

IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

NEW CASTLE COUNTY

STATE OF DELAWARE, )  
)  
Plaintiff, )  
v. ) Case No.: 0805006318  
)  
DERRICK A. NOEL, )  
)  
Defendant. )

Date Submitted: November 18, 2008

Date Decided: December 3, 2008

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**MEMORANDUM OPINION ON  
DEFENDANT’S MOTION TO SUPPRESS**

Pending before this Court is a Motion to Suppress Evidence (“the Motion”) filed by defendant Derrick A. Noel (“Noel”) pursuant to Court of Common Pleas Criminal Rules 12(b) and 41(f). A Suppression hearing was held in this Court on November 18, 2008. Following the receipt of testimony and evidence the Court reserved decision. This is the Court’s Final Memorandum Opinion. For the reasons set forth below, the Court denies defendant’s Motion.

## **I. The Facts.**

Corporal Michael Hopkins (“Corporal Hopkins”), a patrol officer with twenty (20) years of service with the New Castle County Police Department presented testimony at the suppression hearing. Corporal Hopkins was on routine patrol April 8, 2008 in New Castle County at approximately 6:40 p.m. in a marked patrol vehicle in full uniform on Kirkwood Highway west of I-95, City of Wilmington. Corporal Hopkins was patrolling an area off Meadowwood Drive near a parking lot when he observed defendant’s motor vehicle partially blocking two (2) fire lanes. There appeared to be two (2) occupants located inside the motor vehicle as well as two (2) occupants located outside the motor vehicles at the time Corporal Hopkins arrived at the scene.

When Corporal Hopkins pulled up he observed one of the occupants outside the motor vehicle with what appeared to be a wooden object re-entering the motor vehicle. Corporal Hopkins stopped his motor vehicle and inquired as to what the object was as he believed it could potentially be a barrel of a shot gun. Corporal Hopkins approached the passenger’s side door after the occupants re-entered the motor vehicle and observed a wooden baseball bat inside defendant’s motor vehicle. The occupant, Derrick Noel, informed Corporal Hopkins that he was driving down Kirkwood Highway with his three (3) passengers, when he encountered a red pick up truck driving in a “road rage incident.” According to the defendant, the red pick up truck then followed defendant to the location of his motor vehicle but left the scene

when Corporal Hopkins appeared. The defendant indicated to Corporal Hopkins that he was going to use the bat as a weapon to defend himself. At that time, Corporal Hopkins testified he had no interest in searching the motor vehicle but instructed the right passenger occupant to put the baseball bat in the trunk for officer safety because he was outnumbered 4 to 1 by the occupants, one of which was prepared to use the bat with force against occupants of the red pick up truck.

When the trunk was opened by the passenger of the front seat, Corporal Hopkins noticed numerous cans of spray paint and “other stuff”.<sup>1</sup>

After observing the cans of spray paint Corporal Hopkins requested identification from other occupants of the motor vehicle. He received the defendant’s I.D. but the front passenger denied he had proper identification. The passenger subsequently produced identification, an I.D. Card although initially denying he possessed any form of identification.

In plain view Corporal Hopkins observed a photo album in the back seat of the motor vehicle. When Corporal Hopkins picked up the photo album it opened and he observed photographs of graffiti. Corporal Hopkins then requested identification from the occupants in the back seat of defendant’s motor vehicle.

At some point Corporal Hopkins went to his patrol vehicle and ran a RECOM search of the defendant’s criminal record. At this time Corporal Hopkins testified he believed after considering the items in defendant’s trunk, he believed that there was

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<sup>1</sup> At this point the defendant was identified as Derrick A. Noel in the Courtroom.

sufficient evidence to charge the defendant with possession of graffiti implements, tools or instruments in violation of 11 *Del. C.* §812(b) of the Delaware Code as amended. At some point, as described later, other officers appeared at the scene.

Corporal Hopkins testified at this point his concern was officer safety.

On cross-examination Corporal Hopkins testified he was on the 3:00 p.m. – 1:00 a.m. shift and was headed to Burger King for lunch when he observed the defendant’s motor vehicle. He stopped to investigate at the scene the defendant’s car because it was blocking a fire lane. He observed what appeared to be a wooden object which he believed could be a shot gun. Corporal Hopkins observed the passenger attempting to get into the motor vehicle angling his body so that the wooden object could not be seen.

