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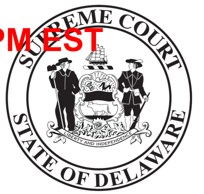

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JARROD PENN,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 416, 2025
	)	
STATE OF DELAWARE	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S CORRECTED OPENING BRIEF

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DATED: February 17, 2026

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NATURE AND STAGE OF THE PROCEEDINGS

On May 9, 2022, Jarrod Penn was indicted for Drug Dealing, Possession of a Firearm During the Commission of a Felony, Possession of a Firearm by a Person Prohibited, Possession of Ammunition by a Person Prohibited, Carrying a Concealed Deadly Weapon and Resisting Arrest.

On February 10, 2023 a Motion to Suppress was filed. On April 4, 2023, the State's response to the Motion was filed. On April 14, 2023, the suppression hearing occurred.

The Judge issued an Opinion on May 1, 2023 denying the motion to suppress.

Jury trial occurred on September 3 and 4, 2024. Mr. Penn was found guilty on all counts. At Sentencing on September 19, 2025, Mr. Penn was Sentenced to a total of 21 years Level 5 suspended after 8 years minimum mandatory level 5 followed by Level 3 probation. This is the Opening brief of his timely filed appeal.

SUMMARY OF THE ARGUMENT

1. Mr. Penn was walking with one side of his jacket hanging lower than the other and he was not paying attention to Sergeant Ketler. There was no reasonable suspicion of a crime when Sergeant Ketler approached him and Sergeant Ketler acknowledged at the suppression hearing that he was free to leave. Sergeant Ketler, in response to Mr. Penn asking "why are you messing with me," said "I believe you have a firearm." This statement by Sergeant Ketler converted this encounter into an investigative detention without the necessary reasonable suspicion. Mr. Penn, after being told "I believe you have a firearm," then reaching for or touching the outside of his jacket pocket where the firearm was believed to be, does not provide the missing reasonable suspicion for a stop. Mr. Penn then running also does not provide reasonable suspicion as this was an unlawful attempted detention.

2. Additionally, even if Sergeant Ketler believed Mr. Penn was carrying a concealed deadly weapon, it is not a crime unless Mr. Penn is not licensed. Here, Sergeant Ketler did not have reasonable suspicion that he was not licensed and for this, independent reason, the firearm and drugs should have been suppressed.

3. Finally, Officer Akil took the drugs out of Mr. Penn's pocket and put them back. He should have been considered the seizing officer, but he was not

called by the State nor required to be present at trial. Officer Moses, by testimony, discussed the fact that Officer Akil found the drugs. Because a necessary chain of custody witness, Officer Akil, was not present to be cross examined, the drug and firearm during commission of a felony convictions should be reversed.

STATEMENT OF FACTS

Suppression Hearing

On March 31, 2022, Sergeant Ketler of the Wilmington Police Department was in an unmarked car in the area of Cityview Avenue and 30th Street in Wilmington, DE. (A80, 81) There was a traffic stop down the street unrelated to this case. (A87, 88) As Sergeant Ketler was about to assist, he observed Mr. Penn walking across the street and noticed his right jacket pocket was unzipped and was extremely lower than his right hip area. (A89, 90) His left jacket pocket was high on his hip area. (A90) He testified that this is part of the characteristics of armed gunmen training. (A90) He testified it would take "maybe four cell phones" to weigh the pocket down that much. (A92)

Mr. Penn walks into the park and sits on a bench. (A93) He looked nervous while sitting on the bench. (A94) He then exited the park. (A95) Sergeant Ketler then told other units Mr. Penn may be armed with a firearm. (A95) Mr. Penn then walked onto the steps of a residence-33 East 30th Street and it looked like he was going to enter the residence. (A97, 98) Sergeant Ketler said it looked like, "in my opinion, blading" that he was blading his body to make himself slimmer. (A99) Sergeant Ketler did not see a firearm.

(A100) Sergeant Ketler also acknowledged that Mr. Penn was looking at the traffic stop down the road and not looking at Sergeant Ketler. (A114, 118).

