

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
v.	)	ID No. 1009013260
	)	
CARL ROY,	)	
	)	
Defendant.	)	

Submitted: February 9, 2011

Decided: March 17, 2011

On Defendant's Motion to Suppress

**GRANTED**

**OPINION**

Michael J. Hendee, Esquire, Deputy Attorney General, Department of  
Justice, Wilmington, Delaware, Attorney for the State

Kevin J. O'Connell, Esquire, Wilmington, Delaware, Attorney for  
Defendant

**JOHNSTON, J.**

Defendant Carl Roy was indicted for Possession of a Controlled Substance Within 300' of a Park and Possession of a Controlled Substance Within 300' of a Church. The indictment stems from a September 15, 2010 detention and pat-down search. Wilmington Police Officers found a plastic bag of crack cocaine in defendant's pants pocket.

On January 21, 2011, Defendant filed a Motion to Suppress.

### **FACTUAL CONTEXT**

Around 11:20 a.m. on September 15, 2010, Officers Ledesma and Schupp of the Wilmington Police Department patrolled, in police vehicle, the 400 block of Delamore Place in Wilmington, Delaware. Officer Ledesma testified that this is a "well-known drug related area."

The Officers noticed an individual standing in the street about "half a block" from their position. Officer Ledesma explained that, prior to that day, he had stopped this individual four or five times, and therefore, he recognized the individual as the defendant.

On direct examination, Officer Ledesma testified that defendant "looked up and down the street" and went "in-between two vehicles as if he was attempting to conceal himself from us while we were coming down the street." Officer Ledesma stated that defendant "had his hands like in his waistband, like he was trying to conceal something into the front of his pants

. . .” Officer Ledesma believed that defendant was concealing contraband. He explained that “by the way that [defendant] was [concealing] it it looked like a small item. It wasn’t anything big.”

On cross examination, Officer Ledesma testified that he could not see defendant’s hands and did not know whether he was concealing something. Officer Ledesma stated that the vehicles on either side of defendant obstructed his line of sight.

The Officers drove southbound towards defendant. Meanwhile, defendant walked northbound. The Officers stopped “within five feet” of defendant, and exited the vehicle. Officer Schupp said: “Come here, Carl.” Officer Ledesma explained that defendant “was acting like he was talking to [two females on the corner] but then he came over to us.” Defendant placed his hands on the police vehicle and stated: “Let’s get this over with.”

A pat-down search revealed four grams of crack cocaine in defendant’s pants pocket.<sup>1</sup>

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<sup>1</sup> In its papers, the State asserts that defendant consented to Officer Schupp’s search of his person. Officer Schupp, however, was not present at the suppression hearing and therefore did not testify. Officer Ledesma did not overhear Officer Schupp’s conversation with defendant just prior to the pat-down search.

## **PARTIES' CONTENTIONS**

Defendant argues that the Officers lacked reasonable articulable suspicion to seize him. Assuming, *arguendo*, the Officers were justified in detaining him, defendant contends that the Officers lacked reasonable suspicion that defendant was armed and dangerous. Therefore, defendant claims, the pat-down search was not justified. For these reasons, defendant asserts that the Motion to Suppress should be granted. Defendant argues that this case is analogous to *Jones v. State*.<sup>2</sup>

In *Jones*, the police received an anonymous tip shortly before 10 p.m. that a “suspicious black male wearing a blue coat” had been standing for some time in a high-crime, high-drug area.<sup>3</sup> An officer responded and observed the defendant, who matched the description but was not engaged in suspicious activity.<sup>4</sup> The officer approached the defendant, and asked him to state his name, address, business abroad or destination, and ordered him to stop and remove his hands from his coat pockets.<sup>5</sup> The defendant did not comply and walked away.<sup>6</sup> Subsequently, a struggle ensued, and the officer

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<sup>2</sup> 745 A.2d 856 (Del. 1999).

<sup>3</sup> *Id.* at 858-59.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 859.

<sup>6</sup> *Id.*

arrested the defendant.<sup>7</sup> The officer found a small bag of cocaine that the defendant had thrown during the struggle.<sup>8</sup>

The Delaware Supreme Court held that the defendant was seized when the officer instructed him to stop and remove his hands from his coat pockets.<sup>9</sup> The Court found that the officer lacked reasonable and articulable suspicion to detain the defendant, and instead relied on a “hunch.”<sup>10</sup> The anonymous tip merely provided readily observable facts, and the officer’s observations “did not corroborate or particularize the conclusory term ‘suspicious.’”<sup>11</sup> The Court explained that factors such as “nighttime and the negative reputation of a neighborhood” are used to “support or bolster a finding a reasonable suspicion, not as the sole bases on that finding.”<sup>12</sup> The Court noted that “[i]n a close case like the present one, the balance ought to be struck on the side of the freedom of the citizen from governmental intrusion. To conclude otherwise would be to elevate society’s interest in apprehending offenders above the right of citizens to be free from unreasonable stops.”<sup>13</sup>

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 867.