On further cross-examination Corporal Hopkins testified when he arrived he asked the passenger, “What’s that?” Corporal Hopkins later learned as indicated in his direct testimony it was a base ball bat. Corporal Hopkins also asked the defendant why he was blocking a fire lane. When Corporal Hopkins ran the RECOM of defendant’s criminal history he noticed the defendant had a criminal arrest for graffiti. Corporal Hopkins inquired orally back at the location of the automobile as to what previous arrests the defendant had in his record. Defendant, after questioning, admitted that he had previously been arrested for graffiti as well as other criminal offenses.

Next, Corporal Hopkins requested Cody Peete and Rebecca Lynn, the backseat passengers, to exit defendant's motor vehicle. Corporal Hopkins also testified, as he did on direct, when he picked up the photo album he saw four (4) photos of the same tag "EASY" in the album when it opened.

The second police officer arrived at the scene. Corporal Hopkins believed he gave the defendant a summons, but gave him the wrong copy of the summons and returned several days later at 11:30 p.m. to issue a summons to defendant at his parent's home.

The defense presented its case-in-chief. Derrick A. Noel, the defendant, testified that he recalled that on April 8, 2008 at 6:40 p.m. Corporal Hopkins pulled up next to his motor vehicle. He recalls a discussion with Corporal Hopkins as to his previous arrests. When he indicated he was arrested for resisting arrest Corporal Hopkins told him "keep on going" and moved his hands like a spray can. Noel told Corporal Hopkins he had previous arrests for graffiti, but thought the arrest had been expunged. Noel testified he believes the spray cans were not in plain site when Corporal Hopkins instructed his passenger to open the trunk and observed them. Noel also presented testimony that the photo album was on the floor in his motor vehicle and he believed the bat never ended up in the trunk. Noel testified the bat remained in the parking spot next to his motor vehicle. In essence, Noel claims his passenger never put the bat in the trunk.<sup>2</sup> Noel believes Corporal Hopkins was not

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<sup>2</sup> However, his passenger never presented testimony at the hearing.

telling the truth when he presented testimony that he saw his passenger put the bat in the trunk.

Noel indicated also on direct testimony that when other officers appeared and conducted a full search of his motor vehicle and opened the trunk there was 172 cans of spray paint and numerous other object including approximately 100 nozzles used to spray graffiti in his trunk. Noel believes that Corporal Hopkins was “rummaging around” and could not view the spray cans when he instructed his front seat passenger to open the trunk.

Karen Peete (“Ms. Peete”) presented testimony at trial. Ms. Peete was a passenger’s mother. She presented testimony that she saw the baseball bat at the scene next to the motor vehicle on the ground, not in the trunk. However, she also indicated she was not present when the officers performed a search of defendant’s and that she “had no idea” what happened at 6:40 p.m. or thereafter when she arrived at the scene with the baseball bat.

Cody Peete (“Peete”) also presented testimony at trial. He is a friend of Derrick Noel, and a passenger in Noel’s vehicle. Noel recalls Corporal Hopkins asking defendant what he was doing on the day of the charged stop, April 8, 2008. He recalls the defendant telling Corporal Hopkins he believed the arrest for graffiti was expunged.

Corporal Hopkins was recalled as part of State’s case-in-chief. He indicated a full search of defendant’s motor vehicle yielded approximately 100-200 spray cans

plus numerous nozzles, a baseball bat, and a photo album indicating sketch drawings of the graffiti and a second baseball bat when the motor vehicle was searched.

## **II. The Parties Contention.**

### **(i) The Defendant's Position**

Defendant contends in his Motion to Suppress that the State lacked probable cause to search his motor vehicle and the search was in violation of the Fourth Amendment as “An Unreasonable Search and Seizure”. U.S. Const. Amd. IV; Del. Const., Art. I, Sec. 6. Defendant further argues that in the absence of exigent circumstances, as in the instant case, a warrant supported by probable cause should have been secured by Corporal Hopkins. *See e.g. Hanna v. State*, 591 A.2d 158, 162 (Del. Supr. 1991). In essence, defendant argues the search of his motor vehicle was “unreasonable” and therefore the evidence seized by the New Castle County Police should be inadmissible at trial as lacking a warrant with no stated exception to the search warrant requirement for automobiles. *See Cole v. State*, 561 A.2d 466 (Del. Supr. 1989).

