, at the suppression hearing his counsel confirmed that he does not challenge this issue. (A50-A51). As such, he has waived the issue.

Under Rule 8, "[o]nly questions fairly presented to the trial court may be presented for review."[59] Nevertheless, this Court may review such questions for plain error.[60] "Plain error review requires the error complained of be 'so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process,' and the error must be 'basic, serious and fundamental ... and clearly deprive an accused of a substantial right, or which clearly show manifest injustice.'"[61] And the plain error must be "apparent on the face of the record."[62]

But this Court has also "explained that '[t]he plain error standard of appellate review is predicated upon the assumption of oversight.'"[63] And it "is reserved for claims that were not brought to the trial court's attention by oversight, not conscious

[58] *Id.* at 29.
[59] *Pollard v. State*, 284 A.3d 41, 45 (Del. 2022).
[60] *Id.*
[61] *Woody v. State*, 219 A.3d 993 (Del. 2019).
[62] *Baker v. State*, 906 A.2d 139, 150 (Del. 2006).
[63] *Williams v. State*, 98 A.3d 917, 921 (Del. 2014).

strategic decision of counsel."[64] Where defense counsel made a conscious decision that constitutes a true waiver, plain error appellate review is precluded.[65]

At the suppression hearing, McDougal's counsel conceded that the pat down could not be challenged and that he was challenging only what happened before the pat down. (A50). McDougal's counsel stated: "Certainly when an officer sees a bulge, that's when Mr. McDougal is sitting down. Obviously I can't contest the case law when the officer sees a bulge. The problem here is that by that point this had gone far beyond the scope of what this should have been." (A50). Furthermore, defense counsel confirmed to the trial judge at the end of the suppression hearing that McDougal challenged only the initial stop. (A51).[66] As such, McDougal's counsel made a conscious decision to focus on the initial stop and not to challenge the pat down and retrieval of the firearm, which precludes plain error appellate review of this issue. (A50-A51).

Moreover, even if plain error review applied, McDougal's challenge on appeal to the pat down and retrieval of the firearm does not meet that standard. McDougal does not point to a plain error in the record. He does not show that the

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[64] *Bowersox v. State*, 2013 WL 1198083, at *2 (Del. Mar. 25, 2013).
[65] Id.
[66] The trial court asked the parties: "And so I think both sides agree that the focus of this is really the initial stop and not the continued detention when he was asked to sit down. Right?" Appellant's counsel confirmed, stating: "Yes, Your Honor." (A51).

Superior Court made an error on this issue, much less an error that is so clearly prejudicial to his substantial right as to have jeopardized the fairness and integrity of his trial.[67] To the extent that McDougal takes the position that his trial counsel erred in failing to challenge the search, McDougal cannot assert a claim of ineffective assistance of counsel in a direct appeal.[68]

Accordingly, this Court should not consider McDougal's challenge to Officer Moses's pat down in his appeal.

F. Officer Moses Properly Conducted the Pat Down of McDougal

Even if this Court were to examine the pat down of McDougal and the retrieval of the firearm, the trial court's decision should be affirmed as the record below shows that Officer Moses's search was not illegal.

In his opening brief, McDougal states that the "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."[69] Not only does McDougal fail to cite to the record where the officers made

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[67] As already discussed, the trial judge had the defense counsel confirm the scope of the motion to suppress at the end of the suppression hearing, and the defense counsel confirmed that McDougal was only challenging the initial stop. (A51). Therefore, McDougal cannot argue that the Superior Court made an error in defining the issues to be examined for the motion to suppress.

[68] *See Davis v. State*, 803 A.2d 427 (Del. 2002) ("[I]t is settled law that claims of ineffective assistance of counsel will not be considered for the first time on direct appeal.").

[69] Op. Br. at 27.

this concession, the record does not support the claim. The record shows that Officer Moses initially asked McDougal for permission to pat him down. (A38). And Officer Moses did not pat McDougal down until he possessed facts sufficient to reasonably suspect that McDougal was armed and dangerous. (A36-A44). As such, despite McDougal's assertion, Officer Moses did not conduct a pat down without cause to believe that McDougal was armed and dangerous.

Alternatively, McDougal argues that "the observation of a bulge in [his] clothing alone was insufficient to warrant a pat down."[70] But McDougal ignores the fact that the "bulge" was not the only observation leading Officer Moses to reasonably suspect that McDougal was armed and dangerous. As already mentioned, the confidential informant had notified the police that individuals in and around the area of 24th and Carter, including the two individuals accompanying McDougal, carried concealed firearms on their persons. (A34, A35, A38, A39, A41, A45). Officer Moses testified that the area was a high crime area. (A34, A39). In addition, Officer Moses testified that he observed that McDougal was wearing multiple layers of clothing, which Officer Moses knew from his training to be a characteristic of an armed gunman attempting to conceal a firearm. (A35). Moreover, concerning the bulge itself, Officer Moses testified that it was in an area where a person would normally carry a firearm. (A36, A40). Lastly, Officer Moses

[70] Op. Br. at 27.

gave McDougal an opportunity to explain what the bulge was, which McDougal failed to do. (A44). Officer Moses then conducted a pat down to ensure safety. (A36).

The law is clear that Officer Moses acted legally when he conducted a pat down of McDougal after reasonably suspecting that he was armed and dangerous.[71] This Court has explained that when an officer has reason to believe that a suspect is armed and dangerous, the officer is authorized to pat down the suspect, and if the officer feels "something that [the officer] [is] unable to identify and that reasonably could [be] a weapon," the officer is "entirely justified in removing the unknown object in order to determine whether it [is] a weapon."[72] This is what happened here.

McDougal then argues that, if Officer Moses was warranted in conducting a pat down, "there was no valid reason for him to do a pseudo pat down [and] then reach inside [McDougal's] pants."[73] McDougal does not explain what he means by referring to the pat down as a "pseudo pat down," but the evidence confirms that Officer Moses conducted a proper pat down. Officer Moses testified that he conducted the pat down over McDougal's clothing, felt something, and then lifted

[71] *Womack v. State*, 296 A.3d 882, 891–92 (Del. 2023) ("[O]fficers may take measures that are reasonably necessary to protect themselves and maintain the status quo.").
[72] *Lawrence v. State*, 1995 WL 312614, at *2 (Del. 1995).
[73] Op. Br. at 29.

McDougal's clothing to reveal a firearm. (A36-A37, A44). The body worn camera footage confirms this sequence of events. (A30, A48).[74]

Accordingly, even if this Court were to consider McDougal's new challenge in this appeal that Officer Moses's pat down violated his constitutional rights, his challenge is meritless.

[74] *Id.*

CONCLUSION

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

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DEPARTMENT OF JUSTICE

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Dated: September 21, 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.	)	

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 Time New Roman 14-point typeface using Microsoft Word 2016.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 7,257 words, which were counted by Microsoft Word 2016.

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DATE: September 21, 2023