<sup>10</sup> *Id.* at 868.

<sup>11</sup> *Id.* at 870.

<sup>12</sup> *Id.* at 871.

<sup>13</sup> *Id.* at 868 (emphasis in original).

The State argues that the Officers had reasonable articulable suspicion to seize defendant and perform a pat-down search. The State cites these facts: the high-crime, high drug area; defendant looking up and down the street and concealing himself between two vehicles; defendant concealing a small object in his waistband; defendant eluding the Officers by talking to the females; and defendant placing his hands on the police vehicle and stating “let’s get this over with.” The State contends that, because defendant was concealing an object in his waistband in a high-crime, high-drug area, the Officers had reasonable suspicion that he was armed and dangerous and were justified in performing the pat-down search. The State claims that this case is analogous to *Woody v. State*<sup>14</sup> and *State v. Rollins*.<sup>15</sup>

In *Woody*, officers were conducting surveillance in a high-crime, high-drug area, and noticed the defendant and two other men standing in a yard behind a residence.<sup>16</sup> The officers approached the yard, and the defendant turned and walked toward the front of the residence.<sup>17</sup> Subsequently, the defendant ran back towards the rear door after seeing additional officers enter the yard.<sup>18</sup> An officer observed the defendant clutching a bulge in his coat pocket, which he believed to be a weapon or

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<sup>14</sup> 765 A.2d 1257 (Del. 2001).

<sup>15</sup> 922 A.2d 379 (Del. 2007).

<sup>16</sup> *Woody*, 765 A.2d at 1260.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

drugs.<sup>19</sup> The officers identified themselves and ordered the defendant to stop.<sup>20</sup> The defendant did not comply and the officers arrested him, finding a gun in his coat pocket.<sup>21</sup>

The Delaware Supreme Court held that, unlike the circumstances in *Jones*, the defendant's flight from the officers is considered to determine whether the officers had reasonable and articulable suspicion, because he fled *before* the officers seized him.<sup>22</sup> The Court characterized the defendant's flight as "nervous, evasive behavior," and therefore found it suggestive of wrongdoing.<sup>23</sup> Additionally, the Court considered the high-crime, high-drug area and that the defendant was clutching a bulge in his pocket.<sup>24</sup> The Court held that the totality of the circumstances amounted to reasonable and articulable suspicion that the defendant was engaged in criminal activity.<sup>25</sup>

In *Rollins*, officers patrolled a high-crime, high drug area.<sup>26</sup> In an attempt to surprise anyone involved in a drug transaction, the officers drove

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 1264.

<sup>23</sup> *Id.* at 1265 (citing *Illinois v. Wardlow*, 120 U.S. 119, 124 (2000)).

<sup>24</sup> *Id.* at 1266.

<sup>25</sup> *Id.*

<sup>26</sup> *Rollins*, 922 A.2d at 381.

their vehicle into the courtyard of apartment projects.<sup>27</sup> A woman yelled “five-O” in the direction of the defendant.<sup>28</sup> Subsequently, the officers observed the defendant put his hand into his pocket, withdraw it, and walk away from the officers.<sup>29</sup> The officers drove near the defendant and asked him to come over to the vehicle.<sup>30</sup> An officer grabbed the defendant by the arm and brought him to the car because the officer believed the defendant “looked like he was looking for a way out.”<sup>31</sup> A search revealed cocaine in the defendant’s pocket.<sup>32</sup>

The Delaware Supreme Court found that the following circumstances amounted to reasonable and articulable suspicion that the defendant was engaged in criminal activity: the high-crime, high drug area; the bystander’s warning shout of “five-O” directed towards the defendant; the defendant’s insertion and removal of his hand in his pocket when he saw the officers approaching; and the defendant walking away from the officers.<sup>33</sup>

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<sup>27</sup> *Id.* at 382.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 384-86.



## ANALYSIS

### *The Seizure*

In *Michigan v. Chestnut*,<sup>34</sup> the United States Supreme Court held that a seizure takes place when the officer's conduct would "have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business."<sup>35</sup> The Court created an exception to that rule in *California v. Hodari D.*,<sup>36</sup> holding that, even when an officer has manifested a "show of authority," a seizure within the meaning of the Fourth Amendment further "requires *either* physical force . . . *or*, where that is absent, *submission* to the assertion of authority."<sup>37</sup>

In *Jones v. State*,<sup>38</sup> however, the Delaware Supreme Court relied upon the Delaware detention statute, 11 *Del. C.* § 1902, and Article I, § 6 of the Delaware Constitution, affording defendants more protection than the United States Constitution.<sup>39</sup> The Court declined to follow *Hodari D.* It declared that determining whether a "seizure has occurred . . . requires focusing upon

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<sup>34</sup> 486 U.S. 567 (1988)

<sup>35</sup> *Id.* at 569.

<sup>36</sup> 499 U.S. 621 (1991).

<sup>37</sup> *Id.* at 626 (emphasis in original).

