



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 REPLY BRIEF

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Dated: April 1, 2026

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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

The State, in its Answer, contends that “he initiated a prototypical consensual encounter: he asked Penn for permission to talk to him.”¹ One of the issues with the instant case that makes it not a prototypical case, is that Sergeant Ketler makes the accusatory statement: “I believe you have a firearm.”²

Courts have held that accusatory statements can contribute to the totality of the circumstances of turning a consensual encounter into an investigative detention which requires reasonable suspicion. In *Florida v. Royer*, the United States Supreme Court discussed the initial encounter as follows: “but when the officers identified themselves as narcotics agents, told Royer that he was suspected of transporting narcotics, and asked him to accompany them to the police room, while retaining his ticket and driver’s license and without indicating in any way that he was free to depart, Royer was effectively seized for the purposes of the Fourth Amendment. These

¹ Ans. Br. at 16

² A103

circumstances surely amount to a show of authority such that a reasonable person would have believed he was not free to leave.”³

Similarly, in *U.S. v. Villa-Gonzalez*, the 8th Circuit described as follows: “First, in the course of the encounter, Bignell told Trinidad he believed Trinidad and Jose were drug dealers. Such inquisitorial statements are not present in the vast run of consensual encounters between police and individuals, and certainly make any encounter more coercive.”⁴

In *U.S. v. Williams*, the United States Court of Appeals for the Sixth Circuit described the factual circumstances as follows: “Here, instead Vass immediately accused Williams of a crime. A reasonable person would not have felt free to walk away under such circumstances.”⁵

The State cites, in its Answer, the 6 part test that this Court applied to the totality of the circumstances in *Jones v. State*,⁶ which include the following factors: 1) the encounter occurred in a public or private place; 2) the officer informed the suspect that he was free to leave and not under arrest; 3) the suspect consented or refused to talk to the officer; 4) the officer moved the suspect to another area; 5) there was physical touching, display of

³ *Florida v. Royer*, 460 U.S. 491, 501 (1983).

⁴ *U.S. v. Villa-Gonzalez*, 623 F.3d 526, 534 (8th Cir. 2010).

⁵ *U.S. v. Williams*, 615 F.3d 657, 663 (6th Cir. 2010).

⁶ *Jones v. State*, 28 A.3d 1046, 1052-53 (Del. 2011) citing *United States v. Scheets*, 188 F.3d 829 (7th Cir. 1999).

weapons, or other threatening conduct; and 6) the suspect eventually departed the area without hindrance.⁷

Applying these factors to the instant case there are factors in the analysis that suggest investigative detention including factor 2: that he was not told that he was free to leave; factor 3, although close, weighs in Mr. Penn's favor because by asking "why are you messing with me?" the likely implication is that he does not want to talk or be bothered; factor 5 weighs in favor of investigative detention as Sergeant Ketler making an accusatory statement is coercive; and factor 6, Mr. Penn obviously did not depart without hindrance.

Overall, it is important to note, that this Court made clear in *Jones* that "we do not expect courts to merely count the number of factors weighing on one side of the determination or the other because a factor may be more indicative of a coercive atmosphere in one case than in another."⁸ Here, the "I believe you have a firearm" statement was coercive, it was a significant part of the initial encounter, and it would suggest to a reasonable person that they would not be free to leave.

⁷ *Jones v. State*, 28 A.3d 1046, 1052-53 (Del. 2011); Ans. Br. 19, 20.

⁸ *Id.* at 1053

This case is not like *United States v. Orman*⁹ cited by the State's Answer.¹⁰ In *Orman*, the encounter begins with the officer asking Orman, "Excuse me, may I speak to you?" Orman then responded, "Sure."¹¹ In *Orman*, like the vast majority of consensual encounter cases, the encounter centers around an officer asking an individual questions which can have the effect of signaling to the person that they are free not to answer. Here, the step that Sergeant Ketler needed to take for it to remain a consensual encounter would have been to secure permission from Mr. Penn to talk. Sergeant Ketler stating "I believe you have a firearm" was coercive and it occurred without reasonable suspicion of a crime. Mr. Penn, a bit later, reaching at the area of his low hanging pocket did not supply the missing reasonable suspicion.¹²

Finally, the State cannot, on appeal, use a violation of a Wilmington Ordinance of jaywalking as a basis to conduct the stop where the officer did not articulate it as a violation of the law. It was only in response to a question from the prosecutor about whether Mr. Penn used the crosswalk that Sergeant Ketler answered: A. He did not.¹³ At no point does he describe it as a violation of the law or a reason to conduct a stop.

⁹ *United States v. Orman*, 486 F.3d 1170, 1171-73 (9th Cir. 2007).

