

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE,)	
)	
)	
)	
v.)	ID No. 1106003662
)	
)	
DAVID L. ABEL,)	
)	
Defendant.)	

Date Submitted: September 1, 2011
Date Decided: October 31, 2011

OPINION

Upon Defendant's Motion to Suppress: GRANTED

Brian J. Robertson, Esq., Deputy Attorney General, 820 North French Street, 6th Floor, Wilmington, DE, 19801, Attorney for the State.

Joseph A. Hurley, Esq., 1215 North King Street, Wilmington, DE, 19801, Attorney for the Defendant.

JURDEN, J

I. INTRODUCTION

On June 4, 2011, the Delaware State Police (“DSP”) arrested David L. Abel and charged him with speeding¹ and two counts of Carrying a Concealed Deadly Weapon.² Abel moves to suppress the two handguns that DSP discovered during a pat down search. For the reasons that follow, Abel’s Motion is **GRANTED**.

II. FACTS

Trooper John Andrew Lloyd was patrolling Interstate 95 on June 4, 2011 when he observed two motorcycles driving southbound. Lloyd suspected the motorcyclists were speeding so he decided to “pace” them. After determining that their rate of speed exceeded the posted speed limit, Lloyd stopped Abel, and another Trooper stopped the other motorcycle on the other side of the highway.³ Though the Troopers split up, Lloyd knew backup was behind him.⁴ As Lloyd exited his unmarked patrol car he noticed that Abel’s vest bore a “Hell’s Angels” insignia. Lloyd testified that the Hell’s Angels Motorcycle Club is an outlaw motorcycle gang.⁵

¹ 21 *Del. C.* §4169.

² 11 *Del. C.* § 222.

³ Lloyd testified that he paced Abel “at 80 in a 55.” Transcript (“Trans.”) at p. 10.

⁴ Trans. at p. 10. Lloyd testified that Corporal Truitt of the Delaware State Police was his “backup.” *See* Trans. at pp. 11 - 12.

⁵ Trans. at p. 7. *See also* State’s Response to Defendant’s Motion to Suppress (“State’s Resp.”) at p. 3. (“The Hell’s Angels Motorcycle Club is a globally recognized Outlaw Motorcycle Gang . . .”).

The State played the video from Lloyd's dashboard camera at the Suppression Hearing. The video shows Lloyd approach Abel and the interaction that followed:

Lloyd: Had ya doing 80 and you were tailgating that car – any reason you were going that fast?

Abel: Just running a little late that's all.

Lloyd: Where ya headed?

Abel: We're just on a run today. I think you got everything there [*Abel is handing Lloyd his license and registration*].

Lloyd: Where ya guys going?

Abel: [*Chuckling*] I'm not gonna talk to you about that, we're just going out for a ride.

Lloyd: No big deal.

Abel: [-- *Laughing mixed with inaudible words* --].

Lloyd: Any weapons on ya?

Abel: No.

Lloyd: No guns?

Abel: No, I'm good.

Lloyd: Ok, I'm gonna pat you down to make sure you don't have any weapons on ya.

Abel: Why uh, I mean for what?

Lloyd: I'm gonna pat ya down. [*Lloyd begins moving towards Abel*].

Abel: I have weapons on me – I have a permit to carry in Pennsylvania.⁶

Throughout this encounter, Abel remained calm and his hands remained primarily in view on the handlebars of his motorcycle.⁷

Lloyd testified that “under the totality of the circumstances” he believed that Abel was armed because of his “evasive” answer concerning Abel’s destination and his Hell’s Angels clothing.⁸ Consequently, Lloyd deemed it necessary to ask Abel if he had any weapons on him. Abel replied “no.” Lloyd told Abel that he “was going to pat him [Abel] down,”⁹ and Lloyd testified that Abel responded, “no, you are not.”¹⁰ The video shows Lloyd persist, and only then did Abel volunteer that he had two weapons on his person. Lloyd conducted a pat-down, found the two handguns, and arrested Abel.

III. THE PARTIES’ CONTENTIONS

Abel argues that he did not exhibit any conduct or behavior that would create a reasonable suspicion that he was armed or dangerous.¹¹ Abel contends that an affiliation with a motorcycle gang, in and of itself, is insufficient to provide

⁶ There is no transcript for the dashboard video played during Abel’s Suppression Hearing, but Officer LLoyd attempted to decipher the conversation during his testimony. The Court reviewed the video again on its own four times. Because the transcript from the Suppression Hearing does not provide a complete record of the conversation on the video, this is the Court’s interpretation of the dashboard video.