Sergeant Ketler pulled up behind him, exited his vehicle, Mr. Penn seemed startled, and Sergeant Ketler asked if he could speak to him. (A100, 101) Mr. Penn then asked "Why are you messing with me." (A102) Sergeant Ketler said, "I believe you have a firearm" (A103) Mr. Penn, then, according to Sergeant Ketler asked "Why are you fucking with me" and raised his right hand and Sergeant Ketler believed he was either going into his pocket or doing a security check. (A103) Sergeant Ketler also testified regarding this time period, that he bladed and "put his elbow or his hand" towards his right pocket where the firearm would be-later clarifying it was his hand not his elbow. (A103, 104). After that, he told him "do not put your hand in your pocket." (A104) He also testified that his body camera was not on because as a supervisor he doesn't normally engage in these types of activities, but that it was his fault. (A104, 105). He also stated, "Absolutely, I should have it on." (A109)

Officers Lerro and Akil came to the location and they had their body cameras on. (A105) Officer Lerro recovered a firearm out of Mr. Penn's right jacket pocket. (A108) On cross examination, Sergeant Ketler testified that Mr.

Penn fled after Sergeant Ketler said "I believe you have a gun in your pocket and Mr. Penn said "stop messing with me." (A122)

Sergeant Ketler testified when he asked him if he could speak with him, Mr. Penn was not in custody and he was free to leave. (A128, 129) He could have walked away. (A129) He was in custody when Sergeant Ketler told him not to put his hands in his pocket because he thought he had a gun. (A129) This occurred after Sergeant Ketler told him "I believe you have a firearm." (A103, 104) Drugs were also recovered out of his left jacket pocket. (A131)

Trial-Day 1; Sep. 3, 2024

Before trial both defense counsel and Mr. Penn informed the Court that Officer Akil was on the *Brady* list for having misrepresented something previously in Court. (A143-145) Mr. Penn mentioned his right to confront Officer Akil for chain of custody purposes as Officer Akil took the drugs out of his pocket. (A147) The State indicated that Officer Akil would not be called and stated that they do not believe Officer Akil is in the chain of custody. (A148) Chain of custody was also discussed by defense counsel at a side bar during a cross examination. (A213)

Detective Lerro conducted a vehicle stop on East 30th Street in Wilmington on March 21, 2022. (A173, 174) He was advised by Sergeant Kelter that help was needed stopping a subject up the street. (A176) Body

camera video was played. (A180, 181) When Detective Lerro got out of his vehicle and started walking towards Mr. Penn, he testified that Mr. Penn started going to the opposite sidewalk. (A184) Det. Lerro was wearing plain clothes with a black vest that said "police street crimes unit." Detective Lerro testified Sergeant Ketler got out of his vehicle once Mr. Penn fled.[1]

Mr. Penn takes off running and is chased by officers and taken into custody. (A185) Det. Lerro patted him down and felt a firearm. (A187) He unzipped his jacket pocket and removed the firearm. (A187) Corporal Akil reached into his jacket pocket on the left side and removed 78 baggies of crack cocaine. (A195) Corporal Akil then puts the drugs back in Mr. Penn's jacket pocket. (A197)

Detective Moses testified that when he arrived at the scene, Detective Lerro and Sgt. Kelter were already at the scene and had someone in custody. (A235) At the station, he took custody of the crack cocaine from Mr. Penn. (A236) He collected the drugs from the jacket pocket but couldn't recall if Mr. Penn was still wearing the jacket or not. (A248) Det. Moses stated that he did not turn his body camera on while collecting the drugs because he was

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[1] At the suppression hearing, Sgt. Ketler testified that he exited his vehicle before the encounter.

