

By Order dated June 1, 2011, the Delaware Supreme Court remanded this matter, directing this Court to report its findings of fact and conclusions of law. Specifically, the Supreme Court ordered this Court “to address whether the police had a reasonable articulable suspicion to believe the defendant operated a vehicle with improper tinting and thus reason to believe the defendant violated Title 21.”

For the reasons detailed herein, the Court finds no such reasonable articulable suspicion. Accordingly, the Court stands by its prior ruling granting defendant’s motion to suppress.

The issue of reasonable articulable suspicion, based on illegal window tint, was waived by the State at the conclusion of the suppression hearing. Regrettably, the Supreme Court apparently was not advised of the State’s concession.

Under the circumstances that were present at the conclusion of the suppression hearing, the Court was not aware of any obligation to search for an alternative, or independent and unarticulated ground for reasonable suspicion. However, as a matter of fact, the Court in this case did comment that the testimony of the police officers was not sufficient on the issue of illegal window tint.

Proceedings in Superior Court

Counsel for defendant filed a motion to suppress all evidence seized by the Wilmington Police Department (“WPD”) on March 23, 2010, following the

detention of defendant's vehicle. A suppression hearing was held on September 15, 2010. This Court considered the testimony of two WPD officers.

Among other arguments, defense counsel asserted that the evidence should be suppressed because the initial stop was pretextual. In response, the State argued:

Detective Ballard sent out a call, believing there was a reasonable articulable suspicion to stop the car. . . . Defense counsel mentions there was a tint and that the officer said he couldn't tell what the federal regulations are. This court has held that if you cannot make out who the defendant is in the car or see into the car that that is sufficient for pulling the car over, if you cannot see into the car. I don't have the case in front of me, but I can give that to the Court at a later time. They have upheld that that was in fact sufficient.

. . . This isn't a pretextual stop. They had reasonable articulable suspicion to stop the car. There are court rulings after *Heath* that basically said that there aren't pretext stops, but I don't even think that's important here because they didn't look for, they didn't stop this car for tint, they had a reasonable articulable suspicion to stop the car. It was communicated to them. Officer Hazzard said it was communicated to him. They believed the car was involved in drug sales, they stopped the car. Then when they approached the car, they had all that knowledge, they see what they believe to be a marijuana cigarette, they ask the defendant to get out of the car. At that point, they have all their prior knowledge and the fact that there's marijuana in the car.

At the conclusion of the hearing, the Court ruled from the bench:

All right. I'm going to work backwards on this.

Once the car was stopped, and the officer testified that he observed what he believed to be a marijuana cigarette or blunt in the ashtray, there was reasonable articulable suspicion and, in fact, probable cause to believe that a crime was being or had been committed. And it was appropriate to ask the defendant to exit the vehicle at that time and to perform or conduct a pat down. So that's not the point at which I'm starting.

I'm going back to talking about the reasonableness of the stop, whether or not there was reasonable articulable suspicion that a crime had been or was being committed.

I'm going to review some testimony.

The first was the testimony of Detective Ballard. Detective Ballard testified that on the 23rd, after he observed what he believed to be a drug transaction, he testified: "At that point, I tried to get other officers from my unit to attempt to stop both vehicles, if they could find probable cause to do it."

So we combine that, then, with additional testimony from Detective Ballard:

Question: "And your testimony was that you wanted to attempt to stop them to see if they could find some probable cause for a stop?"

Answer: "They would need something more than what I observed."

Officer Hazzard testified as follows:

Question: "Now, the reason you pulled the vehicle over was that Detective Ballard told you to. Correct?"

Answer: "Correct."

Question: “And did he tell you about the window tint?”

Answer: “No, I observed the window tint.”

Question: “So you pulled him over because Ballard told you to or because of the window tint?”

Answer: “Well, we were going to follow him trying to find a violation on the vehicle and found a violation.”

Question: “All right. So your instructions were to try to find a traffic violation to justify the stop. Correct?”

Answer: “Right.”

There’s a clear acknowledgment that there was no reasonable articulable suspicion and that additional probable cause was needed prior to the stop.

What I did not hear any testimony about from either witness was that they would have stopped the vehicle for the window tint, regardless of whether or not there was a suspicion of a drug transaction.

The Detective testified that pursuant to his experience and training, he believed he observed a drug transaction. And it turns out that indeed his instinct and his intuition were good, they were accurate, but that’s not sufficient. There needs to be a reasonable articulable suspicion to stop the vehicle. Even in a known drug area an anonymous tip is not sufficient. Had the tip been from a known, presumably reliable informant, had there been an observation of any kind of hand-to-hand transaction, had there not been other reasons to believe that there was simply a conversation that took place when the known drug dealer leaned into the car, there might have been

reasonable articulable suspicion. But here I find that the Detective's instinct, which again was accurate, is just not sufficient, so I'm granting the motion to suppress.

Waiver of Argument Regarding Window Tint Evidence

There was no dispute that defendant's vehicle had tinted windows.

However, the officers were unable to testify with certainty as to whether the degree of tint constituted a violation of Title 21. During argument on remand, the State conceded that the WPD officers did not stop the vehicle for illegal window tint:

MS. HAYES: Your Honor, in the State's review of the record, both Detective Ballard and Officer Hazzard addressed the issue of whether or not there was window tint. And, specifically, Detective Ballard, during his cross by Mr. Foley – and I'm referring to the page of the transcript just for the record. Page 34 of the transcript. Mr. Foley asked Detective Ballard: "did you pull them over for a tinted window?"

Detective Ballard answered: "I believe I mentioned 'tinted window.'"

