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IN THE SUPREME COURT OF THE STATE OF DELAWARE

KENNETH SWANSON, Defendant-Below, Appellant v. STATE OF DELAWARE Plaintiff-Below, Appellee.	)))))))))))	No. 364, 2024

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S REPLY BRIEF

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DATED: June 3, 2025

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I. OFFICERS CONDUCTED AN UNREAONABLE SEARCH OF SWANSON WHEN, WITHOUT JUSTIFICATION, AND IN PUBLIC, THEY REACHED INTO HIS UNDERWEAR AND GRABBED WHAT THEY BELIEVED TO BE UNLAWFUL DRUGS.

Delaware's premiere case explaining plain error reversed because the lower court failed to suppress a defendant's statements made in violation of his Fifth Amendment right to counsel notwithstanding defense counsel's concession at a suppression hearing.[1] Here, while Swanson conceded nothing, there was a failure to file a motion to suppress evidence obtained as the result of the illegal invasion of the most intimate level of his privacy-his body. This invasion was not only intrusive, it was highly demeaning, embarrassing and humiliating. One cannot fathom that the use at trial of evidence obtained from such a search is not "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." Accordingly, contrary to the State's assertion, this Court must review this issue for plain error.

The State is simply wrong in its bald claim that "[t]he test articulated in *Bell* to determine the reasonableness of inmate strip searches under the Fourth Amendment is inapplicable here because this case does not involve a strip search or a routine search of a defendant at the police station." [2] That assertion

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[1] *Wainwright v. State*, 504 A.2d 1096 (Del. 1986).
[2] State's Resp. Br. at p. 17 (*citing Bell v. Wolfish*, 441 U.S. 520 (1979)).

is also confusing given the State's citation to and reliance on multiple cases that apply the *Bell* test to "reach in" searches, the type of search the State concedes occurred in our case.

The factors in *Bell* are relevant in "sexually invasive searches" such as the one that occurred in our case. "[A] sexually invasive search constitutes an extreme intrusion upon personal privacy, as well as an offense to the dignity of the individual."[3] "When 'a search involves movement of clothing to facilitate the visual inspection of a person's naked body, the search qualifies as a type of sexually invasive search.' And '[w]hen the scope of a search exceeds a visual inspection of an individual's naked body, the magnitude of the intrusion is even greater.'"[4] This type of search is considered not only an "extreme intrusion upon personal privacy," but also "an offense to the dignity of the individual."[5] Accordingly, courts regularly apply the *Bell* test in assessing the reasonableness of these "invasive" searches that are public in nature.[6]

In what is apparently its "alternative" argument, the State is unsuccessful in establishing that an assessment of the *Bell* factors in our case require a conclusion that the sexually invasive search was reasonable.

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[3] *Johnson v. Robinett*, 105 F.4th 99, 113-114 (4th 2024).
[4] *Id.* at 114.
[5] *Id*. at 113.
[6] *Id.* at 114; *Coates v. State*, 2025 WL 87957*2 (Md.App.Ct. 2025).

The State tries to minimize the scope of the invasive search by claiming it only lasted a few seconds and that the public did not see Swanson's nude body. These facts ignore the obvious. A "strange" man reached his hands into Swanson's bare genital area out in the middle of the Sunoco gas pump bay area. It matters not whether it was 5 seconds, 10 seconds or 15 seconds. A reasonable man would regard that as an unreasonable intrusion into a very intimate area, highly demeaning, embarrassing and humiliating.

Further, the State's own cases illustrate that the manner in which police conducted the sexually invasive search was unreasonable. Cases cited by the State in which searches were upheld show officers who affirmatively took steps to prevent the defendant from being exposed to others or from being subjected to embarrassment. For example, officers either placed themselves between the car and the defendant or placed the defendant on the side of the car blocking the view of driver's passing by.[7] Some cases also occurred at night, i.e., in the dark.[8]

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[7] *State v. Smith*, 464 S.E. 2d 45, 46 (N.C. 1995) (officer placed himself between the defendant and the car door); *United States v. Gordon*, 2008 WL 3540007, at *3 (D. Utah Aug. 2008) (search occurred behind passenger side door on shoulder of road); *Cuffey v. State*, 2022 WL 17177328 (Md. Ct. Spec. App. Nov. 23, 2022) (search conducted next to officer's vehicle behind rear driver's side door).

[8] *Smith*, 464 S.E. 2d at 46 (search occurred at 1:30 a.m.); *Gordon*, 2008 WL 3540007, at *3 (search occurred at 1:30 a.m.).

Remarkably, the officers in our case affirmatively moved Swanson from between the car and gas pump where he would have more privacy to out in the middle of the gas pump bay. There is no apparent reason for them to have done so in this situation. Even more disconcerting is that it was 11:00 a.m.

To justify this sexually invasive search, the State repeatedly cites to the officers' belief that Swanson possessed illegal drugs. If that belief were sufficient to justify not only a search incident to arrest, but a sexually invasive search, then police would be permitted to conduct sexually invasive searches in all drug arrests.

Further, that there "have been times" that suspects have slipped out of their cuffs to put objects in different locations is not an exigent circumstance. Swanson would have been confined in a vehicle and could easily have been monitored by police. There was also information prior to the stop that Swanson had weapons on him[9] and he had been compliant during the entire interaction. No exigency existed such that an invasive search, conducted at the scene of the arrest, was reasonable.

Finally, the specific location of the invasion does matter in this case. The State claims that Swanson is factually incorrect in his Opening Brief when

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[9]A28.

he states there were "several people present who were pumping gas at the time when the officers searched Swanson, nor were there people going in and out of the store."[10] However, at trial, officer's testified as follows:

> Randazzo:
> Q: There's a convenience store on the right, people getting gas, people driving on the road. Correct? On Maryland Avenue.
> A. Correct, there are.[11]
>
> Walker:
> Q: And then same scenario, convenience store here, other customers using gas pumps. Correct?
> A: I believe so.[12]

So, considering actual testimony, and not counsel's perception from the video, it appears that officers chose to make the opposite decision of the officers in several of the State's cases. [13] Rather than taking Swanson's privacy into consideration, the officers here took the handcuffed Swanson

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[10] State's Resp. Br. at p.27.
[11] A31-32
[12] A47
[13] *United States v. Williams*, 477 F.3d 974, 977 (8th Cir. 2007) (officer made an effort to protect the defendant's privacy by moving him to a more private parking lot that was partially secluded and no one other than officers were within eyesight of the search); *State v. Jenkins*, 842 A.2d 1148, 1151, 1158 (Conn. App. 2004) (police conducted the search out public view on the side of a restaurant).
Peroceski v. Tarr, 2009 WL 3202463, at *3 (D. Minn. Sep. 30, 2009) (police opened defendant's car door, moved defendant toward it, then stood in front of him to diminish potential invasion of suspect's privacy); *United States v. Ashley*, 37 F.3d 678, 682 (D.C. Cir. 1994) (conducted search on a side street and stood in front of suspect during search); *Smith*, 464 S.E.2d at 46 (police used himself and the car door to shield the suspect from view).

from between his car and the gas pump out to the middle of the wide-open gas pump bay area in view of the public.[14]

Accordingly, due to the invasive search of Swanson's groin, the lack of justification for such an invasive search on the scene and the failure of police to make any effort to maintain or respect Swanson's privacy, the search was unreasonable. Thus, the admission of the drugs obtained as a result of that search clearly deprived him of a substantial right and was a manifest injustice. His conviction must now be reversed.

[14]A14, 31-32, 47.

CONCLUSION

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

Respectfully submitted,

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