"aware they already found it on scene" and he was "just going through my process of tagging the drugs. (A249)

On cross examination, he was asked about Wilmington Police Directive 6.93 which says officers will activate body cameras when exercising official police power. (A253) Det. Moses answered he did not think body camera was necessary because it was already located by Officer Akil. (A254)

The Chemist testified that the drugs were confirmed to be cocaine and weighed 7.10 grams. (A288, 289)

Trial Day 2; Sep. 4, 2024

The jury found Mr. Penn guilty of Drug Possession, Possession of a Firearm During the Commission of a Felony, and Carrying a Concealed Deadly Weapon. (A372) The State entered a nolle prosequi on the charge of Resisting Arrest because the jury was not able to reach a unanimous verdict on that charge. (A370) In the B trial, Mr. Penn waived his right to a jury trial for the charges of Possession of a Firearm by a Person Prohibited and Possession of Ammunition by a Person Prohibited and elected to proceed with a bench trial. (A376) He was found guilty of those two charges. (A378).

I. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT FOUND THAT POLICE HAD REASONABLE SUSPICION FOR THE STOP BASED ON MR. PENN REACHING AT THE AREA OF HIS RIGHT POCKET DURING A CONSENSUAL ENCOUNTER

Question Presented

Whether an officer telling a defendant "I believe you have a firearm" during a consensual encounter constitutes police conduct consistent with a consensual encounter or an investigative detention, and whether a consensual encounter is then converted into an investigative detention based on a defendant touching or reaching for the outside of a jacket pocket where a firearm is believed by the officer to be. (A63-137)[2](Exhibit B)[3]

Standard of Review

"This Court reviews suppression decisions for an abuse of discretion. Our review of the trial court's legal conclusions, however, is *de novo*. When the trial court denies the motion after an evidentiary hearing, our review of its factual findings is deferential; the inquiry is whether there was sufficient evidence to support those findings and whether they were clearly erroneous."[4]

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[2] Suppression Hearing.
[3] Motion to Suppress Opinion.
[4] *Diggs v. State*, 257 A.3d 993, 1003 (Del. 2021).

"[T]his Court reviews *de novo* whether police possessed reasonable articulable suspicion to stop a person."[5]

Argument

"A consensual encounter during which a police officer asks a citizen a question is not a seizure under the Fourth Amendment of the United States Constitution or Article 1, §6 of the Delaware Constitution. No level of suspicion is required to support a consensual encounter. An investigative detention, though a more limited intrusion in scope and duration than an arrest, nevertheless constitutes a seizure and is permissible only when there is 'some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.'"[6]

In *Diggs v. State*, the Court described a consensual encounter in the following manner: "A consensual encounter would include-as happened initially here-a police officer asking a citizen a question."[7]

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[5] *McDougal v. State*, 314 A.3d 1077, 1086 (Del. 2024).
[6] *McDougal v. State*, 314 A.3d 1077, 1086 (Del. 2024); *See also* 11 *Del. C.* Sec. 1902(a) ("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.").
[7] *Diggs* at 1003, 1004.

As the United States Supreme Court explains in *Florida v. Royer*, "law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the Street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him, if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to those questions.[8] The Court explains in *Florida v. Bostick*, "So long as a reasonable person would feel free to disregard the police and go about his business, the encounter is consensual and no reasonable suspicion is required. The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature."[9]

The Court went on to explain: "We adhere to the rule that, in order to determine whether a particular encounter constitutes a seizure, a Court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' request or otherwise terminate the encounter."[10]

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[8] *Florida v. Royer*, 460 U.S. 491, 499 (1983)
[9] *Florida v. Bostick*, 501 U.S. 429, 434 (1991)
[10] *Id.* at 439

In *Florida v. Bostick*, two officers boarded a bus, asking for consent to search Bostick's suitcase and told him he could refuse consent.[11] The United States Supreme Court remanded so that the Florida Courts could could evaluate the seizure question under the correct legal standard which includes an evaluation of all of the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter.[12]

In *McDougal*, the officer asked McDougal if he had firearms on him and he said no; he asked him if he could pat him down and he said no; and he asked if he could get his name and he refused."[13] This Court explained: "But becuase Officer Moses did not, at the time he detained McDougal, have reason to suspect that McDougal had committed or was about to commit a crime, McDougal was free to decline to answer Officer Moses's questions and should have been allowed to go on his way."[14]

A. Sgt. Ketler telling Mr. Penn "I believe you have a firearm" would communicate to a reasonable person that he was not free to leave

The following exchange occurred at the suppression hearing:

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[11] *Id.* at 431, 432.