⁷ The video from Lloyd’s dashboard camera reveals that Abel’s hands were in view before Lloyd approached Abel, except for when Abel reached to retrieve his license and registration. The video also reveals that Abel’s motorcycle had raised (high) handlebars – Able had to raise his arms to grip the handlebars.

⁸ Trans. at p. 16.

⁹ *Id.*

¹⁰ *Id.*

¹¹ See Defendant’s Memorandum of Law in Support of Suppression (“Def. Mem.”) at p. 3.

a reasonable articulable suspicion that an individual is armed and dangerous.¹² Thus, Abel argues that the police had no right to initiate the line of questioning focused on weapons given the fact that Lloyd stopped Abel for speeding. As such, Abel argues that this created a second unlawful detention and the evidence derived from this “illegal misadventure must be suppressed.”¹³

The State counters that the Motion to Suppress should be denied because a reasonable articulable suspicion existed to justify Lloyd’s pat down.¹⁴ Specifically, the State argues that the combination of Abel’s Hell’s Angels vest and his refusal to reveal his destination were enough to warrant the pat down for weapons under the totality of the circumstances.¹⁵

IV. THE STANDARD OF REVIEW

On a motion to suppress evidence seized during a warrantless search or seizure, the State bears the burden of “establishing that the challenged search or seizure comported with the rights guaranteed to . . . [the defendant] by the United States Constitution, the Delaware Constitution, and Delaware Statutory law.”¹⁶ “The burden of proof on a motion to suppress is proof by a preponderance of the evidence.”¹⁷

¹² *Id.*

¹³ *Id.* at p. 18.

¹⁴ *See* State’s Resp.

¹⁵ *Id.*

¹⁶ *State v. Iverson*, 2011 WL 1205242, at *3 (Del. Super.) (citing *Hunter v. State*, 783 A.2d 558, 560-61 (Del. 2001)).

¹⁷ *Id.*

V. DISCUSSION

A police officer may stop an individual for investigatory purposes if he has a reasonable articulable suspicion that the person is committing, has committed, or is about to commit a crime.¹⁸ Delaware courts define reasonable suspicion as the officer's ability "to point to specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrants the intrusion."¹⁹ To make this determination, the Court "must examine the totality of the circumstances surrounding the situation 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."²⁰ An officer may only pat down an individual if the officer has a reasonable articulable suspicion that the individual is armed and presently dangerous.²¹

Keeping those principles in mind, a police officer who observes a traffic violation has probable cause to stop the vehicle and its driver.²² A police officer may also order the driver (and passengers) out of a vehicle during a lawful stop.²³ However, "[t]he scope and duration of the detention must be reasonably related to

¹⁸ 11 *Del. C.* § 1902; *see also State v. Henderson*, 892 A.2d 1061, 1064 (Del. 2006) (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)).

¹⁹ *Holden v. State*, 23 A.3d 843, 847 (Del. 2011) (citing *Henderson*, 892 A.2d at 1064-65).

²⁰ *Id.* (citing *Jones v. State*, 745 A.2d 856, 861 (Del. 1999)).

²¹ *Id.* (citing *Henderson*, 892 A.2d at 1064).

²² *Id.* (citing *Whren v. United States*, 517 U.S. 806, 810 (1996)).

²³ *Id.* (citing *Maryland v. Wilson*, 519 U.S. 408, 415 (1997)).

the initial justification for the traffic stop.”²⁴ In other words, a permissible intrusion “must be temporary and last no longer than is necessary to effectuate the purpose of the stop.”²⁵ Beyond that, any investigation of the vehicle or its occupants outside the initial purpose of the traffic stop “constitutes a separate seizure that must be supported by independent facts sufficient to justify the additional intrusion.”²⁶

When a separate seizure occurs, in order to pat down an individual, the officer conducting the search must have a reasonable articulable suspicion that the individual is armed and dangerous.²⁷ Here, the Court must determine whether Lloyd violated Abel’s Constitutional rights by going beyond the initial purpose of the stop and subjecting Abel to a pat down.²⁸

A. Abel’s Refusal to Reveal his Destination

In Delaware, a police officer is permitted by statute “to stop any person abroad, or in a public place,” when he has “reasonable ground to suspect” the individual “is committing, has committed or is about to commit a crime,” and “may demand of him his name, address, business abroad and where he is going.”²⁹

²⁴ *Id.* (citing *Caldwell v. State*, 780 A.2d 1037, 1046 (Del. 2001)).