Defendant cites *United States v. Ross*, 456 U.S. 798, 800 (1982) for the proposition that “... [a] probable cause determination must be based on objective facts that could justify the issuance of a warrant by a Magistrate and not merely on the subject of good faith of the police officers. ‘[a]s we have seen good faith is not enough to constitute probable cause. That faith must be granted on facts within the

knowledge of the [officer], which in the judgment of the Court would make its faith reasonable.” (citing *Carroll*, supra, 267 U.S. 161-162).

Defendant does not argue in his Motion that the police officer in question, Corporal Hopkins lacked reasonable articulable suspicion or that 10 *Del. C.* §1902 was violated. Defendant asserts that Corporal Hopkins lacked probable cause to search his motor vehicle. Defendant argues the search of his motor vehicle was a *de facto* non consensual inventory search not conducted in good faith with probable cause.<sup>3</sup>

Finally, defendant argues the alleged inventory search was not in furtherance of the police caretaking function and was, in fact, a pretextual act for an investigatory motive. See *State v. Miller*, 420 A.2d 181, 184 (Del. Super., 1980).

#### **(ii). The State’s Position**

The State, at the Suppression Hearing argued that once Corporal Hopkins stopped and observed the defendant with what appeared to be a weapon or a shotgun handle or shotgun, there was clearly probable cause to search the defendant’s entire motor vehicle. The State argues *State v. Robert C. Brown*, 1992 WL 240470 (Del. Super.) August 11, 1992 applies for the proposition that ... “Under the ‘automobile exception’ an officer who has probable cause to search a vehicle for instrumentalities of a crime may conduct a warrantless search of the vehicle, to the extent that the portion of the vehicle searched might reasonably be expected to conceal the object of

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<sup>3</sup> Defendant cites the Delaware Supreme Court which has held that inventory searches are lawful only when they are “made to safeguard property for the benefit of the owner, police and tow

the search.” *See U.S. v. Ross*, 456 U.S. 798, 825, 102 S. Ct. 2157, 2173 (1982). Hence, the State argues that reasonable articulable suspicion is not an issue, and probable cause exists once Corporal Hopkins observed the baseball bat in defendant’s passenger’s trunk and being placed in the motor vehicle as a “weapon”.

In essence, the State additionally argues that for officer safety Corporal Hopkins was within his lawful authority, with four (4) potential suspects in a marked vehicle without back-up, to request defendant’s front seat passenger to place the baseball bat into the defendant’s trunk. Subsequent to opening the trunk by the passenger, Corporal Hopkins observed in plain view spray cans and other graffiti items which were allegedly instrumentalities or instruments of graffiti in violation of 11 *Del. C.* §1974(12)(b). Hence, the plain view directive applies.

The State also argues that 10 *Del. C.* §1902 applies as an exception to the warrant requirement of the Fourth Amendment, a “Terry Stop”. As the Court held in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2<sup>nd</sup> 889 (1968), the United States Supreme Court “[h]eld that a limited seizure of an individual along with a limited search for weapons was constitutionally permissible even in the absence of a warrant or probable cause. All that is required of the police is a reasonable suspicion of wrongdoing based upon articulable facts and rational inferences. *Terry*, 392 U.S. at 21 and 88, S.Ct. at 1879.

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company, and not under the pretext to gather evidence without a warrant.” *Lively v. State*, 427 A.2d 882, 883 (Del. Supr. 1981).

The State argues that the New Castle County Police had probable cause to search defendant's motor vehicle because clearly they had reasonable articulable suspicion under *Terry* and observed what appeared to be a wooden portion of a shotgun or a weapon being placed in the defendant's motor vehicle. The Court also notes that defendant's car was also blocking a two-lane fire lane when Corporal Hopkins arrived. The State also argues the potential of a crime when Corporal Hopkins arrived and defendant informed him he was going to use the baseball bat with force for protection and perhaps strike occupants from a red pick up truck that had followed them.

