EFiled: Mar 11 2026 10:47AM EDT
Filing ID 78690806
Case Number 416,2025

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JARROD PENN,

Defendant Below,
Appellant,

v.

STATE OF DELAWARE,

Plaintiff Below,
Appellee.

No. 416, 2025

On appeal from the Superior Court of the State of Delaware

STATE'S ANSWERING BRIEF

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Dated: March 11, 2026

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NATURE OF PROCEEDINGS

On May 9, 2022, a Superior Court grand jury indicted Jarrod Penn on charges of drug dealing, possession of a firearm during the commission of a felony ("PFDCF"), possession of a firearm by a person prohibited ("PFBPP"), possession of ammunition for a firearm by a person prohibited ("PABPP"), carrying a concealed deadly weapon ("CCDW"), and resisting arrest.[1] The State later amended the charge of drug dealing to felony drug possession and entered a *nolle prosequi* on the charge of resisting arrest.[2]

Before trial, Penn filed a motion to suppress for lack of reasonable suspicion to detain him.[3] The Superior Court conducted a suppression hearing and ultimately denied the motion.[4]

Penn later moved to sever the person-prohibited charges for a separate trial.[5] The court granted the motion, creating a *B* case (on the PFBPP and PABPP charges) and an *A* case (on the remainder).[6]

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[1] A1, at Docket Item ("D.I.") 4; A16–18.
[2] *See* A8, at D.I. 60; A315–16.
[3] A2, at D.I. 12; A19–31.
[4] *State v. Penn*, 2023 WL 3221887, at *1, *5 (Del. Super. Ct. May 1, 2023); A3–4, at D.I. 19, 22.
[5] A8, at D.I. 56.
[6] *See* A12–15; A376.

The *A* case proceeded to trial on September 3, 2024, and lasted two days.[7] A jury found Penn guilty of drug possession, PFDCF, and CCDW.[8] Immediately following the verdict, the court turned to the *B* case.[9] Penn waived his right to a jury, and the case proceeded to a bench trial.[10] The judge found him guilty of PFBPP and PABPP.[11]

On September 19, 2025, the court sentenced Penn: (i) for PFDCF, to 10 years at Level V incarceration, suspended after five years for two years of Level III probation; (ii) for PFBPP, to five years at Level V, suspended after three years for two years of Level III; (iii) for drug possession, to two years at Level V, suspended for one year of Level III; (iv) for PABPP, to two years at Level V, suspended for one year at Level III; and (v) for CCDW, to two years at Level V, suspended for one year at Level III.[12]

Penn filed a timely notice of appeal and, on February 6, 2026, his opening brief. This is the State's answering brief.

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[7] A8, at D.I. 60.
[8] A8, at D.I. 60; A372.
[9] A373–376.
[10] A373–376.
[11] A12, at D.I. 2; A378.
[12] Opening Br. Ex., at 1–2; A11, at D.I. 78; A14, at D.I. 17.

SUMMARY OF ARGUMENT

I. The Appellant's arguments in Claims I and II are denied. The Superior Court did not abuse its discretion by denying Penn's motion to suppress. The court correctly determined when the consensual encounter between Penn and the police officer escalated to an investigatory detention: when the officer commanded Penn not to put his hand in his pocket. And at that point in time, the officer had reasonable articulable suspicion that Penn was knowingly concealing a firearm on or about his person. Penn argues that the officer did not have reason to suspect that he lacked a concealed-carry license, but well-established Delaware law provides that licensure is an affirmative defense, not an element of the offense. Penn does not identify an urgent reason and clear manifestation of error to justify overturning this Court's decades-long precedent. In any event, the officer also observed Penn violate a Wilmington City Ordinance and could detain him on that alternative basis.

II. The Appellant's argument in Claim III is denied. The Superior Court did not err by admitting the results of the controlled-substances testing. Although the Delaware Code establishes special chain-of-custody rules for drug cases, they apply only if the defendant

makes a written demand at least five days before trial. Penn does not establish that he made such a demand. Nor did Penn's counsel object to the foundation for admission of the drug evidence. In any event, the absent witness was not in the statutory chain of custody. The witnesses who were all testified. The State therefore complied with the statute, regardless of whether its mandate applied.

STATEMENT OF FACTS

Evidence Presented at the Suppression Hearing

Around 6:15 p.m. on March 31, 2022, officers in the Wilmington Police Department's Street Crimes Unit were conducting a traffic stop near Cityview Avenue and 30th Street.[13] This was a high-crime, high-drug area of the city where there have been shootings and arrests for firearm and drug offenses.[14] The officers were wearing black tactical vests with "POLICE" written across the torso, and their vehicles' red-and-blue flashing lights were on.[15]

Sergeant Deshaun Ketler was on his way to assist the other officers when he observed Penn cross the street in front of his unmarked vehicle.[16] Penn wore a jacket, which was unzipped.[17] The right jacket pocket hung "extremely low" to his hip area while the left pocket was up higher to his waist.[18] The item in the right pocket appeared to be many times heavier than a cell phone or car keys.[19]

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[13] A86–87.
[14] A81–82.
[15] A88.
[16] A89–90.
[17] A89–90.
[18] A89–90; A92.
[19] A92.