²⁵ *State v. Milianny-Ojeda*, 2004 WL 343965, at *3 (Del. Super) (citing *Florida v. Royer*, 460 U.S. 491, 500 (1983)).

²⁶ *Id.* (citing *United States v. White*, 81 F.3d 775, 778 (8th Cir. 1996)); *see also Caldwell v. State*, 780 A.2d 1037, 1046-1050 (Del. 2001).

²⁷ *Holden*, 23 A.3d at 847. (citing *Arizona v. Johnson*, 555 U.S. 323 (2009)).

²⁸ The Fourth and Fourteenth Amendments to the United States Constitution protect individuals from unreasonable searches and seizures. U.S. CONST. amend. IV, XIV. Article I, § 6 of the Delaware Constitution provides similar protections. DEL. CONST. art. I, § 6.

²⁹ *See* 11 *Del C.* § 1902(a).

With respect to a driver, section 1902 permits police to ask where the driver is coming from, where he is going, and the reason for his trip.³⁰ During a stop, a police officer may protect himself by patting down the suspect.³¹ However, an officer's pat down of a suspect is "limited by constitutional principles."³² First, a suspect must be lawfully detained under 11 *Del. C.* § 1902-1903.³³ And second, the officer "must possess a reasonable belief that the detainee is presently armed and dangerous."³⁴ Put differently, a stop alone will not justify a search. In fact, after a stop, a "generalized suspicion" without more will not suffice to establish the reasonable articulable suspicion necessary for a pat down.³⁵ An officer still needs "to point to specific and articulable facts which, taken together with all rational inferences from those facts, reasonably warrant the intrusion."³⁶

In support of his suppression motion, Abel relies on *Caldwell v. State*.³⁷ In *Caldwell*, a police officer noticed the defendant and a passenger parked illegally on the street.³⁸ The officer recognized Caldwell from an "ongoing drug investigation"

³⁰ *Miliany-Ojeda*, 2004 WL 343965, at *3. (citing 11 *Del. C.* § 1902(a)).

³¹ *State v. Fitzpatrick*, 1994 WL 380992, at *5 (Del. Super. 1994) (citing *Hicks v. State*, 631 A.2d 6, 9 (Del. 1993)).

³² *Id.*

³³ *Id.*; 11 *Del. C.* § 1903 provides: "A peace officer may search for a dangerous weapon any person whom the officer has stopped or detained to question as provided in § 1902 of this title, whenever the officer has reasonable ground to believe that the officer is in danger if the person possesses a dangerous weapon. If the officer finds a weapon, the officer may take and keep it until the completion of the questioning, when the officer shall either return it or arrest the person. The arrest may be for the illegal possession of the weapon."

³⁴ *Id.* (emphasis removed) (citing *Hicks*, 631 A.2d at 9).

³⁵ *Id.* (citing *Hicks*, 631 A.2d at 10).

³⁶ *Id.* (emphasis removed) (citing *Hicks*, 631 A.2d at 9).

³⁷ 780 A.2d 1037 (Del. 2001).

³⁸ *Id.* at 1042.

and thus decided to stop Caldwell for the violation.³⁹ As the officer activated his emergency lights, he noticed that Caldwell made eye contact with him in his rearview mirror, and “could see him doing something on the side” with his hand.⁴⁰ Before stopping Caldwell the officer called for back-up.⁴¹

While testifying at the Suppression Hearing, the officer said that Caldwell exhibited nervous behavior, such as shaky hands and perspiration.⁴² The officer asked for Caldwell’s license and registration.⁴³ Caldwell produced both, and then the officer asked Caldwell to get out of his car, and began questioning Caldwell about his passenger and destination.⁴⁴ The officer asked for the passenger’s name, which Caldwell could not produce.⁴⁵ The officer immediately frisked Caldwell, and handcuffed both Caldwell and the passenger.⁴⁶ Later questioning of the passenger revealed that drugs and paraphernalia were hidden in the middle console of Caldwell’s car, resulting in Caldwell’s arrest.⁴⁷