The State does not believe that these acts by Corporal Hopkins constituted an illegal inventory search without probable cause by Corporal Hopkins. The State argues Corporal Hopkins observed what appeared to be a weapon inside a motor vehicle. The New Castle County Police therefore had the authority to further search defendant's motor vehicle for weapons. Hence, when the police officers seized another baseball bat, pictures of graffiti and over 200 cans of spray paint, plus nozzles the State argues the police were within their legal authority and had probable cause to conduct the search.<sup>4</sup>

Hence, the State asserts facts which were brought to the attention of Corporal Hopkins when he confronted the defendant with what appeared to be a weapon, a

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<sup>4</sup> Defendant's Motion does not contend Corporal Hopkins did not stop or detain the defendant for investigatory purposes or that the officer lacked reasonable articulable suspicion to believe that the defendant was committing, has committed or was about to commit a crime. *See* 10 *Del. C.* §1902.

barrel of a shotgun, rose to probable cause when he searched the motor vehicle to search for other weapons.

Finally, the State's closing argument is in accord with *Carroll v. United States*, 267 U.S. 132, 153-154 (1925); *Tatmen v. State*, 494 A.2d at 1251 that provides that, "...[s]o as long the police have probable cause to believe that an automobile is carrying contraband they may search the vehicle without a warrant and that probable cause is determined under the totality of circumstances." *Illinois v Gates*, 462 U.S. at 230-233; *Tatmen v. State*, 494 A.2d at 1251-1252.

### **III. The Law**

"On a Motion to Suppress, the State bears the burden of establishing that the challenged search or seizure comported with the rights guaranteed to a defendant by the United States Constitution, the Delaware Constitution or Delaware statutory law. The burden of proof on a Motion to Suppress is proof by a preponderance of evidence."

*See, State of Delaware v. Daquon D. Anderson*, 2001 Del. Super., Lexis 501 (November 29, 2001); *Hunter v. State*, 783 A.2d 558, Del. Super., No.: 279, 2000, Steele, J. (August 22, 2001) (mem.op. at 5-6); *State v. BNA and Bien-Bien*, 1993 Del. Super., Lexis 132, Del. Super., Tolliver, J. March 17, 1993) (mem.op.) citations omitted.

### **IV. Opinion and Order**

"Generally, warrantless searches and seizures are presumed invalid absent a few exceptions." *See, Minnesota v. Dickerson*, 508 U.S. 366-372 (1993). "In limited circumstances an individual may be stopped, briefly detained and frisked for investigatory purposes without probable cause." *See, Terry v. Ohio*, 392 U.S. 1, 27

(1968). “Such a protective search is permitted without a warrant on the basis of reasonable suspicion, but must be ‘strictly limited to that which is necessary for discovery of weapons which might be used to harm the officers or others nearby.’” *Id.* at 26.

“Under the “Automatic Companion Rule” a search of the companions of an arrestee, especially when the arrestee is armed, is lawful whether the companion has given the officer independent grounds for suspecting danger, provided there is an objective ground for caution.” *See State v. Fitzpatrick*, Del. Super., Cr.A. No.: IN93-08-1593, Carpenter, J. (June 29, 1994); Mem. Op. at 11 (citing *United States v. Simmons*, 7<sup>th</sup> Cir., 567 F.2<sup>nd</sup> 314, 319-20 (1977); *United States v. Poirns*, 4<sup>th</sup> Cir., 484 Fed.2<sup>nd</sup> 919, 922 (1973); *United States v. Berryhill*, 9<sup>th</sup> Cir., 445 Fed.2<sup>nd</sup> 1189, 1193 (1971).