¹⁰ Ans. Br. at 18

¹¹ *United States v. Orman*, 486 F.3d 1170, 1172 (9th Cir. 2007); Ans. Br. 18

¹² A103

¹³ A96

Perhaps there is a reason that Sergeant Ketler did not articulate it as a violation of the law that we will not know based on the record, but that small portion of testimony in response to a question about a crosswalk is not enough to provide reasonable suspicion to conduct a stop. In addition, at the hearing, Sergeant Ketler stated on cross examination that Mr. Penn was initially free to leave at the time he approached him.¹⁴

The State cites *Banks*, but in *Banks*, the reason for the stop was a violation of a Wilmington Ordinance regarding riding bicycles on a sidewalk but the Officer in *Banks* believed *Banks* was violating the law regarding riding a bicycle on the sidewalk, he just cited to the incorrect law.¹⁵ In the instant case, Sergeant Ketler does not actually accuse Mr. Penn of violating the jaywalking law or any law that's related to jaywalking. He does not actually state that he believed Mr. Penn was violating the law related to jaywalking. The very limited testimony about the crosswalk in this case is not enough to supply reasonable suspicion to conduct a stop. An example of how this could be unfair, would be if there are rules or factual circumstances that an officer has for when a particular Wilmington Ordinance, like jaywalking, actually becomes a crime that cannot be known unless a record is established, and here

¹⁴ A128

¹⁵ *Banks v. State*, 2025 WL 3720337 (Del. Super. 2025).

there is simply not a sufficient record for the establishment of reasonable suspicion for a crime.

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

In the State's Answer, without addressing the merits of the dissenting Opinion's concern in *State v. Murray*¹⁶ or the concerns raised in the Opening Brief which included the idea that a stop for suspicion of concealed carry of a gun to see if the person has a license may not be reconcilable with *Delaware v. Prouse*, the State cites the principle of *stare decisis*.¹⁷ Although *stare decisis* is an important principle, it has not in the past, and does not prevent this Court from reviewing potential Constitutional violations and errors in the law. Therefore, this Court should revisit whether *Upshur v. State*¹⁸ remains good law, and this Court should consider whether stopping a person not knowing whether or not they are licensed to carry to see if they are, violates the principles of *Delaware v. Prouse*.¹⁹

One need look no further than the jury instructions in this case to see that this law is applied in a different manner than many other Delaware laws.

¹⁶ *State v. Murray*, 213 A.3d 571, 583, 584 (Del. 2019).

¹⁷ Ans. Br. at 27

¹⁸ *Upshur v. State*, 420 A.2d 165 (Del. 1980).

¹⁹ *Delaware v. Prouse*, 440 U.S. 648 (1979); *State v. Prouse*, 382 A.2d 1359 (Del. 1978).

As to Carrying Concealed Deadly Weapon, the Instructions read to the jury were as follows:

“Unlawfully, as that term is used in the indictment in this case, means that the defendant carried the concealed weapon without a license as provided by Delaware law.

The Delaware Criminal Code describes a procedure by which a person may be licensed to carry a concealed deadly weapon in the State. Thus the State need not present evidence of a lack of such license. If the defendant claims he lawfully carried a concealed weapon, it [is] his burden to show that he has complied with and satisfied Delaware’s licensing statute regarding concealed weapons.”²⁰

The jury instructions, thus, tell the jury that Mr. Penn is charged by indictment with not having a license but that it is his burden to show that he is not in violation of that accusation. Therefore, this Court should revisit *Upshur v. State*.

²⁰ A332

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

The State contends that because there is not a written request for the presence of the chain of custody witnesses in the docket and because “the State could not locate any discovery request in its files, either,”²¹ that the request was, therefore, not submitted to the State. Although it is true that the docket does not reflect a discovery request from either of the two defense attorney offices,²² it is highly unlikely that two different defense attorney offices did not submit a discovery request to the State in a case that spanned over two years before trial.

Further, just because something does not appear in the docket does not mean that it was not provided to the State directly. The docket does reflect that the State submitted an “initial discovery response” on April 27, 2022,²³ a “discovery response” filed on August 29, 2022,²⁴ and a “discovery response” filed on August 22, 2024.²⁵ It should also be noted that the Defense files show

²¹ Ans. Br. at 36 fn 176

²² A1-14

²³ A1

²⁴ A2

²⁵ A8

a discovery letter dated April 19, 2022 and a discovery letter dated May 25, 2023, both seeking the chain of custody witnesses and addressed to the trial prosecutor.²⁶

At no point at trial does the State allege that the demand for chain of custody witnesses was not satisfied. In fact, after Mr. Penn discussed chain of custody and *Brady* witnesses with the Court just before the start of trial, the State declared: “So the State will present the chain of custody evidence required under Delaware law, and Officer Akil is not in the chain of custody.”²⁷ The State cannot promise that they will provide all chain of custody witnesses required by Delaware law at trial, then on appeal claim that they did not receive proper notice of the issue because it is not docketed or is not in their files. The State had an opportunity to address any lack of notice at trial; but instead, the State promised to produce all required chain of custody evidence.

On the merits, Corporal Akil had more than mere “joint possession” of the cocaine with Mr. Penn when he pulled it out of his pocket as the State contends,²⁸ he had sole possession. He pulled it out of Mr. Penn’s pocket. He had enough contact with the drugs for Detective Moses to testify that he did

²⁶ Exhibit A

²⁷ A148, 149

²⁸ Ans. Br. at 43

not turn his body camera on at the station because “the drugs were already found” at the scene.²⁹ Accordingly, the drug possession and Possession of a Firearm During Commission of a Felony convictions should be reversed for lack of foundational requirement of the seizing officer of the drugs.

²⁹ A249, 250

CONCLUSION

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

Respectfully submitted,

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