[12] *Id.* at 437-439.

[13] *McDougal v. State*, 314 A.3d 1077, 1081 (Del. 2024).

[14] *Id.* at 1090.

> Prosecutor: After you asked the Defendant could you speak with him, what did the Defendant do?
>
> Sergeant Ketler: Why are you messing with me was his response.
>
> Prosecutor: He said why are you messing with me?
>
> Sergeant Ketler: Yeah, why are you messing with me?
>
> Prosecutor: So he didn't answer your question?
>
> Sergeant Ketler: He did not
>
> Prosecutor: What happened next?
>
> Sergeant Ketler: Well, my response to him, "Why are you messing with me" was, I believe you have a firearm. A102–103.

At the suppression hearing, Sergeant Ketler described this part of the encounter as a part in which he was not in custody and was free to leave.[15] Similarly, the trial court Opinion described this part of the encounter as consistent with a consensual encounter.[16]

A consensual encounter gives an officer the right to ask questions without the need for reasonable suspicion as long as the person being questioned is free to leave. Here, Sergeant Ketler made a statement: "I believe

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[15] A128, 129.

[16] *State v. Penn*, 2023 WL 3221887 (Del. Super. 2023) at *3 ("Sergeant Ketler's actions prior to ordering Mr. Penn to keep his hands by his side were consistent with a consensual encounter.").

you have a firearm," which would communicate to a reasonable person that they are not free to leave. Sergeant Ketler could have simply responded to Mr. Penn that he is not trying to mess with him, he just has a couple of questions for him. Sergeant Ketler's stated belief that Mr. Penn had a firearm combined with exiting his car and the fact that Mr. Penn appeared startled, converted this encounter from a consensual encounter to an investigative stop without reasonable suspicion. Sergeant Ketler acknowledged at the suppression hearing that he was free to leave at this point in the encounter. The problem is that a reasonable person would not feel free to leave when an officer says "I believe you have a firearm." As this Court states in *Jones v. State*, "If an officer attempts to seize someone before possessing reasonable and articulable suspicion, that person's actions stemming from the attempted seizure may not be used to manufacture the suspicion the police lacked initially."[17] Similarly, here, any actions by Mr. Penn after Sergeant Ketler says "I believe you have a firearm," should not be considered in the reasonable suspicion analysis as his statement to Mr. Penn was made without reasonable suspicion of a crime.

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[17] *Jones v. State*, 745 A.2d 856, 874 (1999); *See also, Woody v. State*, 765 A.2d 1257, 1264 (Del. 2001)("An individual may walk away from an officer who initiates an encounter and refusal to cooperate with the officer cannot be the sole grounds constituting reasonable suspicion."); *State v. Y.A.*, 2025 WL 3528694 (Del. Fam. Ct. 2025) ("*Woody* recognized at the outset that an individual may walk or even run away from a mere consensual encounter with police.").

B. The trial court erred in finding that Sergeant Ketler initiated the stop when he told Mr. Penn not to put his hand in his pocket because reasonable suspicion for a stop did not exist at that point

In *Jones*, this Court discussed the factual circumstances of the attempted stop in that case as follows: "By ordering Jones to stop and remove his hands from his coat, Patrolman Echevarria communicated to a reasonable person that he or she was not free to ignore the police presence. The reasonableness of Patrolman Echevarria's suspicion must rest on the facts known to him at the time he ordered Jones to stop. He had no reasonable and articulable ground to suspect that Jones was committing, had committed or was about to commit a crime."[18]

The trial court, in the instant case, found that "Sergeant Ketler initiated the stop when he told Mr. Penn not to put his hand in his pocket."[19] Since the Court stated that this began as a consensual encounter,[20] the Court would have to believe that the reaching activity converted the consensual encounter to an investigative detention. It is not completely clear what the reaching activity was. Sergeant Ketler did not activate his body camera which could have shed

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[18] *Jones v. State*, 745 A.2d 856, 863 (Del. 1999).
[19] *State v. Penn*, 2023 WL 3221887 (Del. Super. 2023) at *4.
[20] *Id.* at *3 ("Sergeant Ketler's actions prior to ordering Mr. Penn to keep his hands by his side were consistent with a consensual encounter.")

light as to what it was. His testimony was that "he literally put his elbow or his hand on that firearm," in the area "Where I believed the firearm was to be," and clarified that "it was his hand, it wasn't his elbow."[21] His testimony would suggest that before he told Mr. Penn not to put his hands in his pocket, Mr. Penn simply touched, or reached in the area of, the outside of his coat which was also hanging down on the right side, in the area where Sergeant Ketler believed the firearm to be.