Even Penn's balance seemed off while he was walking, as if he was weighed down.[20] Penn was focused on the traffic stop down the street and did not notice Sergeant Ketler.[21]

Sergeant Ketler drove past the traffic stop, circled back around, and stopped to observe Penn.[22] Penn entered a park, sat on a bench, and looked toward the traffic stop.[23] He appeared nervous.[24] He stood and watched, he sat down, he stood up, and he sat down—like he did not know what to do.[25] After a couple minutes, he exited the park at about the same place he entered it.[26] Sergeant Ketler radioed the other units to warn them that a person watching them was possibly armed.[27]

Penn crossed back over the street without using a nearby crosswalk.[28] He walked up the steps of a residence and looked like he was about to walk in, but he remained outside.[29] He looked sideways

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[20] A92.
[21] A90; A114.
[22] A91.
[23] A91; A94.
[24] A94.
[25] A95; A117.
[26] A95.
[27] A95.
[28] A95–96.
[29] A97–98.

toward the officers and attempted to hide himself between the house and a tree.[30] Seemingly, he did not have a good view of the traffic stop and came back down to the sidewalk to see better.[31]

Sergeant Ketler, who had been trained in identifying the characteristics of an armed gunman, suspected that Penn possessed a firearm in his right jacket pocket, but it was concealed, and he could not see it.[32] He exited his vehicle and approached Penn.[33] Penn seemed startled when he noticed the officer.[34]

Sergeant Ketler—who did not have his hand on his firearm, have his handcuffs out, or otherwise threaten Penn—asked Penn if he could talk to him.[35] Penn replied, "Why are you messing with me?"[36] Sergeant Ketler responded, "I believe you have a firearm."[37] Penn

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[30] A125. Sergeant Ketler described Penn's movements during this time as "blading," a characteristic of an armed gunman, but he gave conflicting answers about Penn's positioning, some of which did not support the conclusion that he was blading. *Penn*, 2023 WL 3221887, at *4 n.59. The Superior Court credited Sergeant Ketler's testimony that Penn was attempting to conceal himself but not that his movements constituted blading. *Id.*
[31] A99; A125.
[32] A41–42; A100.
[33] A121.
[34] A101.
[35] A101–02.
[36] A102.
[37] A102–03.

then raised his right hand to his pocket to perform a "security check" of the suspected firearm (a characteristic of an armed gunman) and said, "Why are you fucking with me?"[38] Sergeant Ketler immediately told him, twice and loudly, "Do not put your hand in your pocket."[39] Penn began looking both ways, and as soon as he saw other officers approaching, he fled.[40]

Evidence Presented at Trial

Wilmington Police Detective Anthony Lerro and his partner, Corporal Akil, responded to assist Sergeant Ketler.[41] They drove up the block, and when they arrived, Penn was standing on the sidewalk.[42] Penn fled south as soon as Detective Lerro, who was wearing a black tactical vest that said "Police Street Crimes Unit" on the front and back, exited his vehicle and started walking toward him.[43]

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[38] A103–04.
[39] A104.
[40] A108; A122.
[41] A175–76.
[42] A177; A183.
[43] A184.

Officers Lerro and Akil chased after Penn.[44] Detective Lerro took him to the ground across the street and placed him in handcuffs.[45] Detective Lerro then searched Penn and felt an apparent firearm in his right jacket pocket.[46] He unzipped the pocket and indeed found a loaded silver-and-black nine-millimeter handgun inside.[47]

After Detective Lerro found the firearm, Corporal Akil searched Penn's left jacket pocket and found a clear bag that contained 78 individual baggies of suspected cocaine.[48] Corporal Akil pulled the bag out of Penn's pocket but then put it back in.[49] The officers transported a handcuffed Penn back to the police station with the suspected cocaine still in his pocket.[50]

At the station, Detective Leonard Moses seized the suspected cocaine from Penn.[51] He removed the drugs from Penn's coat while

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[44] A185.
[45] A185; A210; A221.
[46] A186–87.
[47] A186–88; A192.
[48] A195.
[49] A197; A210–11.
[50] A212; A255.
[51] A236.

Penn was in turnkey for processing.[52] He tagged, field tested, bagged, and sealed the drugs.[53] He then placed them in the evidence locker.[54]

Sandra Sewitsky, a forensic analytical chemist with the Delaware Division of Forensic Science, later tested the suspected controlled substances and identified them as 7.1869 grams of cocaine.[55]

Hugh Stephey, the Administrator of the Wilmington Police Department's Firearms and Ballistics Section, tested the recovered firearm and confirmed that it was functional.[56] Detective Lerro searched the CJIS database to check whether Penn had a permit to carry a concealed firearm in Delaware.[57] He did not.[58]

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[52] A243.
[53] A236.
[54] A236.
[55] A289.
[56] A258; A265.
[57] A200.
[58] A200.

ARGUMENT

I. The Superior Court did not abuse its discretion by denying Penn's motion to suppress.

Question Presented

Whether the police had reasonable articulable suspicion that Penn had committed a crime when they detained him.

Scope of Review

This Court reviews the denial of a motion to suppress evidence for abuse of discretion.[59] It reviews associated legal questions *de novo*.[60] If the court below conducted an evidentiary hearing, this Court's review of its factual findings is deferential, limited to an examination of whether those findings were clearly erroneous and supported by sufficient evidence.[61]

Merits of Argument

Penn filed a motion to suppress, challenging whether Sergeant Ketler has reasonable articulable suspicion to detain him.[62] The

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[59] *Diggs v. State*, 257 A.3d 993, 1003 (Del. 2021).
[60] *Id.*
[61] *Id.*
[62] A25–28; A55–58.

