EFiled: Jun 27 2025 01:51PM EDT
Filing ID 76547028
Case Number 489,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARVIN SWANSON, Defendant-Below, Appellant v. STATE OF DELAWARE Plaintiff-Below, Appellee.	)))))))))))	No. 489, 2024

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S REPLY BRIEF

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DATED: June 27, 2025

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1. Lerro's observations along with the purported tip from a confidential informant did not provide reasonable suspicion to stop Swanson as part of an investigatory detention.

It is the State, not Swanson, that divorces various facts from the totality of the circumstances.[1] The State improperly seeks to bolster the significance of those individual facts with its own speculation as to what inferences could be drawn from them. For example, the officer did not speak to the inference, if any, he drew (or even could have drawn) from Swanson miming the act of pointing a gun. So, in an effort to strengthen the existence of that action, the State argues that it could be interpreted as an act "to warn others he had a gun." [2] The State's speculation cannot be a substitute for the record.

The State also focuses on the fact that there were "call out" warnings in the neighborhood before police detained Swanson. However, the State acknowledges that "police were called out before they had sight of the scene

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[1] State's Ans. Br. at p. 11.
[2] State's Ans. Br. at p. 12.

preventing them from identifying if the callout was directed at Swanson."[3] This concession in addition to the officer's testimony that it is not unusual for individuals to call out warnings when they see police in the area, and that there were multiple people in the area reveals that, in our case, the "call out" added nothing to the equation of general suspicion.[4]

Assuming, *arguendo*, police had reasonable suspicion to stop Swanson, they were required to release him after they found no weapon on him as any reasonable suspicion that may have existed was extinguished.[5] The information the officer possessed was that Swanson had a weapon on him. They had no reasonable suspicion based on any particularized facts that Swanson, a pedestrian, may have stashed the gun or put it in the bin.

The State characterizes the absence of a weapon on Swanson as merely "a discrepancy" and claims that permitted further detention. This rationale is backwards. The specific claim by the informant that Swanson was engaged in criminal conduct, turned out to be untrue. At this point, to the extent this Court determines that the initial detention was lawful, the continued detention

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[3] State's Ans. Br. at p.13.
[4] A73-74.
[5] *Purnell v. State,* 931 A.2d 437 (Del. 2007) (this Court found that a further detention and search of the defendant was unreasonable after an initial search of the defendant revealed no weapons which dispelled an informant's claim).

became unlawful.[6] The State's rationale would support a finding that a continued detention is permissible so police can continue to investigate anytime that an initial lawful stop does not yield evidence of criminal conduct alleged by the informant.

The State is also wrong in its assertion that "a finding that the officers had reasonable articulable suspicion to detain Swanson while they canvassed the area" is not consistent with *Howard v. State*.[7] In that case, the Court concluded that a 40-minute detention following a traffic stop to obtain "the assistance of a drug sniffing dog" was reasonable. However, the continued detention in that case, unlike in ours, occurred after police actually witnessed conduct consistent with drug dealing, not after discovering the lack of evidence. But, more significantly, the continued detention was to obtain assistance in a search already authorized upon execution of the traffic stop. A delay to obtain assistance to conduct a less intrusive search than was permissible was reasonable. Here, police completed its permissible search of

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[66] The State argues that this "issue" was not raised on appeal. State's Ans. Br. at 17. It fails to understand that the continued detention in its entirety, including the transportation, is being challenged. And, continuing to detain Swanson after no weapon was found, is a factor in determining whether the transportation to the station was reasonable and necessary.

[7] 2007 WL 2310001 (Del. Aug. 14, 2007).

Swanson, a pedestrian. They found nothing. The informant did not know that a gun existed elsewhere.[8] No further detention was permissible.

Generally, a continued detention of a defendant while police canvas of the area is permissible when the defendant fled from police, there was a reason to suspect that he may have discarded contraband along the way, and the canvas is conducted around the flight path.[9] Here, there were no such facts allowing for continued detention during a canvas of the area.