The Delaware Supreme Court reviewed Caldwell’s challenge to the stop. Caldwell argued that the search was not reasonably related to the justification for the traffic stop.⁴⁸ The Supreme Court agreed. In its analysis, the Supreme Court

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* (Caldwell did, however, know where he had picked up the passenger and where they were going).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

noted that because the officer had reasonable grounds to suspect that Caldwell had committed a parking violation, 11 *Del. C.* § 1902(a) permitted the officer to question Caldwell about his name, address, business abroad, and destination.⁴⁹

However, the Supreme Court also noted that:

[R]ather than continue to question the occupants of the car, the officer frisked and handcuffed Caldwell and detained him until another officer arrived. Because these actions 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.⁵⁰

Next, the Supreme Court analyzed whether the police were justified in patting down Caldwell.⁵¹ At the time of the search, the officer had observed: (1) Caldwell move his arm as the police pulled him over; (2) Caldwell's nervous behavior; and (3) "Caldwell's implausible assertion that he did not know the identity of his passenger."⁵² The Court determined that these facts alone did not justify an extended detention and pat down of Caldwell.⁵³ Consequently, the Court held that the duration of the traffic stop and the pat down that accompanied it were not reasonably related to the justification for the stop "and were not supported by independent facts justifying the officer's conduct."⁵⁴ Moreover, the Court

⁴⁹ *Id.* at 1049.

⁵⁰ *Id.*

⁵¹ *Id.* at 1050.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 1051.

determined under the totality of the circumstances that a reasonably prudent person would not have believed that Caldwell was armed and dangerous.⁵⁵

In contrast, *State v. Fitzpatrick*⁵⁶ offers an example of a situation where reasonable articulable suspicion exists to pat down a suspect. In *Fitzpatrick*, Officer Shanahan of the New Castle County Police observed a caravan riding on Interstate 495.⁵⁷ The caravan consisted of a van (the lead vehicle), fourteen to eighteen motorcycles, and two pickup trucks, each truck carrying a motorcycle.⁵⁸ Shanahan noticed that the caravan appeared to be riding in formation, and the entire group made lane changes without proper signaling.⁵⁹ Because the two pickup trucks were in the back of the caravan, Shanahan decided to stop only those two vehicles.⁶⁰ As Shanahan approached the pickup trucks to pull them over, he noticed “clubs and bludgeons” strapped to the handlebars of the motorcycles.⁶¹ Out of caution, Shanahan called for back-up before making the stop.⁶² Once backup arrived, Shanahan pulled the pickup trucks over, and as Shanahan suspected they would, the rest of the caravan also stopped.⁶³ Once stopped, Shanahan approached one of the pickup trucks.⁶⁴ He observed two pistols on the

⁵⁵ *See id.*

⁵⁶ 1994 WL 380992 (Del. Super. 1994).

⁵⁷ *Fitzpatrick*, 1994 WL 380992, at *1.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

seat between the passenger and driver, and two magazines on the floor.⁶⁵ Shanahan immediately drew his weapon and ordered the two occupants out of the truck.⁶⁶ Shanahan also warned the other officers of his discovery.⁶⁷

Approximately fifteen minutes later, Officer Martinez of the New Castle County Police arrived on the scene and observed other officers removing knives and clubs from the individuals associated with the caravan.⁶⁸ Martinez approached the defendant and asked if he possessed any weapons on his person.⁶⁹ The defendant said that he did.⁷⁰ Martinez's search of the defendant produced a handgun, and a magazine.⁷¹ Martinez then arrested the defendant for carrying a concealed deadly weapon.⁷²

The defendant moved to suppress the handgun and magazine arguing that the search violated his right to be free from unreasonable searches and seizures under the Fourth Amendment to the United States Constitution.⁷³ The Court held that the stop and detention were lawful, and that reasonable suspicion supported the defendant's frisk.⁷⁴ The Court reasoned that the circumstances justified a pat down because the police observed weapons in plain view, Martinez witnessed

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at *2.

⁶⁹ *Id.*

⁷⁰ *See id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at *5.

other officers confiscate weapons from other members of the caravan, the officers were outnumbered, and “although . . . [the defendant] did not exhibit any overt threatening behavior toward any officer, he was nevertheless part of a group of individuals who were heavily armed”⁷⁵

In this case, Lloyd testified that he believed Abel and the other motorcyclist were speeding. Once Lloyd determined that both were exceeding the speed limit a stop was justified. However, whether Abel’s refusal to reveal his destination justified the pat down is a different matter entirely.

