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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

APPELLANT'S REPLY BRIEF

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A. 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.

The State acknowledges,[1] as the trial court found,[2] that the prosecutor conceded the initial encounter between McDougal and Officer Moses was consensual.[3] Unfortunately, the State veers off track when it erroneously claims that "McDougal misapprehends the record" because, the State asserts, the consensual encounter was properly converted into a lawful detention when McDougal "was told that if he gave his name, he would be allowed to move along[.]"[4] This reasoning does nothing more than reveal the State's misapprehension of the basic legal principle that police are not permitted to

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[1] State's Ans. Br. at 24.

[2] Ex.A to Opening Brief at *3 (citing *Woody v. State*, 765 A.2d 1257, 1264 (Del. 2001) (relying on *Florida v. Royer*, 460 U.S. 491, 498 (1983) in concluding "law enforcement officers may approach and ask questions of an individual, without reasonable articulable suspicion that criminal activity is afoot. The individual, however, may not be detained and may walk or even run away. Refusal to answer the officer's inquiry cannot form the basis for reasonable suspicion.")).

[3] A49.

[4] State's Ans. Br. at 24.

convert a consensual encounter into a detention simply to conduct further investigation based solely on a defendant's refusal to provide his name.[5]

While it is true that "[p]olice-citizen encounters [can] progress from consensual encounters" to lawful detentions, they can do so "only if the police officer has reasonable suspicion, based on articulable facts, that criminal activity is afoot." [6] Here, by Moses' own admission, reasonable suspicion warranting a lawful detention never existed before the consensual encounter or even before he ordered McDougal to sit on the stoop.

> I got all this previous information, I have a characteristic I 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, at least he's sitting down, he's not readily available to try and injure us, his hands are open, I could see.[7]

Moses repeatedly made clear at the suppression hearing that the sole reason the consensual encounter was converted into a detention was McDougal's choice not to give police his name during the initial encounter.[8] The prosecutor also emphasized that before police were in any position to see

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[5] A48-49. *Royer*, 460 U.S. at 498. *Williams v. State*, 962 A.2d 210, 215–16 (Del. 2008); *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000).
[6] *United States v. McCray*, 148 F. Supp. 2d 379, 382 (D. Del. 2001) (*citing United States v. Sokolow*, 490 U.S. 1, 7 (1989)).
[7] A40.
[8] A36, 39.

the purported bulge on McDougal, he was already sitting on the stoop after police ordered him there because he chose not to give them his name during the consensual encounter.[9]

As the State concedes,[10] during a consensual encounter, an individual "has a right to ignore the police and go about his business."[11] He can also choose to "stay put and remain silent in the face of police questioning[.]"[12] The individual's refusal to provide his name to police cannot provide objective grounds for a detention.[13] Thus, in light of its concession that the initial encounter was consensual, the State's argument is confounding. The moment police chose to detain McDougal because he exercised his right not to answer police during the consensual encounter, they unlawfully detained him.[14] Anything occurring after that is the result of that unlawful detention and evidence obtained therefrom should have been suppressed.

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[9] A48, 49.

[10] State Ans. Br. at 23.

[11] *Royer,* 460 U.S. at 498. *Wardlow,* 528 U.S. at 125.

[12] *Wardlow,* 528 U.S. at 125 (noting that an individual "has a right to ignore the police and go about his business or to stay put and remain silent in the face of police questioning")

[13] *Royer,* 460 U.S. at 498. *Florida v. Bostick,* 501 U.S. 429, 437 (1991).

[14] "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.'" *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)).

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

There is no dispute that to establish reasonable suspicion, police must "identify the crimes that an objectively reasonable police officer might suspect to a fair probability" the individual is committing.[15] Apparently, the State does not recognize that the officers' failure to identify the loitering provision they suspected McDougal of violating amounts to a failure to state with "a particularized and objective basis" the crime they suspected to a fair probability McDougal committed.[16] None of the officers' recitations of the conduct they believed to be unlawful as "loitering" actually amount to any loitering violation. [17] Therefore, police testimony "fail[ed] to demonstrate any objective basis to believe that criminal activity was afoot at all."[18]

On appeal, the State provides its own combination of factors which it believes amounts to reasonable suspicion that McDougal violated the loitering statute – "the group was blocking pedestrian traffic, the identified individuals did not live in the area, the location was high crime area, and the officers had information that drug activity was taking place at that exact location."[19] Not

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[15] *Juliano v. State*, 260 A.3d 619, 631 (Del. 2021). See 11 Del. C. §1902 (a).
[16] *United States v. Brown*, 159 F.3d 147, 149 (3d Cir. 1998).
[17] A38, 45, 46.
[18] *McCray*, 148 F. Supp. 2d at 390–91. *Juliano*, 260 A.3d at 631.
[19] State Ans. Br. at 22.

only does the State continue to offer shifting bases for reasonable suspicion of loitering, the bases it offers do not support reasonable suspicion. There is nothing in the record indicating that, if McDougal was blocking pedestrian traffic, he was asked to move out of the way; police did not know whether McDougal lived in the area at the time and the remaining stale generalities contribute nothing to the "loitering analysis" in this case.