Superior Court held that the detention occurred when Sergeant Ketler told Penn not to put his hand in his pocket.[63] The court then reviewed the facts leading up to that moment and held that reasonable suspicion supported the detention.[64] The court therefore denied the motion.[65]

Penn claims that the Superior Court abused its discretion by denying the motion. He advances several supporting arguments, split between Claims I and II of his opening brief.[66]

First, although Penn initially agreed with the Superior Court on when the detention occurred,[67] and then argued after the suppression hearing that the detention instead occurred as soon as Sergeant Ketler approached him,[68] he now contends that the detention occurred at an intermediate step, when Sergeant Ketler said to him, "I believe you have a firearm."[69] According to Penn, that statement, plus the act of exiting the car, would have communicated to a reasonable person that he was not free to leave, as evidenced by Penn's startled reaction.[70]

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[63] *Penn*, 2023 WL 3221887, at *2–3.
[64] *Id.* at *4.
[65] *Id.* at *5.
[66] Opening Br. 9, 18.
[67] A25.
[68] A55.
[69] Opening Br. 13–14.
[70] Opening Br. 13–14.

Any facts gleaned after that moment, he argues, cannot be considered when evaluating the existence of reasonable suspicion.[71]

Second, Penn contends that Sergeant Ketler lacked reasonable suspicion to detain him when he did.[72] He argues that carrying a concealed firearm is a crime only if the person does not have a license, and Sergeant Ketler did not yet have information suggesting that Penn was unlicensed.[73] Penn argues that this Court should reconsider its decision in *Upshur v. State*,[74] which held that licensure is an affirmative defense and not an element of the crime.[75]

The Superior Court did not abuse its discretion by denying the motion to suppress. The court correctly identified when the seizure of Penn occurred, and the facts known to Sergeant Ketler at that time constituted reasonable suspicion that Penn was committing CCDW. In any event, Sergeant Ketler also saw Penn violate a Wilmington City Ordinance. He therefore had reasonable suspicion to detain Penn

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[71] Opening Br. 16–17.
[72] Opening Br. 21–22.
[73] Opening Br. 21–22.
[74] 420 A.2d 165 (Del. 1980).
[75] Opening Br. 18–20, 22–23.

immediately, and he reasonably inquired into whether Penn was armed and dangerous.

A. The police officer's initial contact with Penn was a consensual encounter.

Both the Fourth Amendment to the United States Constitution and Article I, § 6 of the Delaware Constitution guarantee the right of the people to be secure from unreasonable searches and seizures.[76] Under the exclusionary rule, evidence obtained in violation of these guarantees is inadmissible at trial.[77]

In Delaware, a seizure occurs when a reasonable person would have believed that he was not free to ignore the police presence.[78] Not every police encounter, even one that is investigative in nature, is a "seizure" within the meaning of these constitutional provisions, however.[79] Interactions between law enforcement and citizens

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[76] *Diggs*, 257 A.3d at 1003.
[77] *Id.*
[78] *Jones v. State*, 745 A.2d 856, 869 (Del. 1999).
[79] *Diggs*, 257 A.3d at 1003 (citing *Florida v. Royer*, 460 U.S. 491, 499 (1983)).

generally fall within three categories: (i) consensual encounters; (ii) investigative detentions; and (iii) formal arrests.[80]

An arrest occurs when a person is taken into custody to answer for the commission of a crime.[81] An arrest is a "seizure" within the meaning of the constitutional provisions and must be supported by probable cause.[82] Probable cause to arrest exists when, under a totality of the circumstances, the facts suggest there is a fair probability that the person committed a crime.[83]

An investigative detention is less intrusive than an arrest but still a "seizure."[84] To stop or detain someone for investigatory purposes, a police officer must have reasonable articulable suspicion to believe the individual is committing, has committed, or is about to commit a crime.[85]

A consensual encounter is not a "seizure" under the United States or Delaware constitutions.[86] "[L]aw enforcement officers do

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[80] *Id.*
[81] *Id.* at 1004.
[82] *Jackson v. State*, 643 A.2d 1360, 1364 (Del. 1994).
[83] *Id.* at 1365.
[84] *Diggs*, 257 A.3d at 1004.
[85] *Register v. State*, 337 A.3d 1224, 1234 (Del. 2024).
[86] *Diggs*, 257 A.3d at 1004.

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 such questions."[87] Therefore, no level of suspicion is required to support a consensual encounter.[88]

An interaction that begins as a consensual encounter can escalate to an investigative detention.[89] That is what occurred here.

When Sergeant Ketler first approached Penn, he initiated a prototypical consensual encounter: he asked Penn for permission to talk to him.[90] He did not have his hand on his firearm or his handcuffs out.[91] He did not tell Penn to place his hands behind his back or order him to the ground.[92] As the Superior Court found: "Sergeant Ketler did not use, threaten, or display any force when initiating conversation

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[87] *Royer*, 460 U.S. at 499.
[88] *Diggs*, 257 A.3d at 1004.
[89] *Id.*
[90] *See id.* at 1003–04 ("A consensual encounter would include—as happened initially here—a police officer asking the citizen a question.").
[91] A101–02.
[92] *Penn*, 2023 WL 3221887, at *3.

with Mr. Penn."[93] Penn did not ignore the police presence or walk inside the residence. Instead, he voluntarily engaged in the encounter, asking Sergeant Ketler: "Why are you messing with me?"[94] The Superior Court found that Penn's response showed his willingness to engage in the conversation.[95] Accordingly, their interaction, at the outset, was a consensual, non-seizure encounter.

B. The encounter escalated to an investigatory detention when the officer ordered Penn not to put his hand in his pocket.