<sup>38</sup> 745 A.2d 856 (Del. 1999).

<sup>39</sup> *Id.* at 863-64.

the police officer's actions to determine when a reasonable person would have believed he or she was not free to ignore the police presence.”<sup>40</sup>

This Court finds that defendant was seized when Officer Schupp stated: “Come here, Carl.” The Officers drove towards defendant, parked the vehicle five feet from defendant, exited the vehicle, and instructed defendant to approach them. Under these circumstances, a reasonable person would believe he was not free to ignore the Officers’ presence.

The circumstances surrounding the seizure are analogous to those in *Jones*. In *Jones*, the Delaware Supreme Court held that the defendant was seized when the officer instructed him to stop and remove his hands from his coat pockets.<sup>41</sup>

Because the Court finds that defendant was seized when Officer Schupp stated “[c]ome here, Carl,” subsequent circumstances will not be considered in determining whether the Officers had reasonable articulable suspicion to detain defendant.

### ***Reasonable Articulable Suspicion***

The 4th Amendment to the United States Constitution and Article I, Section 6 of the Delaware Constitution protect individuals from

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<sup>40</sup> *Id.* at 869.

<sup>41</sup> *Id.* at 867.

unreasonable seizures of their persons and effects. In *Terry v. Ohio*,<sup>42</sup> the United States Supreme Court held that a police officer may seize an individual for investigatory purposes if the detention is supported by “a reasonable and articulable suspicion of criminal activity.”<sup>43</sup> The Supreme Court defined the standard as the ability to “point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion.”<sup>44</sup>

The Court is not convinced that Officer Ledesma had the ability to see defendant concealing a “small item” in his waistband. On cross-examination, Officer Ledesma admitted that the vehicles on either side of defendant obstructed his line of sight.

Additionally, as the Court mentioned, defendant’s conduct after he was seized—“acting like he was talking” to the females on the corner and placing his hands on the police vehicle and stating “let’s get this over with”—will not be considered to determine whether the Officers had reasonable articulable suspicion.

Therefore, the Court is left with these factors: the high-crime, high-drug area; defendant looking up and down the street and concealing himself

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<sup>42</sup> 392 U.S. 1 (1968).

<sup>43</sup> *Id.* at 21.

<sup>44</sup> *Id.*

between two cars; and defendant walking toward the Officers. The high-crime, high-drug area, alone, is insufficient to constitute reasonable suspicion, but is a relevant contextual consideration.<sup>45</sup> Also relevant is that these events took place during the day. Defendant's conduct in a high-crime, high-drug area justifiably aroused the Officers' suspicion. However, the sequence of events took place during the day, concluding with defendant walking toward the Officers. These factors mitigated the severity of defendant's suspicious behavior, stemming the Officers' suspicion before it reached the threshold of reasonable and articulable. Therefore, considering the totality of the circumstances, the Court finds that the Officers lacked reasonable articulable suspicion that defendant was engaged in criminal activity.

Indeed, this is a close case. It is worth repeating that “*the balance ought to be struck on the side of the freedom of the citizen from governmental intrusion. To conclude otherwise would be to elevate society's interest in apprehending offenders above the right of citizens to be free from unreasonable stops.*”<sup>46</sup>

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<sup>45</sup> *Woody*, 765 A.2d at 1265 (citing *Wardlow*, 528 U.S. at 124; *Brown v. Texas*, 443 U.S. 47, 52 (1979)).

<sup>46</sup> *Jones*, 845 at 868 (emphasis in original).

This case is distinguishable from *Woody*. In *Woody*, defendant nervously and evasively fled from the officers in a high-crime, high-drug area, clutching a bulge in his pocket that an officer believed to be a weapon or drugs.<sup>47</sup> Apart from the high-crime, high-drug area, these circumstances are not present here. Defendant did not—as the State characterizes it—evade the Officers *before* they seized him, and Officer Ledesma did not observe defendant clutching anything on his person.

Additionally, this case is distinguishable from *Rollins*. In *Rollins*, there were several factors supporting the officers’ reasonable articulable suspicion. In a high-crime, high-drug area, a woman yelled “five-O” in the direction of defendant, defendant made furtive gestures in his pocket, and defendant evaded the police.<sup>48</sup> Here, save the high-crime, high-drug area, none of these circumstances are present.

### **CONCLUSION**

The Officers seized defendant when Officer Schupp stated: “Come here, Carl.” Considering the totality of the circumstances, the Court finds that the Officers lacked reasonable articulable suspicion that defendant was engaged in criminal activity or was armed and dangerous. Therefore, the

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<sup>47</sup> *Woody*, 765 A.2d at 1264-66.

<sup>48</sup> *Rollins*, 922 A.2d at 382.

Officers were not justified in detaining defendant and conducting a pat-down search.

**THEREFORE,** Defendant's Motion to Suppress is hereby  
**GRANTED.**

**IT IS SO ORDERED.**

/s/ Mary M. Johnston  
The Honorable Mary M. Johnston