IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
v.	)	I.D. No. 0308017950
	)	
DEIVY J. MILIANY-OJEDA,	)	
	)	
Defendant.	)	

Date Submitted: November 21, 2003
Date Decided: February 18, 2004

O P I N I O N

Upon Defendant's Motion to Suppress - ***GRANTED***

Robert Surles, Esquire, Deputy Attorney General, Department of Justice, 820 North French Street, Wilmington, Delaware 19801, for State of Delaware.

Joseph A. Hurley, Esquire, 1215 King Street, Wilmington, Delaware, 19801, for Defendant.

JURDEN, J.

Before the Court is the defendant's Motion to Suppress. For the reasons that follow, the defendant's motion is **GRANTED**.

I. FACTS

On August 25, 2003, at approximately 12:00 a.m., Corporal Cras was on routine patrol on Interstate 95 in New Castle County when he observed the defendant's vehicle speeding and tailgating. According to Corporal Cras, the defendant was traveling 72 miles per hour in a 55 miles per hour zone and was only one-and-one-half car lengths behind the vehicle ahead of him. Corporal Cras noted that the defendant's vehicle had tinted windows and a Florida license plate. Corporal Cras activated his emergency equipment and the defendant pulled his vehicle over to the side of the road. Corporal Cras approached the vehicle and asked the defendant for his license, registration, and proof of insurance. The defendant, an Hispanic male, spoke English with a Spanish accent. As the defendant produced the requested documents, Corporal Cras observed that the defendant's hand was shaking "uncontrollably." Corporal Cras told the defendant he was stopped for speeding and following too closely. Corporal Cras testified that because he was concerned about the defendant's shaking hand, he asked the defendant where he was coming from and going to, and the purpose of his trip. The defendant said he was coming from Miami, Florida and going to his cousin's house in Elizabeth, New Jersey, for his sister's wedding. Corporal Cras asked the defendant where his cousin lived. The defendant could not give an address. The defendant said he planned to stay in Elizabeth for one week. Corporal Cras noticed a tote/gym bag in the back seat. According to Corporal Cras,

he thought the defendant should have more luggage if he was going to be away for a week.[1] As the defendant answered Corporal Cras' questions, his hands shook, his lips quivered in an unusual manner, he perspired, he repeated Corporal Cras' questions, and he did not make eye contact when responding. Corporal Cras testified that based on what he learned at the Police Academy, the defendant fit the profile of a drug courier.

At this point, Corporal Cras returned to his patrol car to run the defendant's license and registration through the computer system. The computer check revealed that the defendant's license and registration were valid. Corporal Cras returned to the defendant's vehicle with the documentation. The defendant was now smoking a cigarette, and his hand was still shaking uncontrollably. Corporal Cras testified that most people are nervous when they are pulled over, but not to the extreme state exhibited by the defendant. In Corporal Cras' opinion, the defendant's uncontrollably shaking hand and conspicuously quivering lips manifested a cause for concern. Corporal Cras testified that the defendant's behavior made him wonder whether the defendant's behavior might be attributable to a medical condition. Based on his experience, Corporal Cras testified that drivers have usually calmed down by the time he returns from conducting a computer check of their documentation. Corporal Cras asked the defendant if he was okay. The defendant replied that he was fine. When he asked the defendant if he had anything to drink, the defendant responded in the negative.

Corporal Cras testified that he then asked the defendant to exit the vehicle, to check on his

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[1]Corporal Cras admitted on cross examination that he reached this conclusion before and without knowing whether the defendant had any additional luggage in the trunk.

medical condition and explain his violations to him. Upon exiting the vehicle, the defendant's hand was still shaking uncontrollably and his lips were still quivering. Corporal Cras also observed that the defendant was breathing faster and was sweating. Again, Corporal Cras asked the defendant if he was okay. The defendant replied that he was okay, but did not make eye with Corporal Cras. When Corporal Cras asked again where the defendant had come from, the defendant again said he had come from Miami. Corporal Cras asked the defendant a second time about his destination. The defendant looked down and away and repeated the question. The defendant then said he was going to Jersey City. Corporal Cras asked the defendant if he was driving straight through to Jersey City. The defendant indicated he had stopped in North Carolina for the night. Next, Corporal Cras asked defendant if he had purchased any fireworks in North Carolina and whether there were any fireworks in his vehicle. The defendant replied he had neither purchased fireworks nor was he transporting fireworks. Corporal Cras asked the defendant if he had any guns or illegal contraband in his vehicle. The defendant said "No." When Corporal Cras asked the defendant if he could search his vehicle, the defendant consented.