Presumably, Penn asked Sergeant Ketler a question because he wanted him to answer it.[96] So Sergeant Ketler did, responding: "I believe you have a firearm."[97]

According to Penn, the seizure occurred here. He argues that a reasonable person would not feel free to ignore Sergeant Ketler after he exited his vehicle and shared, in response to Penn's question, his belief that Penn had a firearm.[98]

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[93] *Id.*
[94] A102.
[95] *Penn*, 2023 WL 3221887, at *3.
[96] *Id.*
[97] A102–03.
[98] Opening Br. 13–14.

Penn is wrong. These two actions, by themselves, did not rise to the level of a stop or detention.

The Ninth Circuit encountered a similar fact pattern in *United States v. Orman*.[99] A mall employee witnessed Dale Orman place a handgun in his boot before entering the mall.[100] The information was relayed to a police officer working there.[101] The officer located Orman and approached him.[102] When he was about six to eight feet away, he asked Orman, " "[E]xcuse me, may I speak to you?"[103] Orman responded, "Sure," and the officer motioned him to come over, away from the mall's foot traffic.[104] The officer then "told Orman that he had information that Orman may be carrying a gun and asked Orman if that were true."[105] Orman admitted that he was, and the officer retrieved the firearm from Orman's waistband.[106]

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[99] 486 F.3d 1170, 1171–73 (9th Cir. 2007).
[100] *Id.* at 1171.
[101] *Id.* at 1171–72.
[102] *Id.* at 1172.
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*

Orman moved to suppress the seizure of the handgun for lack of reasonable suspicion.[107] The federal district court denied the motion, a decision upheld on appeal.[108] The Ninth Circuit ruled that the encounter between Orman and the police officer was consensual throughout: "A reasonable innocent person would not feel that he was being detained by a police officer who politely asked him if he could have a word with him and quickly inquired about a handgun."[109] The court noted that the officer did not draw his gun, another nearby officer was 20 feet away and nonthreatening, the encounter was brief, and it occurred in a public setting.[110] The court then held that, under the circumstances, it was reasonable for the officer to retrieve the firearm for his own safety and the safety of the mall patrons.[111]

In *Jones v. State*,[112] this Court adopted a non-exhaustive list of factors to inform the totality-of-the-circumstances review of whether a police interaction was a consensual encounter or a detention. Courts

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[107] *Id.* at 1172–73.
[108] *Id.* at 1173, 1177.
[109] *Id.* at 1175.
[110] *Id.* at 1175–76.
[111] *Id.* at 1176 (noting that seizing the firearm in this case was "less intrusive than the patdown in *Terry* [*v. Ohio*, 392 U.S. 1 (1968)]").
[112] 28 A.3d 1046, 1052–53 (Del. 2011).

should consider, among other things, whether: (i) the encounter occurred in a public or private place; (ii) the officer informed the suspect that he was free to leave and not under arrest; (iii) the suspect consented or refused to talk to the officer; (iv) the officer moved the suspect to another area; (v) there was physical touching, display of weapons, or other threatening conduct; and (vi) the suspect eventually departed the area without hindrance.[113] This Court does not rigidly apply these factors, and no one factor is determinative.[114]

Applying these factors to Penn's case demonstrates that, until Sergeant Ketler ordered Penn to not put his hand in his pocket, the encounter between them was consensual. Sergeant Ketler approached Penn on a public road and sidewalk. He asked for permission to talk to Penn. Penn responded by engaging Sergeant Ketler in conversation. Sergeant Ketler did not move Penn to another area. He did not touch Penn, display his weapon, or engage in any other threatening conduct. No display of authority occurred until he made the command to keep his hand out of his pocket.

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[113] *Id.*
[114] *Id.* at 1053.

Contrary to Penn's argument, his own startled reaction is not a relevant factor in this analysis. Sergeant Ketler's approach may have startled Penn, but Penn was already visibly concerned about the police presence down the street and was actively committing multiple crimes. The reaction to a police officer of someone actively breaking the law can hardly be ascribed to the objective reasonable person.

The consensual encounter therefore continued past Sergeant Ketler's statement "I believe you have a firearm." Penn continued to engage Sergeant Ketler in conversation, this time asking him, "Why are you fucking with me?"[115] But as he asked this question, Penn performed what appeared to be a "security check" of the firearm in his pocket, raising his hand to feel it was there.[116] Seeing Penn move his hand toward the suspected firearm, Sergeant Ketler immediately told him, twice and loudly, "Do not put your hand in your pocket."[117]

The Superior Court concluded that the seizure occurred here.[118] Indeed, under the circumstances, Sergeant Ketler communicated to Penn—by raising his voice, commanding Penn to act instead of asking

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[115] A103.
[116] A103–04.
[117] A104.
[118] *Penn*, 2023 WL 3221887, at *3.

for permission to speak, and repeating his commands—that he was not free to ignore his presence and go about his business.

Penn argues that the command "alone, [wa]s not enough to convert a consensual encounter to an investigative detention."[119] Even if true, this does not mean that the encounter became a detention earlier, as Penn argues on appeal. It could have been a consensual encounter until some later point instead, such as when the other officers arrived on scene.

In any event, Penn's argument does not acknowledge the full totality of the circumstances at the time of the command. Sergeant Ketler did not merely tell Penn to not put his hand in his pocket. He changed tone, volume, and urgency—all of which would have indicated to a reasonable person that the nature of the interaction was changing. Accordingly, the Superior Court correctly determined that the seizure occurred with this command.