This, alone, is not enough to convert a consensual encounter to an investigative detention. It could be, if the right side of the coat was hanging down, Mr. Penn was trying to adjust it to make it more comfortable. It is interesting to note that Sergeant Ketler initially mentioned that it was Mr. Penn's elbow before clarifying that it was his hand that was used. He also answered the Prosecutor's question about it being his right elbow to his right side and did not immediately clarify.[22]

Similar to the factual circumstances in *Jones*, here, Sergeant Ketler did not have reasonable and articulable suspicion that a crime had been committed, was being committed, or was about to be committed when he

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[21] A103, 104.
[22] A104 ("Q. So he put his right elbow to his right side? A. Where I believed the firearm was to be.").

ordered Mr. Penn not to put his hands in his pocket. And, like *Jones*, anything that occurs after this point cannot form the basis of a stop.

II. CARRYING A CONCEALED FIREARM, ALONE, IS NOT AUTOMATICALLY A CRIME AND THEREFORE, THIS ALONE SHOULD NOT FORM THE BASIS FOR REASONABLE SUSPICION FOR A CRIME UNLESS THERE IS EVIDENCE THAT THE PERSON IS NOT LICENSED

Question Presented

Whether an officer who believes an individual is carrying a concealed deadly weapon, without more, may conduct an investigative detention of the individual given that carrying a concealed deadly weapon is not a crime unless the individual is not licensed to carry. Additionally, whether the license element of the carrying concealed deadly weapon statute should be an element of the offense. (A27, 28) (The reasonable and articulable suspicion portion of this issue was raised below by suppression hearing counsel's motion to suppress. (A27, 28) (The element of the offense portion of the issue was not raised below but should be heard by this Court in the interest of justice given that the reasonable suspicion portion of this issue was raised below.)

Standard of Review

"The trial court's legal conclusions, including those addressing constitutional issues, are reviewed de novo."[23]

Argument

[23] *Terreros v. State*, 312 A.3d 651, 660 (Del. 2024).

In *State v. Murray*, when the officer apprehended Murray for suspicion of possession of a firearm, Murray began posturing himself behind his friend and turning and blading his right side away from the officer.[24] This Court, later in the Opinion appearing to reference this behavior states: "If a person has a legal right to carry a concealed weapon, that person has no need to act like someone in possession of illegal contraband."[25] This Court reversed the Superior Court and found that the motion to suppress should have been denied.[26]

The dissenting Opinion in *Murray* states that this Court should reconsider *Upshur v. State*[27] which is a case in which this Court held that licensure is an affirmative defense, and that this Court should consider Murray's Fourth Amendment rights in terms of the fact that "carrying a concealed deadly weapon is not in and of itself against the law."[28] The dissenting Opinion also notes that Pennsylvania, as discussed in *Commonwealth v. Hicks* "has rejected the notion that a police officer may

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[24] *State v. Murray*, 213 A.3d 571, 573 (Del. 2019).
[25] *Id.* at 580.
[26] *Id.* at 574.
[27] *Upshur v. State*, 420 A.2d 165 (Del. 1980).
[28] *Id.* at 584, 585 (Traynor, J., dissenting).

infer criminal activity merely from an individual's possession of a concealed firearm in public."[29]