2. Assuming, *arguendo*, police had reasonable, suspicion to justify Swanson's initial detention, police unlawfully converted that stop into a *de facto* arrest when they transported him to the police station.

Regardless of whether this Court finds the initial or continued detention at the scene to be reasonable, it must conclude that it was not "reasonable and necessary" under §1902(c) to transport Swanson from the scene to continue an investigation by obtaining a DNA sample from him.[10] Contrary to the

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[8] A95.

[9] *See United States v. Vasquez*, 638 F.2d 507, 523–24 (2d Cir. 1980) (allowing restraint of suspect while officers searched a shopping bag, which was dropped at suspect's feet and suspected of containing a weapon); *see also United States v. Caruthers*, 458 F.3d 459, 468–69 (6th Cir. 2006) (abrogated on other grounds) (police approached defendant while investigating a shot-fired call, the defendant fled but was observed in a position suggesting that he was discarding what might have been a gun); *United States v. Soto–Cervantes*, 138 F.3d 1319, 1323 (10th Cir.1998) (upholding *Terry Stop* while police searched nearby area after noting detainee's furtive movements "could support an inference that the man had left to hide something upon spotting the officers").

[10] A34, 109.

State's argument, Swanson never claimed that *Hayes v. Florida*[11] "created a categorical ban on the removal of suspects from a location absent probable cause of a warrant."[12] However, the language in *Hayes* could not be more clear, "the line is crossed when the police, without probable cause or a warrant, forcibly remove a person from his home *or other place in which he is entitled to be* and transport him to the police station, where he is detained, although briefly, for investigative purposes."[13] As Swanson acknowledged in his opening brief, there are limited non-investigative circumstances, such as the interest of safety or security, where transportation from the scene may be reasonable and necessary in the absence of probable cause.[14] There just simply are no such non-investigatory interests in our case to justify Swanson's transportation. [15] In fact, the State and the trial court[16] both recognized the

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[11] 470 U.S. 811 (1985).
[12] State's Ans. Br. at p.20 (citing Opening Brief at p.16).
[13] 470 U.S. at 816. *See State v. Murray*, 213 A.3d 571, 577 (Del. 2019) (noting the holding in *Hayes)*. *But see State v. Biddle*, 1996 WL 527323, at *18 (Del. Super. Ct. Aug. 9, 1996) (finding that fingerprinting taken at the station was not unlawful because the defendant consented to the transportation); *United States v. Parr*, 843 F.2d 1228 (9th Cir. 1988). "[T]here is no such thing as a Terry 'transportation.' Rather, the removal of a suspect from the scene of the stop generally marks the point at which the Fourth Amendment demands probable cause." *Centanni v. Eight Unknown Officers*, 15 F.3d 587, 591 (6th Cir. 1994).
[14] *Id.*
[15] Ex. A at 16.
[16] The trial court recognized the significance of the lack of safety or security concerns in our case when it explained the distinction between our case and

nature of these exceptions, then shoved them aside and concluded there is a reasonable basis under *Hayes* to transport Swanson for investigative purposes.

The State's discussion of *Delvalle v. State*[17] further reveals a misunderstanding of when continued detention is justified. Pursuant to 11 Del. C. §1902 (b), when a person is lawfully stopped and *"fails to give identification or explain the person's actions to the satisfaction of the officer may be detained and further questioned and investigated."* This statute specifically authorizes a continued detention for purposes of identification only. In *Davella,* the defendant provided different names. One of the incorrect names he gave police was linked to active capiases. Therefore, unlike in our case, police were permitted to continue to detain the defendant.

Further, there were no exigent circumstances to continue to detain Swanson and take him to the station. Police got the gun off the street, any DNA sample that might be needed from Swanson was not in danger of disappearing, and police could seek to obtain a lawful search warrant.

