**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

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| STATE OF DELAWARE, | ) | |
| | ) | |
| v. | ) | |
| | ) | ID# 1106003662 |
| DAVID ABEL, | ) | |
| | ) | |
| Defendant. | ) | |

**ORDER**

AND NOW, this day 28th of November, 2011, the Court having duly considered the State's Motion for Reargument, and the Defendant's opposition thereto, **IT APPEARS THAT**:

On October 31, 2011, the Court granted David Abel's Motion to Suppress evidence seized during an illegal roadside search conducted by Delaware State Police.[1] On November 7, 2011, one day before trial, the State filed a Motion for Reargument pursuant to Superior Court Civil Rule 59(e) and Superior Court Criminal Rule 57(d). For the following reasons, the State's Motion is **DENIED**.

The State's Motion for Reargument must be denied because the State advances an argument that it failed to present in its opposition to the suppression motion or at the hearing on the motion. The Court will only grant a motion for reargument when it "has overlooked a controlling precedent or legal principles, or

[1] *State v. Abel*, 2011 WL 5221276 (Del. Super.).

the Court has misapprehended the law or facts such as would have changed the outcome of the underlying decision."[2] It is well settled that a motion for reargument is not an opportunity for a party to revisit arguments already decided by the Court or to present new arguments not previously raised.[3] And yet, the State readily admits that it did not initially raise the argument it now seeks to raise here.[4] As the Defendant correctly notes in his response:

> The issues that were delineated by the pleading were put to a test at the Hearing. At no time during the Hearing did the State ever, in any way, ask questions or introduce evidence that sought to justify the search on any basis other than the protective frisk theory. The State was given free rein, at the Hearing, to pose whatever questions desired.[5]

Under the circumstances presented here, the Court is not required to, nor will it, provide the State with a "second bite of the apple."

The Court notes that even if the Court could ignore the procedural bar and consider the new argument presented in the State's motion, it appears that the Motion for Reargument lacks merit under Delaware case law and the Delaware Constitution. One of the purposes of Rule 59 Motions for Reargument is to provide the Court "with an opportunity to reconsider a matter and to correct any

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[2] *State Farm Fire and Cas. Co. v. Middleby Corp.*, 2011 WL 2462661, at *2 (Del. Super.) (citing *Kennedy v. Invacare Corp.*, 2006 WL 488590, at *1 (Del. Super.)).
[3] *Id*. (citing *Plummer v. Sherman*, 2004 WL 63414, at *2 & n. 7 (Del. Super.)); *see also Hennegan v. Cardiology Consultants, P.A.*., 2008 WL 4512678, at *1 (Del. Super.) (other citations omitted)).
[4] State's Motion for Reargument at p. 3.
[5] Defendant's Response to State's Motion for Reargument at p. 3-4.

alleged legal or factual errors prior to an appeal."[6] In the Court's view, *State v. Church*,[7] *Caldwell v. State*,[8] and *State v. Drummond*[9] support the Court's opinion. In both *Church* and *Caldwell*, police officers had probable cause to believe that the defendants had committed minor traffic violations.[10] In light of those offenses, under 21 *Del. C.* § 701 the police had the discretion to effectuate a lawful arrest.[11] But the officers did not "exercise that discretion to arrest at the *outset* of the traffic stop."[12] As a rule, "[a]fter deciding to initiate a routine traffic stop without arresting the stopped motorist, officers cannot subsequently employ 'discretion' to extend the duration or intrusiveness of that stop beyond its initial purpose unless independent facts justify the expanded detention."[13] To hold otherwise would run contrary to the Fourth Amendment to the United States Constitution and Article I, Section 6 of the Delaware Constitution. Moreover, if the Court were to reject the rule in *Church* and adopt the State's logic, the Court would create a rule that any motorist who commits a traffic violation could be stopped and searched regardless of an officer's justification because a custodial arrest is permitted under the circumstances.

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[6] *Bowen v. E.I. duPont de Nemours and Co., Inc.*, 879 A.2d 920, 921 (Del. 2005).
[7] 2008 WL 4947653 (Del. Super. 2008).
[8] 780 A.2d 1037 (Del. 2001).
[9] 2000 WL 703250 (Del. Super. 2000).
[10] *Church*, 2008 WL 4947653, at *6.
[11] *Id*.
[12] *Id*. (emphasis added).
[13] *Id*.

As a final note, despite the fact that an arrest is needed to make a search incident to arrest argument, the record is devoid of any argument that an arrest was made *before* the search, let alone any argument that the officer had the intent to arrest Abel for his traffic violation *before* the search.

**WHEREFORE**, the State's Motion for Reargument is **DENIED**.

**IT IS SO ORDERED.**

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Jan R. Jurden, Judge