

**COURT OF COMMON PLEAS
FOR THE STATE OF DELAWARE**
WILMINGTON, DELAWARE 19801

John K. Welch
Judge

December 14, 2011

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Re: *State of Delaware v. Luis E. Vizcarrondofargas*
Case No: 1011000033

Date Submitted: December 5, 2011

Date Decided: December 14, 2011

MEMORANDUM OPINION ON
DEFENDANT'S MOTION TO SUPPRESS

Dear Counsel:

Pending before this Court is a Motion to Suppress (the “Motion”) filed by defendant Luis E. Vizcarrondofargas (“defendant”) seeking suppression of certain evidence seized from his motor vehicle during a traffic stop on November 1, 2010 in New Castle County.

Defendant, following the hearing on the Motion to Suppress withdrew his Motion as to whether reasonable articulable suspicion stop existed for the police officer in question to stop the defendant for speeding. Defense counsel, however, proceeded on his Motion to Suppress alleging that the arresting officer, Corporal Douglas R. Brietzke (“Corporal Brietzke”) exceeded a brief investigatory seizure of

defendant's motor vehicle and there was no further reasonable articulable suspicion to conduct a further inquiry or investigation after the initial traffic stop because criminal activity was not afoot.¹

As articulated below, because the reasonable articulable suspicion for further investigation of defendant occurred during the routine stop when defendant shielded the arresting officer from his glove box, arguably because of a weapon, contraband, or drugs, the Court finds that further detention and investigation of the defendant was reasonable under the circumstances.

For the reasons set forth below, the Court DENIES the defendant's Motion to Suppress.

I. The Facts.

Corporal Douglas M. Brietzke ("Corporal Brietzke") was employed on November 1, 2010 performing traffic enforcement on Interstate 95 in New Castle County. The day in question was a "cool, cold night" in the "mid 30-40s." It was dark at approximately 1:00 AM when Corporal Brietzke noticed defendant's motor vehicle traveling on Interstate 95, a public highway. Corporal Brietzke testified the defendant was speeding and traveling at approximately 70 MPH in a 55 MPH according to his

¹ See *Terry v. Ohio*, 392 U.S. 1 (1968).

police speedometer which was tracking the defendant by “pacing” defendant’s motor vehicle.²

After Corporal Brietzke tracked the defendant’s white 2007 Toyota Camry with white temporary tags at 70 MPH he initiated a traffic stop by using overhead lights and siren. Corporal Brietzke testified there was “not much traffic” in either direction on I-95 and subsequently made contact with the defendant. When stopped, Corporal Brietzke advised the defendant he was being pulled over for speeding and requested defendant’s driver’s license, registration, and insurance card. When defendant went to reach into the center console for his registration card, the defendant, according to Corporal Brietzke used his back to shield the police officer’s view of the console of his motor vehicle. According to Corporal Brietzke, the defendant used his coat and physically blocked Corporal Brietzke from observing the contents of the console and/or actions of the defendant while attempting to locate his registration card.³

According to Corporal Brietzke, the actions of defendant caused him “some concern” and “confusion” as to whether the defendant may be in possession of weapons and/or other contraband or drugs. Corporal Brietzke questioned the defendant as to when he purchased the motor vehicle and “where he was coming

² A foundation was laid in the Suppression record that Corporal Brietzke’s speedometer had been properly calibrated and upon *voir dire* defendant’s counsel withdrew his reasonable articulable suspicion argument for lack of foundation based upon the pacing of the defendant’s car through the motor vehicle and stopping him for the initial detention for speeding as set forth above on the procedural posture.

³ According to Corporal Brietzke, defendant put his arms up and blocked the glove box from his full view.

from”. The defendant informed Corporal Brietzke that he was coming from New Jersey from a friend’s house. The defendant appeared to be a “little bit nervous” and for officer safety, Corporal Brietzke therefore removed him from his motor vehicle. Corporal Brietzke testified a passenger, Mr. Isaac Smith, was in the right seat of defendant’s motor vehicle. Corporal Brietzke next questioned the passenger who gave Corporal Brietzke a “completely different story” and informed Corporal Brietzke that he and the defendant they were traveling from New York. Corporal Brietzke, based upon defendant’s previous conduct of blocking the console testified he determined there might be a weapon, drugs or contraband inside the console and questioned the defendant further.⁴ Corporal Brietzke asked the defendant what was in the glove box. When Corporal Brietzke questioned the passenger who said “I don’t know”.