Corporal Cras presented the defendant with a standard Consent to Search form and offered a version of the form written in either English or Spanish. The defendant, who indicated that he read and understood Spanish, chose the Spanish form. The defendant read the form, indicated that he understood the form, and signed it. After receiving the defendant's verbal and written consent to search the vehicle, Corporal Cras searched the vehicle.

Corporal Cras opened the trunk, which appeared empty. Upon further investigation, he

discovered what appeared to be a compartment constructed under the rear window deck. Corporal Cras entered the rear of the vehicle and looked under the rear window deck. The speakers were missing, and he could see a metal compartment with a trap door. Corporal Cras detected a strong odor of raw Marijuana emanating from the metal compartment. A subsequent search of the metal compartment revealed twenty-eight pounds of Marijuana. The defendant was charged with Trafficking in Marijuana, Possession with Intent to Deliver, Use of a Vehicle for Keeping Controlled Substances, Possession of Drug Paraphanalia and Speeding. The defendant filed the instant motion seeking to suppress the evidence obtained from his vehicle.

II. DISCUSSION

The defendant moves to suppress the evidence obtained by the State as a result of the roadside detention and subsequent search of the defendant's vehicle. He asserts that the police had no reasonable suspicion of illegal activity upon which to base a prolonged detention beyond the time necessary for issuance of a traffic citation, and that the defendant's consent to search the vehicle was invalid because it was the fruit of an unlawful seizure. The State contends that the prolonged detention was lawful based on the police officer's reasonable suspicion of criminal activity, and that the consent to search was valid.

The seizure of a vehicle and its occupants based upon an observed traffic violation is a "seizure" within the meaning of the Fourth Amendment.[2] The seizure that is permitted is not limitless, but is delineated by both constitutional and statutory considerations. "Specifically, the

[2] *Caldwell v. State*, 780 A.2d 1037, 1045 (Del. 2001).

State must demonstrate that the [traffic] stop and any subsequent police investigation were reasonable in the circumstances."[3] The detention must be limited in scope and duration,[4] and the seizure must be "reasonably related in scope to the circumstances which justified the interference in the first place."[5] The scope of the detention must be carefully tailored to its underlying justification.[6] In other words, the permissible Fourth Amendment intrusion "must be temporary and last no longer than is necessary to effectuate the purpose of the stop."[7] Further, it is well settled that the duration and execution of a traffic stop is necessarily limited by the initial purpose of the stop.[8] The duration and scope of the detention must last only so long as is reasonably necessary to conduct the above activities and/or to issue a traffic citation, at which point the legitimate investigative purpose of the traffic stop is completed.[9] Any investigation of the vehicle or its occupants beyond that required to complete the purpose of the traffic stop constitutes a separate seizure that must be supported by independent facts sufficient to justify the additional intrusion.[10] That is to say, the

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[3] *Id.* at 1046.

[4] *Terry v. Ohio,* 392 U.S. 1 (1968).

[5] *Id.* at 20.

[6] *Florida v. Royer*, 460 U.S. 491, 500 (1983).

[7] *Id.*

[8] *Caldwell,* 780 A.2d at 1047.

[9] *United States v. White*, 81 F.3d 775, 778 (8th Cir. 1996); *see also Caldwell*, 780 A.2d at 1046-1050.