[119] Opening Br. 15–16.

C. At the time of the detention, the police had reasonable suspicion to believe Penn was committing CCDW.

To detain Penn, Sergeant Ketler needed reasonable articulable suspicion to believe that Penn was committing, had committed, or was about to commit a crime.[120] Reasonable suspicion is less demanding than probable cause and does not need to rule out the possibility of innocent conduct.[121]

Reasonable suspicion must be evaluated in the context of the totality of the circumstances known to the officer at the time of the detention, as viewed through the eyes of a reasonable, trained police officer in the same or similar circumstances, combining objective facts with the officer's subjective interpretation of those facts.[122] In conducting this evaluation, this Court first assesses the "objective observations and consideration of the modes or patterns of operations of certain kinds of lawbreakers".[123] It next "consider[s] the inferences and deductions that a trained officer could make which might well elude and untrained person."[124]

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[120] *Register*, 337 A.3d at 1234.
[121] *Id.*
[122] *Id.*
[123] *Id.* (internal quotation marks omitted).
[124] *Id.* (internal quotation marks omitted).

Sergeant Ketler suspected that Penn possessed a firearm in his jacket pocket. Under 11 *Del. C.* § 1442, a person commits CCDW when he "carries concealed a deadly weapon upon or about the person without a license to do so." In order to convict someone of CCDW, the State must prove that the person: (i) knowingly; (ii) carried upon or about his person; (iii) a deadly weapon.[125] A "deadly weapon" includes a firearm.[126] The lack of a concealed-carry license is not an element of the offense; instead, it is an affirmative defense that can be raised by the defendant.[127]

Sergeant Ketler reasonably suspected that Penn was committing CCDW. He observed Penn in a high-crime, high-drug area of the city.[128] Penn's unzipped jacket hanging "extremely low" to his right hip area, throwing off his balance as he walked.[129] The item in his pocket must have been many times heavier than a cell phone or keys.[130] It was entirely concealed in his pocket and not visible.[131]

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[125] *See Boyce v. State*, 2025 WL 1411854, at *6 (Del. May 15, 2025) (quoting a CCDW jury instruction).
[126] 11 *Del. C.* § 222(6).
[127] *Smith v. State*, 2005 WL 2149410, at *2 (Del. Aug. 17, 2005).
[128] A82.
[129] A92.
[130] A92.
[131] A100.

While in the park, he appeared nervous as he monitored the unrelated traffic stop down the street.[132] He stood, sat, stood, sat, and stood back up before leaving, as if he did not know what to do.[133] When he returned to the front of a residence, he attempted to hide himself between the house and a tree as he watched the police activity.[134] Although observing an unrelated traffic stop is not suspicious by itself, nervously watching the stop while trying to hide yourself is. When Sergeant Ketler mentioned firearms, Penn reached for his pocket to conduct an apparent "security check" of the firearm—a characteristic of an armed gunman.[135]

Together, these facts supported the conclusion that Penn knowingly concealed a deadly weapon in his jacket pocket. Thus, Sergeant Ketler had reasonable articulable suspicion that Penn was committing CCDW when he ordered Penn not to put his hand in his pocket. The Superior Court did not abuse its discretion in denying the motion to suppress.

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[132] A94.
[133] A117–18.
[134] A125.
[135] A103–04.

D. Penn identifies no urgent reason and clear manifestation of error to justify overturning *Upshur*.

Penn argues that Sergeant Ketler, when he detained him, did not have reason to suspect that he lacked a concealed-carry permit.[136] Acknowledging that this Court held in *Upshur* that licensure is an affirmative defense to CCDW and not an element of the offense, Penn invites this Court to revisit *Upshur*.[137] In doing so, he cites and adopts the dissenting opinion in *State v. Murray*,[138] which suggested the same course.[139]

Obviously, a majority of this Court already considered and rejected the dissenting opinion in *Murray*. In response to the dissent, the majority stated:

> It has long been the law in Delaware that the burden is upon the defendant to establish that he had a license to carry a concealed deadly weapon. Establishing that a person does not have a license to carry a concealed deadly weapon, therefore, is not an element of the offense that must be proved beyond a reasonable doubt by the prosecution. Because the lack of a license is not an element of the offense, the presence or absence of a license need not, and should not, be considered in determining whether

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[136] Opening Br. 21–22.
[137] *See* Opening Br. 22–23.
[138] 213 A.3d 571 (Del. 2019).
[139] Opening Br. 19–23.

> there was reasonable, articulable suspicion to stop the suspect.[140]

By asking this Court to reconsider *Upshur*, Penn's claim implicates the doctrine of *stare decisis*. This Court recently had occasion to address that doctrine in *Berry v. State*:[141]

> *Stare decisis* is an essential feature of common law systems. Adherence to precedent is fundamental to our legal system, allows for the predictable and consistent application of the law, and contributes to the actual and perceived integrity of the judicial process. Under the doctrine of *stare decisis*, courts overturn settled law only for urgent reasons and upon clear manifestation of error. Even in cases involving constitutional claims, a departure from precedent 'demands special justification.
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> . . . .
>
> *Stare decisis* protects the interests of parties in the judicial system, who act in reliance on precedent. Those reliance interests are especially strong in criminal cases. Merely disagreeing with the reasoning or holding of a previous case is not grounds to revisit it. This Court is particularly chary to overturn precedent where, as here, the only change is the court's composition. . . .