Corporal Brietzke then conducted a protective pat down of defendant outside defendant’s vehicle for officer’s safety for weapons or other contraband or drugs.

Because of the potential drug contraband or paraphernalia, Corporal Brietzke contacted Wilmington Police Department. He requested that Mr. Isaac Smith, the passenger also be removed from the motor vehicle and be placed in the police car. Corporal Brietzke articulated the reason Smith be removed was so that the Wilmington Police Department canine could not attack him. The Wilmington Canine

⁴ Corporal Brietzke also testified he did not believe the defendant’s story because his passenger gave a different story.

Drug Unit arrived at the location of the stop and conducted a canine drug search of defendant's motor vehicle which was "positive" in the console area.

Corporal Brietzke then searched that console area and found drug contraband; namely a "pipe", a "candle", a clear plastic bag with two cylinder tubes and rubber gloves which he based upon his training and expertise Corporal Brietzke was aware was used for heroin and/or consumption of heroin.

II. Standard of Review.

"A defendant moving to suppress evidence bears the burden of establishing that a search or seizure violated his rights under the U.S. Constitution, the Delaware Constitution, or the Delaware Code." *See Rakas v. Illinois*, 439 U.S. 128, 130 N.199 S.Ct. 421, 58 L.Ed.2d 387 (1978); *State v. Dollard*, 788 A.2d 1283, 1286 (Del. Supr. 2001; *State v. Bien-Aime*, 1993 WL 138719 at *3 (Del. Supr. March 17, 1993).

III. The Law.

(i) Validity of the Initial Traffic Stop

The first issue this Court must decide is whether there was a reasonable articulable suspicion for the traffic stop in question and/or whether it was pretextual in nature and therefore the Motion to Suppress should be granted. As set forth in *State of Delaware v. John C. Dinan*, 1998 Del. C.P. LEXIS 31, Welch, J. (October 15, 1998) "reasonable articulable suspicion" is defined as follows:

The Fourth Amendment in Article 1, Sec. 6 of the Delaware Constitution protecting individual's right to be free from unreasonable searches and seizures. U.S. Const. Amend. IV; Del. Const. Art. I §6. Accordingly, a

police officer must justify any "seizure" of a citizen. The level of justification required varies with the magnitude of the intrusion to the citizen. See, *U.S. v. Hernandez*, 854 F.2d 295, 297 (8th Cir. 1988). Not every contact between a citizen and a police officer, however, involves a "seizure" of a person under the Fourth Amendment. See, *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868, n16 (1968); see also, *Thompson v. State*, Ark. Supr., 303 Ark. 407, 797 S.W.2d 450, 451 (1990). . . .

Of the three (3) categories of police encounters as stated in *State v. Arterbridge*, 1995 Del. Super. LEXIS 587, 1995 W.L. 790965 (December 7, 1995) "stopping an automobile falls under the second category and therefore requires that the officer have a reasonable articulable suspicion to do so." *Delaware v. Prouse*, 440 U.S. 648, 59 L. Ed. 2d 660, 99 S. Ct. 1391 (1979).

For the traffic stop to be legal "...the quantum of evidence required for reasonable articulable suspicion is less than that of probable cause." *Downs v. State*, Del. Supr., 570 A.2d 1142, 1145 (1990). As provided in *Jones v. State*, Del. Supr. 744 A.2d 856 (1999), the "determination of reasonable suspicion must be evaluated in the context of the totality of circumstances as viewed from the eyes of a reasonable, trained police officer in the same or similar circumstances, combining objective facts with an officer's subjective interpretation of those facts." *Id.* Case law has indicated that changing lanes without a signal is a violation of 21 *Del. C.* §4155 which creates probable cause for an officer to stop the vehicle. See e.g. *State v. Walker*, 1991 Del. Super., LEXIS 104, Del. Supr., Cr. A. No.: IK90-08-001, Steele, J. (March 18, 1991).