Lloyd was permitted under 11 *Del. C.* § 1902 to inquire about Abel’s destination. And, because Abel refused to provide his destination, Lloyd was permitted to ask more questions. As the Court noted in *Caldwell*, the circumstances permitted the officer to ask more questions of the suspect; perhaps even required it. But Abel’s refusal did not give Lloyd a reasonable articulable suspicion that Abel was armed and dangerous. Abel simply told the truth. If the police were not justified in *Caldwell* to conduct a pat down where the defendant told an “implausible story,” a pat down is certainly not justified here. Lloyd needed a lawful detention *and* a reasonable belief that Abel was armed and presently dangerous to perform a pat down, neither of which were present here.⁷⁶

⁷⁵ *Id.*

⁷⁶ *See id.*

Typically, a pat down “is justified based on the nature of the suspected crime, a sudden reach by the individual, a bulge, or a history with the specific individual.”⁷⁷ Lloyd articulated none of those factors. Lloyd stopped Abel for speeding, and Abel initially cooperated by providing his license and registration. Abel’s hands remained visible almost the entire time, Lloyd never identified a bulge in Abel’s vest or pants, and Abel was on a motorcycle where all of his movements could be easily observed.⁷⁸ Further, Abel never exhibited any hostile or aggressive behavior towards Lloyd. In fact, considering Abel had just been stopped for speeding, the video from Lloyd’s dashboard camera depicts Abel as being quite jovial. Therefore, Abel’s refusal is just *one* of many factors to consider. The Court finds that under the totality of the circumstances, Abel’s refusal to reveal his destination does not support Lloyd’s conclusion that Abel was armed and dangerous. Moreover, asking Abel if he had any weapons during a traffics stop without specific articulable facts to suggest Abel possessed weapons exceeded the initial scope of the stop, and therefore, the initial stop ended. Because an independent basis did not exist to extend the stop, a second unjustified stop began.

⁷⁷ *Holden*, 23 A.2d at 850.

⁷⁸ After observing the video provided by the dashboard camera in Officer Lloyd’s patrol car, it is reasonable to conclude that it is easier to observe the movements of a motorcycle operator than the movements of an automobile operator.

The State argues that a reasonable suspicion existed to suggest Abel was armed and dangerous because Abel refused to respond to Lloyd's question and he had on a "Hell's Angels" vest. The State heavily emphasizes Abel's clothing in its argument to establish that Lloyd had a reason to be fearful of Abel. But Lloyd's subjective feelings are only part of the analysis. The Court must also look at the facts objectively to determine whether a pat down search was justified. Thus, the Court must determine whether Abel's clothing, coupled with his unwillingness to share his destination, provided Lloyd with an independent justification to pat down Abel under the totality of the circumstances.

B. Abel's Hell's Angels Vest and Refusal to disclose his Destination Did Not Justify a Continued Detention or a Pat down.

While the State concedes that the situation that Lloyd encountered when he approached Abel "would not appear to be all that menacing to the untrained observer,"⁷⁹ it asserts that Abel's Hell's Angels Motorcycle Club vest "changes everything."⁸⁰ Delaware law does not support this proposition.

In *State v. Dollard*, the Delaware State Police used a confidential informant to arrange a drug deal with an individual named "Twan" at a specific location.⁸¹ The officer conducting the investigation responded to the area with a probation

⁷⁹ State's Resp. at 2.

⁸⁰ *Id.*

⁸¹ 788 A.2d 1283, 1284-85 (Del. Super. 2001).

officer posing as a buyer and waited for “Twan” to arrive.⁸² The defendant approached the would be buyer and asked whether “she had the money.”⁸³ She indicated that the money was in her car, and returned to the vehicle to advise the officer about the conversation.⁸⁴ The officer immediately approached the defendant, identified himself, and for officer safety reasons searched the defendant because in the officer’s experience, “drug dealers often carry weapons.”⁸⁵ The officer did not consider the area to be a high crime area or an area frequented by drug dealers.⁸⁶ The officer also indicated that the area was well lit.⁸⁷ The defendant made no threatening gestures, and no bulges were observed in either the defendant’s jacket or pants to indicate that he might be carrying a weapon.⁸⁸ The State conceded that the “only appreciable threat to officer safety was . . . [the officer’s] knowledge that drug dealers often carry weapons.”⁸⁹

Because this was an issue of first impression in Delaware, the Court in *Dollard* engaged in a thorough analysis of case law from this state and other jurisdictions (specifically *Terry v. Ohio*)⁹⁰ to determine whether the mere fact that

⁸² *Id.* at 1285.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 1285-86.