Penn offers no urgent reason or clear manifestation of error to justify his request. He adds no new legal or factual developments to

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[140] 213 A.3d at 580 n.55 (cleaned up).
[141] 2025 WL 2639971, at *7 (Del. Sept. 15, 2025).

the argument he adopts from the *Murray* dissent. As in *Berry*, pointing to a recent dissenting opinion should not be enough.

This Court should "meet [Penn's] invitation to revisit [*Upshur*] with a substantial degree of caution" and reject it.[142] The holding in *Upshur* has been the law in Delaware for more than four decades and has been upheld across those decades.[143]

E. Alternatively, the officer had reasonable suspicion to detain Penn for violating a Wilmington City Ordinance.

Even if this Court is inclined to revisit *Upshur*, Penn's case is not the appropriate vehicle for doing so. Sergeant Ketler had alternative grounds for detaining Penn: a violation of a Wilmington City Ordinance.[144]

Sergeant Ketler first observed Penn cross the street in front of his vehicle.[145] After spending some time in the park, Penn crossed the

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[142] *See id.*
[143] *See, e.g.*, *Murray*, 213 A.3d at 580 n.55; *Smith*, 2005 WL 2149410, at *2; *Lively v. State*, 427 A.2d 882, 884 (Del. 1981).
[144] This Court may affirm on grounds other than those relied upon by the lower court. *Colon v. State*, 900 A.2d 635, 638 n.12 (Del. 2006); *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995).
[145] A89.

street again.[146] Even though there was a crosswalk at the corner of the block, Penn did not use it.[147]

By jaywalking, Penn violated a provision of chapter 37 of the Wilmington City Ordinances, concerning motor vehicles and traffic. Section 37-356 provides:

> Where crosswalks and safety zones are established, designated and maintained by appropriate markings or devices on or placed upon the street surface in any intersection or any street by authority of the department of public works for the protection and safety of pedestrians, it shall be the duty of pedestrians using such marked streets and intersections to cross only at these marked locations.

This Court recently held in *Banks v. State*[148] that a violation of the same chapter of the Wilmington City Ordinances "supplied reasonable, articulable suspicion to justify a brief investigatory stop."

Therefore, by observing Penn violate § 37-356, Sergeant Ketler had reasonable suspicion to detain him even before approaching him. Although Sergeant Ketler did not immediately detain him, he was not required to. Officers in the field retain some discretion on how to approach their investigations. For example, 11 *Del. C.* § 1902

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[146] A95–96.
[147] A96.
[148] 2025 WL 3720337, at *1 (Del. Dec. 23, 2025).

provides that a peace officer "may stop" a person abroad based on reasonable suspicion. The language is permissive rather than mandatory.

An officer who has lawfully detained a person may frisk him for weapons if he has reasonable articulable suspicion to believe the person is presently armed and dangerous.[149] Sergeant Ketler could reasonably reach this conclusion in consideration of the same facts that supported his belief that Penn was knowingly carrying a concealed firearm about his person. His detention of Penn and inquiry into the presence of a firearm were therefore justified.

[149] *State v. Abel*, 68 A.3d 1228, 1233 (Del. 2013).

II. The State did not need to produce Corporal Akil as a witness at trial to establish the foundation for its drug evidence.

Question Presented

Whether 10 *Del. C.* §§ 4331 and 4332 required the State to produce Corporal Akil as a witness at trial as the "seizing officer" in the chain of custody of its drug evidence.

Scope of Review

This Court generally reviews a trial court's admission or exclusion of evidence for abuse of discretion.[150] It reviews associated questions of law, such as the interpretation of a statute, *de novo*.[151]

Questions that were not fairly presented to the trial court are reviewed only for plain error, however.[152] To constitute plain error, the alleged defect "must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[153] The doctrine is limited to basic, serious, fundamental, and material defects

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[150] *Hairston v. State*, 249 A.3d 375, 380–81 (Del. 2021).
[151] *Id.*
[152] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).
[153] *Id.*

apparent on the face of the record that clearly deprive the accused of a substantial right or clearly show manifest injustice.[154]

Merits of Argument

Penn claims that, by declining to call Corporal Akil as a witness at trial, the State did not establish the necessary foundation for the admission of its drug evidence.[155] He contends Corporal Akil was the "seizing officer" within the meaning of § 4331(1) and, therefore, a necessary witness in the chain of custody under § 4332(a)(1).[156] According to Penn, the State's omission also denied him the opportunity to examine Corporal Akil about the underlying facts and to impeach him using "his potential presence on the *Brady* [*v. Maryland*][157] list."[158] Penn therefore contends that the Superior Court should have excluded the drug evidence and asks this Court to reverse his convictions that depended on it, drug possession and PFDCF.[159]

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[154] *Id.*
[155] Opening Br. 24.
[156] Opening Br. 25–26.
[157] 373 U.S. 83 (1963).
[158] Opening Br. 26.
[159] Opening Br. 24, 27.

A. The Delaware Code provides special chain-of-custody rules for when the State seeks to establish the identity of a controlled substance.