As noted below, “...[p]erhaps the most important exception to the warrantless requirement to the 4<sup>th</sup> Amendment is the so called “Terry Stop’.” In *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct., 1868, 20 L.Ed. 889 (1968) the United States Supreme Court held that a limited seizure of an individual with a limited search for weapons was constitutionally permissible even in the absence of a warrant or probable cause. All that is required of the police is a reasonable suspicion of wrongdoing based upon articulable facts and rational inferences. *Terry*, 392 U.S. at 21, 88, S.Ct., at 1879. “The holding rested on the notions that police require flexibility when dealing with a myriad situation arising in the course of everyday police work and that the limited nature of

the intruse and justifies the lesser showing of suspicion required. *Terry*, 392 U.S. at 20, 88, S.Ct. at 1879.

Before addressing the merits of the Motion to Suppress it must also be noted that in *Tatman v. State*, Del. Supr., 494 A. 2d 1249, 1250 (1985) it was held by the Delaware Supreme Court that “[s]o long as the police have probable cause to believe an automobile is carrying contraband or evidence they may lawfully search the vehicle without a warrant.” *Id.*

The Court has carefully scrutinized the facts and applicable law following the hearing held in this Court on November 18, 2008 in New Castle County. The Court Denies Defendant’s Motion to Suppress the evidence seized at the scene. Simply put, the Court finds probable cause existed by Corporal Hopkins to seize the evidence in the defendant’s trunk and documents in defendant’s motor vehicle. Corporal Hopkins observed the evidence in plain view, which constitute graffiti implements, tools, in violation of 11 *Del. C.* §812(b) of the Delaware Code of 1974. He also had probable cause to search. Corporal Hopkins testified at trial that he requested the passenger of defendant’s motor vehicle to place the baseball bat in the trunk because of officer safety having observed what appeared to be a barrel of a shot gun.

At issue in the instant Motion to Suppress is which party or fact witness was more credible. The Court finds Corporal Hopkins’ testimony credible. He was outnumbered four to one at the time of his *Terry stop* investigation. Pursuant to 10 *Del. C.* §1902 he observed the graffiti implements in plain view when the defendant’s

passenger opened the trunk. Having observed what appeared to be a weapon in the motor vehicle after the defendant's passenger observed the police officer and went back into his motor vehicle in an angled position, this Court finds the officer was within his legal authority with probable cause to search the defendant's motor vehicle for weapons.

The final argument raised by defendant at the suppression hearing was that the criminal summons for a violation of 11 *Del. C.* §1264 was issued three-to-four days later at 11:30 p.m. at the defendant's residence. Corporal Hopkins testified at the Suppression Hearing that he gave the wrong copy to the defendant and returned later at defendant's parent's home to issue the correct copy of the criminal summons. Corporal Hopkins was not impeached at the Suppression Hearing. The Court can find no case law and defendant has offered no case authority that prohibits after a review by law enforcement agency a summons to be issued three or four days later after the search of defendant's motor vehicle, even given the testimony that the defendant was given a criminal summons on the day in question. The Court notes it offered at trial to clear up the timing of the issuance of the criminal summons when it reviewed the copy of the criminal summons in the Court file. Neither counsel offered testimony or argument on that issue.

As provided in *Tatman v. State*, 4948 A.29 1249 (Del. Supr. 1985) Officer Hopkins had probable cause to believe an automobile was carrying weapons as well as observed instrumentalities of graffiti in open view when he opened the trunk. *See* 10

*Del. C. §812(a).* The opening of the trunk was for officer safety and the Court finds Officer Hopkins had an objective reason to stop the motor vehicle initially when it was parked in a motor vehicle lane. The passenger in defendant's motor vehicle gave him wrong answers on the issue of identification. He clearly had reasonable articulable suspicion for the initial investigatory stop which grew into probable cause when he observed the graffiti instruments in plain view when the trunk was opened by the defendant's passenger.

Finally, this Court finds that based upon the totality of circumstances that once Corporal Hopkins had probable cause, the subsequent full search was not, in fact, a non-consensual inventory search without probable cause for the reasons stated in this opinion.

For these reasons the Court finds the officer was within his legal authority, had both reasonable articulable suspicion and probable cause to search the motor vehicle and defendant's Motion is therefore Denied.

**IT IS SO ORDERED** this 3<sup>rd</sup> day of December 2008.

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**John K. Welch**  
Judge

/jb  
cc: Ms. Juanette West, Scheduling Case Manager