[10] *Id.*

police must have reasonable and articulable suspicion based upon "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion."[11]

Under Delaware statutory law, the seizing officer may, if there are reasonable grounds to do so, ask where the driver is coming from, where he is going to, and the reason for his trip.[12] The term "reasonable ground" as used in section 1902(a) has the same meaning as "reasonable and articulable suspicion."[13] A determination of reasonable suspicion must be evaluated in the context of the totality of the circumstances as viewed through the eyes of a reasonable, trained, police officer in the same or similar circumstances, combining objective facts with such an officer's subjective interpretation of those facts.[14] The Court must judge the facts under an objective standard and, thus, a police officer's subjective opinion that suspicious circumstances are ongoing is insufficient.[15]

In moving to suppress the evidence, the defendant relies on *Caldwell v. State.*[16] In *Caldwell*,

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[11]*Jones v. State*, 745 A.2d 856, 861 (Del. 1999), quoting *Terry v. Ohio* 392 U.S. 1, 21 (1968).

[12]*See* 11 *Del. C.* § 1902(a). This section codifies the standard for investigatory stops and detentions and provides as follows:

> 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.

[13]*Jones v. State*, 745 A.2d 856, 861 (Del. 1999).

[14]*Id.*

[15]*Harris v. State*, 806 A.2d 119 (Del. 2002); *State v. Moore*, 2001 WL 1198682 (Del. Super. Ct. Aug. 21, 2001).

[16]780 A.2d 1037 (Del. 2001).

the police observed Caldwell and a passenger parked in a fire lane. The officers recognized Caldwell as a person suspected of drug dealing. When Caldwell saw the police drive by, he pulled away from the curb. The police followed. After a short time, the police officer activated his emergency lights and pulled Caldwell over. As Caldwell pulled over, they noticed he moved his arm in a curious manner. When the officers approached Caldwell's vehicle, they noted his hands were shaking and he was acting nervous. They asked Caldwell for his license, registration and proof of insurance and he produced them. The police then asked Caldwell to exit his vehicle. The police asked Caldwell who his passenger was, where they were coming from, and their destination. Caldwell said he did not know his passenger's name, but that he had picked the passenger up on South Queen Street and they were going to Capitol Park. The police immediately frisked and handcuffed Caldwell and his passenger and waited for back up before questioning Caldwell any further or initially questioning his passenger.[17] The officers in *Caldwell* said that part of the reason for the stop was Caldwell's criminal history and unspecified intelligence gathered in an ongoing drug investigation. The police conceded that they did not usually take enforcement actions or give tickets for parking violations.

The Court in *Caldwell* noted, "[t]he question we address here is whether the officer's conduct during the traffic stop was sufficiently related to the parking violation."[18] When the officer handcuffed Caldwell, he had not yet: (1) elicited conflicting answers from the passenger about their

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[17]After handcuffing Caldwell, the police asked him what he was doing with his right hand as he was pulling over. Caldwell purportedly told the police he was putting a razor blade in the center console and invited the officer to look for himself. *Caldwell,* 780 A.2d at 1043.

[18]*Id.* at 1046.

destination and relationship; (2) asked Caldwell why he moved his right arm while pulling over; or (3) searched the center console to verify Caldwell's explanation for the right arm movement.[19] Based upon these facts, the *Caldwell* Court held that because the pat-down and handcuffing were "entirely unrelated to the parking violation and exceeded the proper scope of a traffic stop for a parking violation, it was at this point that the traffic stop ended and a second, independent investigative detention began."[20] The Court closely examined the second independent investigative detention to determine whether it was "supported by independent facts, known to the officer at the time," that would justify the additional intrusion.[21]

The Court finds the circumstances in *Caldwell* relevant to the instant case. In *Caldwell,* the Delaware Supreme Court held that a policeman's observation of a traffic violation does not confer upon him the right to abandon or never begin to take action related to the traffic violation, and, instead attempt to secure a waiver of Fourth Amendment rights.[22] The Court held that Caldwell's nervous behavior combined with the "odd assertion" that he did not know the name of his passenger, taken together, did not justify the "detention of extended duration" and the "more intrusive measures like the pat-down... and handcuffs."[23] In so holding, the *Caldwell* Court noted: "[m]ost Courts

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[19] *Id.* at 1045, n.13.