A violation of 21 *Del. C.* §4114(a) may also be a statutory violation constituting probable cause. See e.g., *State v. Harmon*, 2001 Del. Super., LEXIS 338 Del. Super.

(August 22, 2001). “If probable cause to arrest exists, this provides more than reasonable suspicion necessary to stop the vehicle.” *Eskridge v. Voshell*, Del. Supr., No. 307, 1990, Horsey, J. (Apr. 17, 1991) (ORDER); *Austin v. Division of Motor Vehicles*, Del. Super., C.A. No. 91A-08-2, Goldstein, J. (Jan. 9, 1992) (Op. and Order); *State v. Lahman*, Del. Super., Cr. I.D. No. 9410011118, Cooch, J. (Jan. 31, 1995) (Mem. Op.); *State v. Brickfield*, Del. CCP, Case No. 9609017975, Stokes, J. (May 8, 1997); *Webb v. State*, Del. Supr., No. 332, 1997, Berger, J. (Mar. 26, 1998) (ORDER).

In other cases, this Court has found that under a review of the totality of circumstances that a seatbelt violation in plain view of a police officer, while on uniform patrol, in a marked vehicle allegedly violating 21 *Del. C.* §4108 constitutes probable cause and/or reasonable articulable suspicion for a traffic stop. The general rule is that “[t]he stop of an automobile is reasonable where the police have probable cause that a traffic violation occurred.” *State v. Banther*, Del. Super., Cr.A. No.: IK97-05-0094, (Ridgely, J.)(September 24, 1998).

As defendant points out in paragraph 9 of his Motion, ... “[Id] it is well settled that reasonable articulable suspicion is required to seize an individual and it must be based upon specific and articulable facts and cannot be based on a mere hunch.”⁵

The issue in this case is whether the officer observed any criminal activity during or shortly after the initial traffic stop of the defendant for speeding before he conducted further investigation and investigated the center console for either

⁵ See *Terry v. Ohio*, 392 U.S. 1 (1968); *Jones v. State*, 745 A.2d 856 (Del. 1999).

weapons and/or drug contraband or drugs. This determination must be based upon a reasonable articulable suspicion considering and evaluating the totality of the circumstances at the time.⁶

Under the reasonable articulable suspicion test, a police officer “must point to specific and articulable facts when which, taken together with rational inferences from those facts reasonable warranting the intrusion.”⁷

In the instate case, Corporal Brietzke extended his search after the initial stop for speeding because the defendant shielded the center console to block his view when attempting to locate his registration card. The reasonable articulable reason offered by Corporal Brietzke’s sworn testimony at the suppression hearing was the defendant may be shielding a weapon, contraband or drugs while defendant was looking in his console for the registration card. The Court finds that reasonable articulable suspicion therefore existed for Corporal Brietzke to continue this investigation after the initial traffic stop for speeding. In addition, the defendant and his passenger gave directly conflicting stories as to their whereabouts and where they were coming from; the Court believes, in fact, further aid Officer Brietzke’s reasonable articulable suspicion argument and testimony that did, in fact, exist.

Clearly the instant stop was not a pretextual stop because of the initial speeding violation by the defendant. However, under the totality of the circumstances as

⁶ *United States v. Cortez*, 449 U.S. 411, 417-418 (1981).

⁷ See *Coleman v. State*, 562 A.2d 1171, 1174 (Del. 1989) (quoting *Terry*, 392 U.S. at 21).

viewed from 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," the Court finds it was reasonable to conclude criminal activity may be afoot when the defendant blocked Corporal Brietzke's view while retrieving the initial registration.

V. Opinion and Order.

Therefore, the Court DENIES Defendant's Motion to Suppress. The matter shall be scheduled for trial at the earliest convenience of the parties with notice to counsel of record.

IT IS SO ORDERED this 14th day of December, 2011.

John K. Welch

John K. Welch
Judge

/jb

cc: Ms. Diane Healy, Case Manager
CCP, Criminal Division