Delaware Rule of Evidence ("D.R.E.") 901(a) sets forth the general standard for authenticating items of evidence. An item's proponent "must produce evidence sufficient to support a finding that the item is what the proponent claims it is."[160] The proponent may satisfy this burden directly by having a witness visually identify the item or indirectly by establishing a chain of custody that traces the item's continuous whereabouts.[161]

Delaware's chain-of-custody law requires the proponent to "eliminate the possibilities of [the item's] misidentification and adulteration, not to an absolute certainty, but simply as a matter of reasonable probability."[162] This Court has "never interpreted this standard as requiring the [proponent] to produce evidence as to every link in the chain of custody."[163] Instead, the proponent "must simply demonstrate an orderly process from which the trier of fact can conclude that it is improbable that the original item has been tampered

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[160] D.R.E. 901(a).
[161] *Whitfield v. State*, 524 A.2d 13, 16 (Del. 1987).
[162] *Demby v. State*, 695 A.2d 1127, 1131 (Del. 1997).
[163] *Id.*

with or exchanged."[164] Factual discrepancies, such as gaps in the supporting testimony, go to weight to be afforded to the proffered item of evidence, not its admissibility.[165]

The Delaware Code provides special authentication rules for drug cases.[166] The statutory procedures apply when the State intends to "establish[] that physical evidence in a criminal or civil proceeding constitutes a particular controlled substance defined under Chapter 47 of Title 16."[167] In such cases, 10 *Del. C.* § 4332(a)(1) mandates that the State "shall, upon written demand of a defendant filed in the proceedings at least 5 days prior to the trial, require the presence of the forensic toxicologist or forensic chemist, or any person in the chain of custody as a prosecution witness."[168] For these purposes, § 4331(1) defines "chain of custody" to mean: (i) the "seizing officer"; (ii) the "packaging officer," if different than the seizing officer; and (iii) the forensic toxicologist, forensic chemist, or other

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[164] *Id.*
[165] *Id.* at 1132.
[166] *Hairston*, 249 A.3d at 381.
[167] 10 *Del. C.* § 4330.
[168] § 4332(a)(1).

person who actually touched the controlled substance itself before or during its analysis.[169]

Sections 4331 and 4332 "eliminate the logistical and financial burden that the State would face if it were required to produce at trial every person who handled the evidence, irrespective of how tangential the contact might have been."[170] Nonetheless, they require, in unambiguous terms, the production of the three witnesses specifically listed.[171] "Sections 4331 and 4332 do not contemplate or permit the substitution of another witness in the place of the specifically identified witnesses, even if that witness might, in the absence of Subchapter III, be an appropriate authentication or chain of custody witness under D.R.E. 901(a)."[172]

B. Penn does not establish that he made the written, pretrial demand required under § 4332.

Section 4332's specific chain-of-custody requirements are conditional. Before the State is bound to them, the defendant must

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[169] § 4331(1).
[170] *Demby*, 695 A.2d at 1132.
[171] *Hairston*, 249 A.3d at 383.
[172] *Id.*

first file a demand, in writing and "at least 5 days prior to the trial," that the State produce the witnesses.[173] Otherwise, the forensic report identifying the substance is generally admissible and presumed accurate, even without the analyst's testimony.[174]

Oftentimes, Delaware defense attorneys include the § 4332 demand in their initial discovery requests. Here, the State provided initial discovery early in the case, before the indictment.[175] Penn, with discovery already in hand, did not thereafter docket any discovery request with the Superior Court.[176] Nor does it appear that he filed a written § 4332 demand in another form.[177]

The body of Penn's argument presumes that he made a valid § 4332 demand without addressing the matter directly.[178] With his question presented, Penn cites two portions of the record where he

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[173] § 4332(a)(1).
[174] *Hairston*, 249 A.3d at 382.
[175] A1, at D.I. 3.
[176] *See* A1–8. The State could not locate any discovery request in its files, either.
[177] *See* A1–8.
[178] *See* Opening Br. 24–27.

claims to have preserved the issue below.[179] Neither portion reflects that he satisfied the demand requirements of § 4332.

Penn first cites an exchange between himself and the judge on the morning of trial.[180] Addressing the court directly, Penn claimed that he had a right under "*Ha*[*irston*] *versus State*" to confront Office Akil because he was the "se[izing] and packaging officer."[181] Under the plain language of § 4332, Penn's statements are not sufficient to compel the State to produce the witnesses required under § 4332: they were not in writing and were not made five days before trial.

In response to Penn, the prosecutor told the trial judge that "the State will present the chain of custody evidence required under Delaware law," which did not include Corporal Akil.[182] Given the context of the prosecutor's statement and the absence of any written demand from Penn, it appears that the prosecutor was attempting to assure the judge that Penn's in-court protestations were

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[179] Opening Br. 24 (citing A146–48 and A213–15); *see also* Opening Br. 6 (citing A143–48 and A213).
[180] Opening Br. 24 (citing A146–48).
[181] A147 (emphasis added).
[182] A148–49.

inconsequential, rather than concede that Penn had met his demand obligations under § 4332.

Penn next cites an exchange that occurred at sidebar when the prosecutor objected to trial counsel's cross-examination.[183] Trial counsel attempted to ask Detective Lerro about Corporal Akil's prior reprimands.[184] The prosecutor objected on the basis of relevance.[185] Trial counsel explained that he wanted to cast doubt upon the chain of custody by attacking the credibility of the officers involved: Corporal Akil for his prior reprimands, Officer Moses for not writing a report, and the entire Street Crimes Unit for being disbanded.[186] Notably, trial counsel did not challenge the foundation for the drug evidence or claim that Corporal Akil was a necessary witness under § 4332. Even if trial counsel's argument could be generously interpreted as brought under § 4332, it did not constitute a written demand filed at least five days before trial.[187]

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[183] Opening Br. 24 (citing A213–15); *see also* A212.
[184] A212.
[185] A212–13.
[186] A213–15.
[187] *See* 10 *Del. C.* § 4332(a)(1).

In sum, Penn neither contends that he made a timely written demand nor identifies it in the record. In the absence of such demand, the State was not bound to produce the specific witnesses required under §§ 4331 and 4332.