In any event, no loitering provision gave police the authority to require McDougal to provide his name for the purpose of a warning as asserted by Moses. Both officers incorrectly believed they had authority to demand an individual's name when issuing a "move along" warning in order to prevent confusion. Moses claimed that if they saw someone "loitering" at the same spot again later, they wanted to make sure they only cited those whom they had previously warned. Unfortunately for Moses, this is not consistent with the law. This Court holds that when an individual is "initially told to move on when the officers first encounter[] him" and "he complie[s] by leaving the immediate area" he does not violate the statute if police see him again later. That would require a new warning.[20] Therefore, if police saw McDougal in the same place later, he could not be cited. So, identification was not required upon warning.

[20] *Carter v. State*, 814 A.2d 443, 445 (Del. 2002).

C. Police Were Not Justified Pursuant To 11 Del. C. §1321 To Detain McDougal To Investigate His Identity.

The State's defense of the trial court's unexplained application of §1321 is quite problematic. As McDougal explained in his Opening Brief, police never cited to any loitering provision during the suppression hearing. Nor was any loitering provision cited by either defense counsel or the prosecutor in pleadings, during the hearing or during argument. And, of significance, the police report, authored by Officer Hunt, was never introduced into evidence. The closest discussion regarding the loitering provision cited in the police report was as follows:

> 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 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.[21]

In the middle of cross examination, defense counsel turned to Hunt for clarification:[22]

> 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

[21] A45.
[22] A45.

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.

The Court: Did you say pedestrian traffic?

Officer Hunt: Pedestrian -- I'm sorry. Pedestrian. Yes, ma'am. The flow -- the flow of people walking on the sidewalk.

The Court: Okay. I think we were both trying to make sure we understood what you were saying. Thank you.

Officer Hunt: I'm sorry.[23]

Defense counsel then asked Hunt whether a violation of the loitering provision he cited in the report required the defendant to have refused a request by a citizen or police officer to move on. Because Hunt seemed confused, counsel offered to show him a copy of the report which the officer appears to have declined.[24]

In his Opening Brief, McDougal pointed to these unsuccessful attempts of clarification as examples of the officers' failure to state with particularity the crime police suspected McDougal committed.[25] Defense counsel responded in uncertain terms when the trial court asked him if police relied upon §1321. And, Officer Hunt's testimony was ambiguous at best. Because

[23] A45.
[24] A46.
[25] Opening Br. at 10-11.

the report was not in the record, McDougal did not rely on it or exploit its contents in any way in his Opening Brief.

Nonetheless, in its Answering Brief the State relies on the same exchanges in support of the following: "*McDougal's counsel* ***confirmed*** *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).*" [26] The State has had the police report in its possession long before McDougal. Thus, it is, or should be, aware that to say Officer Hunt "***confirmed*** that he cited the statute in his report (there was no mention of a city ordinance)" is to create a false impression of what is contained in the police report. The interests of justice require this Court to take judicial notice of the loitering provision cited by Officer Hunt in his police report as Hunt's testimony and defense counsel's responses can hardly be characterized as "confirmations" that Hunt cited the §1321 in the report.

The interests of justice requiring this Court to take judicial notice include: 1) preventing this Court from being left with the false impression, due to the State's incorrect characterization, that Officer Hunt cited the State statute in the police report; 2) preventing any finding that the trial court's decision that §1321 was applicable because that was what was actually cited

[26] State's Ans. Br. at 16.

in the police report; 3) without the police report, McDougal is unfairly prevented from rebutting the truth of the State's assertion; 4) McDougal made no effort in his Opening Brief to exploit any potential inconsistencies between Hunt's testimony and the police report;[27] 5) the police report was created by the State's witness and has been in its possession since that time, so there is no prejudice; 6) there is no reason to dispute the existence of the report; and 7) McDougal requests judicial notice of only the existence of limited facts to rebut an assertion made by the State and not to make affirmative arguments.

In his police report, Officer Hunt cited the entirety of the Wilmington City Ordinance Loitering Provision and specifically articulated "blocking the flow of pedestrian traffic." *See* Police Report, attached hereto as Exhibit A.[28] He did not cite to any provision of the State statute.[29] In taking judicial notice

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[27] *Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 988 F.2d 61, 63–64 (8th Cir. 1993) ("We are faced with a situation in which misrepresentation, willful or otherwise, left the district court with an incomplete picture of the infringement alleged by Industries. … If an appellate court could never consider new evidence in such cases, parties would have a distinct incentive to deceive the district courts, and the appellate courts would be powerless to remedy such deceptions. We make no general holding as to when an appellate court can consider evidence not contained in the record below, but find that in this case the interests of justice require that we do so."). *See Schwartz v. Millon Air, Inc.*, 341 F.3d 1220, 1225 n.4 (11th Cir. 2003) ("We rarely supplement the record to include material that was not before the district court, but we have the equitable power to do so if it is in the interests of justice.").