⁹⁰ *Terry*, 392 U.S. 1 (1968).

someone is a suspected drug dealer justifies a pat down.⁹¹ The Court concluded that:

[T]he more prudent interpretation of *Terry* is to require that an officer base a determination that his safety or that of others is in danger upon more than his belief that the suspect is a drug dealer and his knowledge that drug dealers often carry weapons. Indeed, allowing pat-down searches of suspected drug dealers to be conducted as a matter of routine practice, without other attendant circumstances, would eviscerate *Terry*'s requirement that the pat-down be based on particularized suspicion developed by the officer with respect to each individual suspect.⁹²

Thus, the Court held that a search based solely on the belief that the defendant was a drug dealer, and that drug dealers often carried weapons, violated the defendant's rights under the Fourth Amendment to the United States Constitution and his rights under Article I, Section 6 of the Delaware Constitution.⁹³

There is little in this case to suggest that Abel was armed and dangerous.

Abel fully cooperated until Lloyd asked about his destination, and then Abel

⁹¹ *Dollard*, 788 A.2d at 1287-1289.

⁹² *Id.* at 1289.

⁹³ *Id.* at 1290; see also *United States v. Robinson*, 149 F.3d 1185 (6th Cir. 1998) (TABLE) (noting that officers had no knowledge of defendant's criminal history, had no direct evidence that he possessed drugs or weapons, the defendant did not appear nervous, and the defendant did not provide inconsistent stories. The court held that the police could not rely on the fact that the defendant's companion had a weapon to justify a pat down of the defendant. Further, the court alludes to the fact that the defendant's Hell's Angels membership alone did not justify a pat down); see also *United States v. Hernandez*, 2011 WL 42875, at * (N.D. Cal.) (Police officers observed known MS-13 gang members standing on a sidewalk in an area that prohibited loitering. The officer's approached, and once they made contact, the officers stated that the defendant exhibited no behavior that indicated he was prone to violence, or had a weapon. However, the officers frisked the defendant and the other gang members because "MS-13 as a whole was a violent gang . . ." The frisk produced a kitchen knife in the defendant's front pocket that resulted in his arrest. The court held that under the totality of the circumstances there was no reasonable suspicion to believe that the defendant was armed and dangerous. Thus, the police were not justified in frisking the defendant. The court noted that the officers failed to articulate "any basis for concluding that defendant Hernandez was armed and dangerous." The court noted that the officer indicated that this was a routine encounter, the defendant made no showing of a propensity towards violence, on seven or eight past encounters that the officer had with the defendant he never exhibited violent characteristics, the encounter occurred in broad daylight on a public sidewalk, and no sudden movements were made by the defendant or anyone with him. The court found that relying only on the defendant's membership in a violent gang did not justify a pat down of the defendant.)

politely declined to divulge that information. The State maintains that Lloyd's training and experience provided him with a legitimate basis to fear Abel.⁹⁴ Specifically, the State asserts that because Delaware is Pagan territory, "[a] gang member traveling unarmed through a rival [Pagan] gang's territory is subject to a serious risk to their safety."⁹⁵ While it may be true that a Hell's Angel motorcycle gang member is more likely to carry a weapon when in Pagan territory than the average citizen, it does not justify a pat down without more particular facts indicating that the individual has a weapon. The basis for the pat down here (Abel's Hell's Angel vest) is insufficient. *Dollard* establishes that allowing a search of Abel based on the fact that he is a member of an "outlaw motorcycle gang," and police knowledge that outlaw motorcycle gang members carry weapons "would eviscerate *Terry*'s requirement that the pat down be based on particularized suspicion developed by the officer with respect to each individual suspect."⁹⁶ Lloyd never articulated a particularized suspicion that Abel was armed and dangerous aside from Abel's alleged gang membership and his refusal to answer a question about his destination. Under the totality of the circumstances, Lloyd had

⁹⁴ See Trans. at p.