[20] *Id.* at 1049.

[21] *Id.* at 1047 (citations omitted).

[22] *Id.* at 1048.

[23] *Id.* at 1050.

require something more than nervousness and implausible conflicting answers to support a finding of reasonable suspicion - for example, insufficient documentation or the odor of masking agents."[24]

The factual circumstances in *United States v. Jones*[25] are strikingly similar to the case at bar and support the defendant's contention that the expanded detention and resultant search were unlawful. In *Jones*, the defendant was stopped based on the observations of a police officer who concluded that the defendant may have been intoxicated or tired. The officer asked Jones to exit his vehicle and accompany the officer back to his patrol car. The defendant complied. While in the patrol car, the officer asked to see Jones' driver's license and insurance card. Upon determining that the documents were valid, the officer ran a computer check of Jones' criminal history. While waiting for the results, the officer asked Jones about the nature and purpose of his trip. Jones appeared nervous, his voice cracked, he yawned, his thumb shook and he would not make eye contact with the officer. Despite this nervousness, Jones answered the questions. The officer then asked Jones if he had any prior arrests. Jones responded that he did not. At this point, the results from the criminal history check were transmitted to the patrol car indicating that Jones had a prior felony arrest. The officer called his dispatcher and learned of two prior theft arrests as well. Jones lied when the officer inquired further about his prior arrests. After several minutes of questioning, Jones admitted he might have been arrested for stealing cigarettes when he was a minor. The officer's suspicion became heightened because the criminal history information from the dispatcher

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[24] *Id.* at 1050, n.32.

[25] 269 F.3d 919 (8th Cir. 2001).

conflicted with Jones' account. In consideration of the foregoing, the Court in *Jones* held that the police officer did not have reasonable articulable suspicion sufficient to expand the traffic stop. The Court noted:

> We have concluded that nervousness combined with several other more revealing facts can generate reasonable suspicion.... Generally, however, "nervousness is of limited significance in determining reasonable suspicion...." "[W]hile a person's nervous behavior maybe relevant, we are wary of the objective suspicion supplied by generic claims that a Defendant was nervous or exhibited nervous behavior after being confronted by law enforcement officials."[26]

In furtherance of his assertion that his constitutional rights were violated, the defendant also relies on *State v. Huntley.*[27] Huntley was a passenger in a vehicle, driven by Martins, that was stopped for speeding. The police asked Martins for his license, registration and proof of insurance. He produced them. The police then asked Martins to exit the vehicle. The officer asked Martins where he was coming from and his destination. Martins said he had been in New York visiting friends with Huntley, and was returning home to Maryland. The police officer determined that Martins' answers seemed truthful, but "fuzzy." Martins said that he had been traveling in tandem with an acquaintance who drove a black Nissan.[28] The police ordered Huntley to exit the vehicle and

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[26]*Id.* at 929 (citations omitted).

[27]777 A.2d 249 (Del. Super. Ct. 2000).

[28]The state troopers were in an unmarked car. Before Huntley and Martins were pulled over, a black Nissan had passed the troopers and then slowed down. Huntley's minivan then passed the troopers and did not slow down. While the police officers were pacing Huntley's vehicle, they noticed that the black Nissan was tailgating their car and appeared prone to striking the troopers' vehicle. The police pumped their brakes and activated their rear emergency lights, at which time the Nissan slowed down and veered off to the right. While still pacing the minivan, the troopers turned on their emergency lights and Huntley and Martins properly pulled

also asked him where he had been and what his destination was. Huntley replied that he and Martins had spent the day in Atlantic City, New Jersey and were returning to Maryland. Again, the police questioned Martins. Martins again told them that he had come from New York City. After further questioning, Huntley again replied that they had been in Atlantic City.