[28] *D.R.E.* 201.

[29] Appellate courts can take judicial notice of the existence of a fact in an extra-record document even if not the truth of the fact asserted. See *Acquila*

that the Wilmington City Loitering Ordinance was cited in the police report, the Court should disregard the State's characterization that defense counsel and Officer Hunt "confirmed" that §1321 was cited in the report.

Meanwhile, the State puts in all of its chips on its overstated claim that police specifically relied on §1321 (6):

> 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."[30]

Not only did the officers fail to "state the subsection number of the statute at the suppression hearing," *they never mentioned the statute at all*. Because the State's only argument in support of the existence of reasonable suspicion of loitering is based on §1321 (6), it has waived any argument attempting to justify McDougal's detention pursuant to any other loitering provision of §1321 or any loitering provision of the Wilmington City Ordinance. Therefore, this Court must find that none of those provisions justified McDougal's detention.

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v. Superior Court, 148 Cal.App.4th 556 (Ct.App. 2007) (taking judicial notice of government records does not entail accepting the truth of facts expressed therein); *Selkridge v. United of Omaha Life Ins.Co.*, 360 F.3d 155, 162 n.5 (3d Cir. 2004) (court can take judicial notice of existence of letter-to-editor by attorney to show its effect on judge criticized therein).

[30] State's Ans. Br. at 15-16.

Further, our case simply contains no "circumstances that warrant[ed] alarm for the safety of persons or property in the vicinity, especially in light of the crime rate in the relevant area" such as to permit the use of this narrow "stop and identify" provision. Nor did the State argue below the existence of such circumstances. On appeal, the State appears to misapprehend the law again when it asserts that §1321 (6) is the "broadest provision." To the contrary, this "stop and identify" provision requires more than the mere articulation of the generalities that the State continues to parrot.

The circumstances in our case do not add up to those described in §1321 (6).[31] In fact, it is quite illogical to say that the concededly consensual encounter involves circumstances of "alarm for the safety of persons or property in the vicinity, especially in light of the crime rate in the relevant area." Therefore, Moses was not justified pursuant to §1321 (6) to detain McDougal to investigate his identity.

D. 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.

Finally, seizure of the gun after the unlawful pat-down in the absence of reasonable suspicion that McDougal was armed and dangerous raises doubt

[31] Opening Brief at 19-21.

about the fairness of the proceedings and constitutes plain error.[32] Contrary to the State's claim, McDougal's assertion that 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" is supported by the record:

- Moses said once police responded to the area they observed McDougal and companions "loitering;"
- Moses said that standing at an intersection during the day is "loitering;"
- Moses said this loitering behavior authorized him to ask McDougal for his name and to ask if he could conduct a pat down;
- Moses said that if McDougal did not give him his name, he could detain him;
- And, after Moses sat McDougal down, he conducted a pat down almost immediately even though, as he acknowledged, McDougal posed no threat; [33]

Therefore, based on the record, and case law the State does not challenge,[34] police "essentially conceded that they believe they have authority to stop

[32] *Caldwell v. State*, 770 A.2d 522, 535–36 (Del. 2001) (finding the admission of drugs after a confrontation with and pat-down of the defendant by the police in the absence of a reasonable, articulable suspicion that he possessed drugs prejudiced him, raised doubt about the fairness of the outcome of trial and constituted plain error.).

[33] A35, 36, 38, 41.

[34] *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

anyone they briefly observe standing at an intersection during the day and ask them for their name and to conduct a pat down."

More significantly, the State ignores Moses' actual concession that he did not believe McDougal was a threat when he was sitting down because he was "not readily available to try and injure us, his hands are open, I could see."[35] And, the State ignores that there were about 6 or 7 officers, dressed in tactical gear, surrounding and towering over McDougal at the time. They were conducting a loitering investigation, and McDougal made no furtive gestures.

The State tellingly fails to address the lack of clarity in the officer's testimony about the nature of the search and what the body cam video reveals about the nature of the search. Initially, Moses said he did not feel anything before he lifted up McDougal's shirt and pulled out a firearm from inside his pants.[36] However, with leading questions, he responded differently. Accordingly, evidence obtained as a result of the unlawful search should have been suppressed.

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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 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).

[35] A40.

[36] A36, 37, 44.

CONCLUSION

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

Respectfully submitted,

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DATED: October 4, 2023