In *Commonwealth v. Hicks*, the Pennsylvania Supreme Court held, "We find no justification for the notion that a police officer may infer criminal activity merely from an individual's possession of a concealed firearm in public."[30] The *Hicks* Court compared the situation to *Delaware v. Prouse* in the following manner: "The Court's concern in *Prouse* was with the 'unfettered governmental intrusion' upon the rights of the individual solely at the 'unconstrained discretion' of a single law enforcement officer in the field."[31] *Delaware v. Prouse* was a case in which both this Court and the United States Supreme Court agreed that stopping motor vehicles to see if the driver was licensed was unreasonable.[32]

The Pennsylvania Supreme Court in *Hicks* also noted that hundreds of thousands of Pennsylvanians are licensed to engage lawfully in concealed firearm possession.[33]

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[29] *Id.* at 583.
[30] *Commonwealth v. Hicks*, 208 A.3d 916, 936 (Pa. 2019).
[31] *Id.* at 396 citing *Delaware v. Prouse*, 440 U.S. 661 (1979).
[32] *State v. Prouse*, 382 A.2d 1359 (Del. 1978) aff'd by *Delaware v. Prouse*, 440 U.S. 648 (1979).
[33] *Commonwealth v. Hicks*, 208 A.3d 916, 945 (Pa. 2019).

The Court also noted that the "sister states" of Massachusetts and Indiana reached similar conclusions with regard to the fact that mere possession of a handgun was not sufficient for reasonable suspicion that the handgun was illegal.[34]

The facts in *Hicks* were that a man was stopped at a gas station and was seized and removed from his vehicle because of a concealed firearm he was entitled to possess and had a license to carry.[35] The Court held that any evidence seized should have been suppressed.[36]

A. Sergeant Ketler did not possess reasonable suspicion of a crime because the officer did not know whether or not Mr. Penn was licensed to carry a deadly weapon concealed

In the instant, the encounter with the Officer began as a consensual encounter as both Sergeant Ketler and the trial court acknowledged. Mr. Penn did not know he was being watched, he was looking at a traffic stop down the road. Even if Sergeant Ketler was convinced that Mr. Penn had a concealed

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[34] *Id.* at 936 citing *Commonwealth v. Couture*, 552 N.E.2nd 533, 541 (Mass. 1990)("The mere possession of a handgun was not sufficient to give rise to a reasonable suspicion that the defendant was illegally carrying that gun."); *Pinner v. State*, 74 N.E.3d 226 (Ind. 2017)("The United States Supreme Court has previously declared that law enforcement may not arbitrarily detain an individual to ensure compliance with licensing and registration laws without particularized facts supporting an inference of illegal conduct.").
[35] *Id*. at 922.
[36] *Id*. at 951.

firearm, he did not yet have reasonable suspicion that Mr. Penn was not licensed at the time the encounter became a detention. According to Delaware Superior court's data, there are currently 33,302 holders of concealed carry licenses in Delaware. (Exhibit C) With this high of a number relative to the population of Delaware, an officer should be required to possess some level of reasonable suspicion that the person was not licensed and in this case that level of suspicion was not present.

Accordingly, the firearm and drugs should be suppressed as having been obtained as part of an illegal stop that occurred without reasonable and articulable suspicion of a crime.

B. This Court should reconsider *Upshur v. State* and find that licensure is an element of the offense of Carrying a Concealed Deadly Weapon and not simply an affirmative defense

11 *Del. C.* Sec. 1442 states: "a) A person is guilty of carrying a concealed deadly weapon when the person carries concealed a deadly weapon upon or about the person without a license to do so as provided by 1441 of this title."[37] Despite the inclusion of the "without a license" language in the statute, the license element is not considered an element of the offense but is,

[37] 11 *Del. C*. Section 1442(a).

instead, only an affirmative defense.[38] Although the *Upshur* Opinion, which was decided in 1980, mentions 11 *Del. C.* Sec. 305*,* exemptions, and the fact that the burden is on the defendant, it is unclear that 11 *Del. C.* Sec. 1442 places the burden on the defendant. The "without a license" language is in the main, subsection a, part of the statute and it appears to be more than just a footnote. It is also unclear that it would be considered an exemption under *11 Del. C.* Sec. 305 based on the current version of the statute.

Accordingly, as mentioned by the dissenting Opinion in *Murray*, this Court should reconsider *Upshur v. State*.