⁹⁵ St.'s Resp. at p. 3. The State notes that "the State of Delaware is generally recognized to be territory under the control of the Pagans Motorcycle Club . . ." The State also notes that the Pagans and the Hell's Angels "have a long history of violent clashes through the Mid-Atlantic region."

⁹⁶ *Dollard*, 788 A.2d at 1289.

an insufficient basis to pat down Abel. Pat downs on the street premised on who someone is as opposed to what they supposedly did are not lawful.⁹⁷

C. Because Inquiring About Weapons was Outside the Scope of the Traffic Stop, Lloyd Created a Second Unlawful Detention. Thus, Abel's Statement After Lloyd Threatened to Search Him Must be Suppressed.

When Lloyd told Abel he was going to perform a pat down, Abel initially refused. Lloyd persisted even though he did not have Abel's consent. Abel relented and told Lloyd that he had two handguns on his person. Abel contends that although he never used the phrase "I give my consent," it amounts to "the verbal equivalent" because he knew that Lloyd planned to perform a pat down.⁹⁸

Consent to a search given during investigatory stops acts as an exception to the requirement of probable cause and a warrant.⁹⁹ For consent to be valid it must be voluntary, and voluntariness is determined by assessing the totality of the circumstances.¹⁰⁰ Where the police have detained someone unlawfully, any consent is tainted, and the right to conduct a search dissipates.¹⁰¹ Therefore, any evidence obtained as a result of the search must be suppressed as a fruit of the unlawful detention unless the consent has been purged of the taint of the illegal seizure.¹⁰²

⁹⁷ See n. 88 *supra*.

⁹⁸ Def. Mem. at p. 5.

⁹⁹ *State v. Huntley*, 777 A.2d 249, 257 (Del. Super. 2000) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973)); *State v. Morris*, 1997 WL 363938, Goldstein, J., (Del. Super.) (Op. and Order).

¹⁰⁰ *Id.* (citing *Bustamonte*, 412 U.S. at 227).

¹⁰¹ *Id.* (other citations omitted).

¹⁰² *Id.* (citing *State v. Wrightson*, 391 A.2d 227, 229 (Del. Super. 1978)).

In *Loper v. State*, the Wilmington Police stopped Loper for speeding.¹⁰³ After questioning, an officer arrested Loper's passenger, and noted that the Loper was acting suspiciously.¹⁰⁴ Another officer asked Loper to get out of his car. Loper did, and the officer asked Loper if he had "anything illegal" on his person.¹⁰⁵ Loper said that he had some "weed" in his front pocket.¹⁰⁶ The officer searched Loper and found marijuana and PCP.¹⁰⁷ Loper moved to suppress the evidence found during his pat down.¹⁰⁸ After hearing testimony and argument at the Suppression Hearing, the Superior Court ruled, *inter alia*, that the police had a reasonable articulable suspicion to stop and search Loper.¹⁰⁹ The Superior Court reasoned that because Loper voluntarily disclosed that he had "weed" on his person, he consented to the search.¹¹⁰

Here, unlike *Loper*, Abel did not volunteer that he had anything illegal on his person until Lloyd told Abel that despite Abel's lack of consent, Lloyd was still going to search him. Thus, Abel's disclosure was not voluntary, and cannot act as consent to a search. However, even if the circumstances could somehow be interpreted as Abel having provided voluntary consent, Lloyd still exceeded the

¹⁰³ 8 A.3d 1169, 1171 (Del. 2010).

¹⁰⁴ *Id.* (The defendant's passenger gave the police a false name and birth date. As the officer documented this information, the passenger told the officer his real name and indicated that he had an outstanding warrant "for curfew." The officer subsequently arrested the passenger).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (The Delaware Supreme Court found that the Superior Court's factual finding was not clearly erroneous).

scope of the original traffic stop because Lloyd did not have independent facts sufficient to justify an additional intrusion, and thus Lloyd unlawfully detained Abel.¹¹¹ As such, any “consent” by Abel suffered an irreconcilable taint and must be suppressed.

VI. CONCLUSION

For the foregoing reasons, Abel’s Motion to Suppress is **GRANTED**.

IT IS SO ORDERED.

Jan R. Jurden

cc: Prothonotary

¹¹¹ *Caldwell*, 780 A.2d at 1051.