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that of *State v. Kang*, 2001 WL 1729126, at *7 (Del. Super. Nov. 30, 2001). Yet, the trial court went on to uphold the transport based on the need of DNA for investigation

[17] 2013 WL 4858986, at *3 (Del. Sept. 10, 2013)

The State also erroneously argues that police had probable cause to transport Swanson to the station to obtain DNA evidence. As an initial matter, this claim should not be addressed as the State abandoned it below. In its response to Swanson's motion, the State contested Swanson's argument "that the police did not have probable cause to transport Swanson to the police station upon his detention" by stating, "probable cause is not the standard here." [18] When defense counsel noted at the end of the hearing that it appeared the State had abandoned that issue the prosecutor asserted that she had not. However, she never followed up with a legal argument.[19] And, as the trial court noted in its decision, the parties agreed that reasonable suspicion was the standard to be applied. [20]

In any event, police had no probable cause to arrest Swanson and take him to the station. As the State conceded, a search of Swanson revealed no weapon. Further, there was no specific or particularized information linking Swanson to the weapon later found in the bin. These facts did not create probable cause to arrest Swanson to obtain his DNA in an effort to establish the link. In this respect, our case is different from those cited by the State regarding probable cause. In the State's cases, contraband was found on the

[18] A34.
[19] A103, 109-121.
[20] Ex. A at p.8.

defendant upon arrest.[21] Here, any potential reasonable suspicion or probable cause was extinguished when no weapon was found on Swanson.

Finally, the manner in which police sought to obtain the DNA sample, (seeking consent from Swanson at the station) and the fact that police released Swanson after he gave his sample but before any link was discovered undercuts any claim of probable cause. An exception to the warrant requirement that allows police to drag an individual to the station for further investigation when the original stop fails to provide probable cause would be an exception that swallows the requirement that probable cause exist before police can arrest an individual.

[21] See *King v. State*, 1993 WL 445484; *Fuller v. State*, 844 A.2d 290 (Del. 2004); *Darling v. State*, 2004 WL 1058363 (Del. Apr. 29, 2024).

II. THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT FAILED TO ASK POTENTIAL JURORS DURING VOIR DIRE WHETHER THEY HAD BEEN OR WERE CURRENTLY A VICTIM IN A CRIMINAL CASE.

It is true that *Knox v. State*[22] involved unusual circumstances. However, the nature of those circumstances does not undercut Swanson's argument. Rather, those circumstances served as an opportunity for the Court to identify the harm that results from failing to allow counsel, as a matter of course, to probe potential jurors as to the existence of "victim bias." In *Knox*, it was by happenstance that it was discovered that the problematic juror was a victim in an unrelated case that was being handled by the State. Generally, the parties would not be aware of the existence of victim bias unless they asked the question. This is precisely why the question probing victim bias must be asked.

Further, the Court explained the importance of probing "victim bias" even when the potential jurors are asked a general question as to whether they know the prosecutor or anyone in his/her office.

> Unlike a witness who is indifferent to the resolution of a case and has no formal relationship with the prosecution, a victim is emotionally invested in the outcome and personally dependent on the attorney general to bring the person the victim perceives to be the wrongdoer to justice.[23]

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[22] 29 A.3d 217, 224 (Del. 2011).
[23] *Id.* at 221.

It is for this same reason that the trial court's question regarding the criminal justice system in general is not sufficient.

Further, the State is wrong in relying on the fact that there was no victim in this case as a mitigating factor. The bias at issue is not necessarily toward the victim, it is toward the prosecution who is assisting the jury in another case. Finally, the State fails to address the fact that the State was given the opportunity to weed out jurors who may have had a bias against it when the judge asked,

> Are you, any member of your immediate family, or a close personal friend, under investigation for, or being prosecuted for any criminal offense anywhere?[24]

The language in *Knox* does not indicate that the holding is limited to the facts of that case. Thus, the trial court's failure to ask that question in our case amounts to plain error. It denied Swanson his fundamental rights to trial by an impartial jury as set forth in Sixth Amendment of the United States Constitution and Article I, § 7 of the Delaware Constitution, thus, his convictions must be reversed.

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[24] A134.

CONCLUSION

For the reasons and upon the authorities cited herein, Swanson's convictions must be reversed.

Respectfully submitted,

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DATED: June 27, 2025