The police questioned a third passenger about Martin and Huntley's itinerary. The passenger pointed to Huntley and said, "[w]hat the other guy said." When questioned further, she said they had been in Atlantic City. In observing Huntley, the police noted that he appeared nervous, avoided eye contact, rocked from side-to-side, and appeared dry mouthed. They asked Huntley if he was armed, and performed a pat-down search yielding no weapons. One officer then asked whether there were any illegal substances or contraband in the vehicle. Huntley said there were not. The officer then asked to search the vehicle. The officer justified the search based on Huntley's nervousness and the conflicting stories of the passengers as to their point of origin. Based on these facts, the officer concluded that there was a "potential for criminal activity." The Court in *Huntley* found that the police did not have reasonable and articulable suspicion and the continued detention of the defendants was based "solely on the trooper's conclusion [that] the defendants' appearance, responses and traveling habits meant they were criminals."[29]

In opposition to defendant's Motion to Suppress, the State relies on *United States v. Givan*,[30]

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over. *Id.* at 251-52.

[29]777 A.2d at 257.

[30]320 F.3d 452 (3rd Cir. 2003).

arguing that the defendant's nervousness, shaking hand, repetition of the officer's questions, failure to make eye contact, and inconsistent answers warranted expanding the investigation beyond that necessary for the traffic stop.

The Court disagrees, because it finds that *Givan* is distinguishable on its facts. In *Givan*, the police told the driver he was free to leave.[31] In the case *sub judice*, Corporal Cras ordered the defendant to exit his vehicle. Under the circumstances, it was reasonable for the defendant to believe he was not at liberty to leave.[32] The Court in *Givan* held that the arresting officer had reasonable suspicion to conduct an additional investigation because the driver stated he had been traveling non-stop on a 17-hour trip to a location known by police to be a drug locus. In contrast, the defendant told Corporal Cras that he broke up his drive from Florida by spending the night in North Carolina. This information should have allayed any concern by Corporal Cras that the defendant might be too

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[31]In *Givan*, the police returned the driver's license and advised him he was free to leave before asking if he would mind answering a few questions. The driver said he did not mind answering some questions. *Id.* at 456.

[32] *See Ferris v. State*, 735 A.2d 491, 502-503 (Md. 1999) (cited in *Caldwell*, 780 A.2d at 1048, nn.20 & 21.). The Court's conclusion is based on several facts: Corporal Cras asked the defendant several questions, checked the defendant's license and registration through the computer in the patrol car, returned to the defendant's vehicle with his documentation, asked the defendant a few more questions, and then asked the defendant to exit the vehicle. Based on the totality of the circumstances in this case, the Court finds that a reasonable person in the defendant's position would not have believed that he was "free to disregard the police presence and go about his business" when Corporal Cras asked him if he would exit the vehicle. *See*, *Ferris*, 735 A.2d at 501-503; *see also, Harris v. State*, 806 A.2d 119, 124, n.15 (Del. 2002) (noting that Delaware has adopted the standard for defining a seizure from the United States Supreme Court decision in *Michigan v. Chesnut*, 486 U.S. 567, 569 (1988), holding that a government seizure occurs when the government agent's conduct "communicates to a reasonable person that he [is] not at liberty to ignore the police presence and go about his business").

fatigued to drive safely.

More importantly, the standard of review imposed by the Court differs from *Givan*. The Court in *Givan* applied a clear error standard and found no clear error. The standard here is whether the State has established, by a preponderance of the evidence, that the warrantless seizure was proper.[33] The Court finds that the State has failed to satisfy its burden.

"In considering the 'whole picture' painted by the facts in this case, the Court believes that a person of reasonable caution would not be warranted in believing that . . . a nervous demeanor and conflicting [answers] reasonably indicates that the defendant[] had committed a crime."[34] The Court concludes, based on the testimony of Corporal Cras, that he simply had a hunch the defendant was engaged in some sort of illegal activity, probably drug related. But a police officer's hunch or "suspicions of criminality" not reasonably articulated or objectively justified by the facts are insufficient.[35] By his own admission, many of the questions posed by Corporal Cras were not related (much less *reasonably* related) to the initial traffic stop. Corporal Cras also testified that he would not have questioned a resident of Delaware as intensely, and in the same fashion, as he would

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[33] *Caldwell*, 780 A.2d at 1046 ("...the State must demonstrate that the stop and any subsequent police investigation were reasonable in the circumstances.").