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[38] *State v. Murray*, 213 A.3d 571, 584, 585 (Del. 2019) (Traynor, J., dissenting); *Upshur v. State*, 420 A.2d 165, 169 (Del. 1980)

III. OFFICER AKIL WAS THE SEIZING OFFICER OF THE DRUGS AND HE WAS NOT PRODUCED AT TRIAL, THEREFORE CHAIN OF CUSTODY WAS NOT ESTABLISHED AND DRUG EVIDENCE SHOULD NOT HAVE BEEN INTRODUCED AT TRIAL

Question Presented

Whether an officer who recovers the drugs from the defendant's pocket and places them back in the defendant's pocket should be considered the seizing officer for the purposes of chain of custody where the packaging officer acknowledges at trial that the drugs were found by that officer. (A146-148) (A213-215).

Standard of Review

"Although we generally review the Superior Court's ruling admitting or excluding evidence for abuse of discretion, where the Superior Court's ruling involves an interpretation of a statute, our review is *de novo*."[39]

Argument

In *Hairston v. State*, this Court held: "We find no ambiguity in the requirement that the State produce three witnesses: 1) the seizing officer, 2) the packaging officer, and 3) the forensic toxicologist or forensic chemist. By their plain terms, Sections 4331 and 4332[40] do not contemplate or permit the

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[39] *Hairston v. State*, 249 A.3d 375 (Del. 2021).
[40] 10 *Del. C.* Sec. 4331 and 4332.

substitution of another witness."[41] The Court also explains that "a defendant may demand the appearance at trial of certain designated individuals in the chain of custody as prosecution witnesses. The defendant may then cross-examine those witnesses-not substitutes of the prosecution's choosing-on the authenticity of the evidence or any other topic within the proper scope of cross-examination."

In *Hairston*, Corporal Bartolo testified in place of Corporal Lynch that he observed the recovery of the drugs from the vehicle and it was in the same condition.[42] Corporal Lynch was the seizing and packaging officer and was on medical leave at the time of the trial.[43] This Court reversed the convictions or aggravated possession of heroin and possession of marijuana.[44]

In the instant case, the drugs were initially found in Mr. Penn's left pocket by Officer Akil and returned to his left pocket which was on body camera, then processed at the station by Officer Moses. Officer Moses testified that the drugs were already found at the scene and that he did not turn on his body camera while collecting the drugs at the station because "he was aware they already found it on scene" and he didn't think body camera was

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[41] *Hairston v. State*, 249 A.3d 375 (Del. 2021).
[42] *Id.* at 379, 380.
[43] *Id.* at 379.
[44] *Id*. at 385.

necessary because it was located by Officer Akil.[45] To the extent that there is any ambiguity as to who should be deemed the seizing officer in a case in which the drugs are taken out of the defendant's pocket by an officer and put back in, Officer Moses appears to acknowledge that his body camera was not turned on because Officer Akil already found the drugs.[46]

He also appears to refer to himself in a manner consistent with being the packaging officer: "I was told where the drugs were and how to get it. And collected it and then wrote up the label and got it tagged."[47]

Because Officer Akil was not called as a necessary witness by the State, not only could the defense not ask him questions about chain of custody and why drugs would be placed back in a defendant's pocket, but he was also not able to have questions asked of him about his potential presence on the *Brady* list which was discussed before the start of trial and both issues were discussed at a side bar during cross-examination of a different officer.[48] In *Hairston*, this Court mentions the importance of the Defense being able to ask a witness in the chain of custody about "any other topic within the proper scope of cross-examination" in addition to questions about the authenticity of evidence.

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[45] A249, 254.
[46] A249, 250 ("But the drugs were already found. I was told where the drugs were and how to get it.").
[47] A250.
[48] A145, A212-215.

For these reasons, the Drug Possession and Possession of a Firearm During Commission of a Felony (Drug Possession) convictions should be reversed for lack of chain of custody foundation for the drug evidence.

CONCLUSION

For the reasons and upon the authorities cited herein, Penn's convictions must be vacated.

Respectfully submitted,

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