C. Penn did not object to the foundation of the testing results for the controlled substances, either.

Presumably, if trial counsel had filed a § 4332 demand and believed that Corporal Akil was a necessary witness, he would have objected to the admission of the controlled-substances testing results. Instead, it appears that trial counsel accepted the State's position that Corporal Akil was not a necessary witness.

When Penn himself raised the issue of Corporal Akil's testimony pretrial, the judge asked trial counsel if he "kn[e]w anything about this."[188] Trial counsel framed it as a *Brady* issue.[189] He and the prosecutor had a conversation about whether Corporal Akil would testify and whether the State should produce any impeachment material under *Brady*.[190] The prosecutor said that Corporal Akil

[188] A145.
[189] A145–46.
[190] A145–46.

would not testify and, consequently, did not produce impeachment material.[191] When trial counsel saw Corporal Akil on the witness list, he then decided to "object for a *Brady* violation."[192] He did not mention § 4332 or claim that Corporal Akil was a necessary witness in the chain of custody.[193]

Trial counsel also did not articulate an objection under § 4332 at sidebar during Detective Lerro's cross-examination. Although trial counsel mentions the "chain of custody" for the drugs, he then made clear that he wanted to impeach the credibility of the officers involved in their discovery, not establish a statutory violation.[194] He attempted to ask about Corporal Akil's prior reprimands in a prior case, questioned Officer Moses' failure to write a report, and portrayed the Street Crimes Unit as "disbanded."[195] He averred that he could impeach Corporal Akil, even if he did not testify, because the State admitted his body-worn-camera footage as evidence.[196] These were

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[191] A145–46.
[192] A146 (emphasis added).
[193] A145–46.
[194] A212–15.
[195] A212–14.
[196] A215.

tactics aimed at casting doubt upon the credibility of the officers before the jury. They were not legal arguments under § 4332.

Notably, trial counsel did not object when Officer Moses identified the drugs before the jury,[197] when the State moved them into evidence,[198] or when the forensic analyst recounted the results of her testing.[199]

Although Penn himself invoked § 4332 (through *Hairston*) when he addressed the judge, he did not have leave to participate in his representation. Under Criminal Rule 47, the Superior Court "will not consider pro se applications by defendants who are represented by counsel unless the defendant has been granted permission to participate with counsel in the defense." Penn repeatedly wrote letters to the court, despite his representation by trial counsel, and the court repeatedly referred those letters back to trial counsel.[200] As recently as two weeks before trial, the court refused to review Penn's *pro se* letters because he was represented by counsel.[201] Thus, to the extent

[197] A236–37.
[198] A272–84.
[199] A284–89.
[200] *See, e.g.*, A6, at D.I. 32–40.
[201] A8, at D.I. 55.

Penn was making a *pro se* objection under § 4332 and *Hairston*, it was ineffective, and the Superior was not required to consider it.[202]

Because Penn did not make the required demand under § 4332, the special chain-of-custody requirements did not apply. And because Penn did not object to the chain of custody under § 4332, he failed to preserve the claim for appellate review. This Court should therefore review the claim only for plain error.

D. Corporal Akil was not the "seizing officer" within the meaning of §§ 4331 and 4332.

Regardless of whether the standard of review is *de novo* or plain error, Corporal Akil was not the "seizing officer" for purposes of §§ 4331 and 4332.

The Code does not further define "seizing officer" for purposes of these sections. The ordinary meaning of the term "seize" includes "to take possession of" or "confiscate."[203]

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[202] *See Harris v. State*, 2019 WL 1752646, at *4 (Del. Apr. 16, 2019) ("The record does not reflect that [Harris] was granted permission to participate with his counsel in the defense. Thus, the Superior Court was not required to consider Harris' pro se filings.").

[203] "Seize," *Merriam-Webster*, https://www.merriam-webster.com/dictionary/seize (last visited Mar. 10, 2026); *see also State v. Winsett*, 200 A.2d 237, 240 (Del. Super. Ct. 1964) (identifying

Corporal Akil first located the cocaine in Penn's left jacket pocket.[204] He pulled out the bag but promptly put it back in Penn's jacket pocket.[205] The drugs therefore remained in Penn's possession, at least until Corporal Moses seized them at the police station.[206]

Corporal Akil may have had joint possession of the cocaine with Penn temporarily, but it cannot be said that he "confiscated" an item that he allowed Penn to retain. Corporal Akil is better described as the "discovering officer" than the "seizing officer," which need not be the same person.[207]

Corporal Moses confiscated or "seized" the cocaine and packaged it.[208] Sandra Sewitsky tested it.[209] Both testified at Penn's trial. Therefore, even if §§ 4331 and 4332 applied, the State complied with its statutory obligations. There was no error.

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the dictionary definition of "seizure" as "to take possession of, or take into physical custody or control").

[204] A195.

[205] *See* A197; A210–11.

[206] A236; A243.

[207] *See Hairston*, at 378–79 (recounting that Corporal Bartolo discovered the heroin, but did not handle it, and that Corporal Lynch, the necessary witness under §§ 4331 and 4332, seized it).

[208] A236; A243.

[209] A289.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Superior Court.

Respectfully submitted,

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Dated: March 11, 2026

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JARROD PENN, Defendant Below, Appellant, v. STATE OF DELAWARE, Plaintiff Below, Appellee.	No. 416, 2025 On appeal from the Superior Court of the State of Delaware

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Dated: March 11, 2026

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