[34] *Huntley*, 777 A.2d at 257.

[35] *Id.*; *see also Harris v. State*, 806 A.2d 119 (Del. 2002); *Caldwell*, 780 A.2d at 1048, n.25 (describing the constitutional concerns that arise when a police officer turns a routine traffic stop into a "fishing expedition" for probable cause or consent to search); *Jones v. State*, 745 A.2d 856, 868 (Del. 1999) (holding "[w]e have consistently held that a police officer's decision to detain an individual for investigatory purposes 'must be predicated on more than a mere hunch.'").

question an out-of-state driver. The only facts offered to justify the expanded detention here are the defendant's inconsistent responses and nervous demeanor. As in *Huntley*, the continued detention of the defendant was based solely on the police officer's conclusion that the defendant's "appearance, responses and traveling habits meant.. [he was a] criminal []."[36] This Court has consistently followed the majority view that inconsistent answers and nervousness without some other "more tangible, objectively articulable indicators of criminality, such as driving with a suspended license, failure to provide proof of ownership of vehicle, or the palpable odor of alcohol, drugs or [masking agents]," do not support a finding of reasonable suspicion.[37] The separate seizure that occurred thereafter is simply not supported by independent facts sufficient to justify the additional intrusion.[38]

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[36]*Huntley*, 777 A.2d at 257.

[37]*Id.* at 256.

[38]"Under the Fourth Amendment, an officer may order both the driver and the passengers to exit the car during the course of a valid traffic stop." *Caldwell,* 708 A.2d at 1049, n.27 (citing *Maryland v. Wilson,* 519 U.S. 408, 412-14 (1997) (other citations omitted)). But in the case *sub judice*, by the time Corporal Cras asked the defendant to exit his vehicle, the officer had already thoroughly questioned the defendant, obtained the defendant's license and registration, conducted a computer check which verified that the defendant's documents were valid, and returned to the defendant's vehicle to ask some more questions. Asking the defendant to exit his vehicle at this time was not related to the purpose of the initial traffic stop and was not justified by sufficient independent facts. *See Charity v. State*, 753 A.2d 556, 567 (Md. App. 2000), *cert. denied*, 759 A.2d 231 (Md. 2000) ("Sergeant Lewis's ordering of the appellant out of the car was not, even in part, an incident of the traffic stop. It was in our judgment, exclusively for the independent purpose of investigating a likely narcotics violation. . . . it is clear that Sergeant Lewis's ordering of the appellant out of the car so he might be subjected to further questioning at the rear of the car had no conceivable relationship to the purpose of the traffic stop.") (*quoted in Caldwell*, 708 A.2d at 1049, nn.27 & 30).

The State has failed to show by a preponderance of the evidence that the expanded detention "was based on suspicions of criminality that were reasonably articulated or objectively justified by the facts."[39] Because the Court finds that the consent to search was given during a state of illegal detention,[40] the consent was invalid. Therefore, all evidence seized from the vehicle is suppressed.[41]

IT IS SO ORDERED.

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Jan R. Jurden, Judge

[39] *Id.* at 257.

[40] The detention beyond that necessary for the traffic stop violated the Fourth Amendment and Article I, Section 6 of the Delaware Constitution which provides:

> The people shall be secure in their persons, houses, papers, and possessions, from unreasonable searches and seizures; and no warrant to search any place, or to seize any person or thing, shall issue without describing them as particularly as may be; nor then, unless there be probable cause supported by oath or affirmation.

[41] *See Caldwell*, 708 A.2d at 1051, 1052, n.40. ("It has long been established that 'any evidence recovered or derived from an illegal search and seizure' must be excluded from evidence. . . . consent is generally insufficient to cleanse the taint from an ongoing illegal detention.") (citations omitted).