And Mr. Foley replied: "All right."

That was the extent of addressing the "tinted window" issue with Detective Ballard.

Officer Hazzard addressed the issue on Page 41 of the transcript. The State asked: "Before we get to see what you saw in the car, were you – when you approached the vehicle, were the windows up or down; do you remember?"

“They were – the front windows were up, but when I approached they were down.

“Okay.

“He had it down for me.

“Were you able – when the windows were up, were you able to see in the vehicle with the windows tinted?

“They had tint on them. I wasn’t able to make out exactly who was driving the vehicle.”

Then Officer Hazzard went on to say what he saw in the vehicle.

The State’s argument, as laid out in the reply brief to the Supreme Court, was that the officers did consider the fact that they had tint on them, although they didn’t – though the issue wasn’t flushed out at the suppression hearing.

Detective Ballard said that he did tell them the car had tint; and Officer said that the windows had tint and he wasn’t able to see exactly who was driving the vehicle.

THE COURT: I’d like to draw your attention to page 62 of the transcript. This is in your argument at the conclusion of the evidentiary portion of the suppression hearing. You say, after talking about the pretextual stop issue: “But I don’t even think that’s important here because they didn’t look for – they didn’t stop this car for tint. They had a reasonable articulable suspicion to stop the car.”

MS. HAYES: Your Honor, the State believes that they did have the reasonable articulable suspicion, but they also did have tint.

THE COURT: Well, it’s important there. Do you still agree with your statement that they didn’t stop this car for tint?

MS. HAYES: Your Honor, I don't think I can take back my statement that I made at the suppression hearing. I can only say that they had reasonable articulable suspicion to stop for tint.

The deputy attorney general who appeared at the suppression hearing, and who argued on remand, was not the same attorney who presented argument before the Supreme Court. The suppression hearing/remand DAG candidly confirmed that, at the conclusion of the suppression hearing, the State had waived the issue of whether the vehicle's window tint constituted reasonable articulable suspicion for the stop.

This Court's bench ruling at the conclusion of the suppression hearing reflects that although the officers were aware of the window tint, that was not the articulated reason for the stop.

Reasonable Articulable Suspicion Standard

Reasonable articulable suspicion is defined 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."¹ 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,

¹*State v. Henderson*, 892 A.2d 1061, 1064-65 (Del. 2006).

combining objective facts with such an officer's subjective interpretation of those facts."²

The focus of the court's analysis is the police officer's knowledge, viewed through the lens of the objective standard of reasonableness. It is well-settled that a "police officer who observes a traffic violation has probable cause to stop the vehicle and its driver. During a lawful traffic stop, a police officer may order both the driver and passengers out of the vehicle pending completion of the traffic stop."³ If the stop is valid, evidence in plain view observed during the stop normally is admissible.⁴ Similarly, evidence discovered during a pat down search for officer safety - based upon the officer's reasonable suspicion that the person subject to the frisk is armed and dangerous - will not be suppressed.⁵

Reasonable Articulable Suspicion in this Case

In this case, the State conceded that window tint was not the reason for the stop. Rather, the officers believed they had reasonable articulable suspicion that the vehicle's occupants were involved in drug sales. Upon stopping the car, the

²*Jones v. State*, 745 A.2d 856, 861 (Del. 1999) (citing *United States v. Cortez*, 449 U.S. 411, 417-18 (1981)).

³*Holden v. State*, 2011 WL 2449014, at *2 (Del.).

⁴*Hardin v. State*, 844 A.2d 982, 985-86 (Del. 2004).

⁵*Arizona v. Johnson*, 555 U.S. 323 (2009).

officers observed what they believed to be a marijuana cigarette and asked defendant to exit the vehicle.

It is undisputed that the car windows were tinted to some degree. The degree of tint, and whether the tint constituted a violation of Title 21, was not established through the officers' testimony during the suppression hearing. The Court's ruling was based upon its determination that the officers objectively lacked reasonable articulable suspicion of a drug transaction to justify the stop. The State waived window tint as justifying the stop. Thus, the Court did not understand window tint to be (in the words of the remand order) an "alternative contention" on the part of the State. Indeed, based upon the State's representation during the suppression hearing, the Court's understanding was explicitly to the contrary.

On remand, the Court reviewed the hearing testimony and finds that the officer's observation of window tint was not the basis for the stop. The articulated reason for the stop was observation of what the police believed to be illegal drug activity.

The Court considered the suppression hearing testimony pursuant to the following standard: if a police officer states that the vehicle was stopped for Reason X, the Court reviews the totality of the circumstances to determine

whether Reason X constitutes reasonable articulable suspicion of criminal activity to justify the stop.

The focus of the Court’s analysis is the police officer’s knowledge, viewed through the lens of the objective standard of reasonableness. The analysis centers on the officer’s ability “to point to specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrants the intrusion.”⁶ The situation is “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.”⁷

The Court is aware of no authority for the proposition that the Court *sua sponte* should review the totality of the circumstances to see whether there is another reason that independently could have justified the stop. In deciding a motion to suppress, the Court’s analysis does not extend to whether there existed any reasonable, *but unarticulated*, suspicions. Additionally, grounds for

⁶*State v. Henderson*, 892 A.2d 1061, 1064-65 (Del. 2006).

⁷*Jones v. State*, 745 A.2d 856, 861 (Del. 1999) (citing *United States v. Cortez*, 449 U.S. 411, 417-18 (1981)).

suppression that have been explicitly waived, should not be considered by the trial court.⁸

CONCLUSION

In response to the Supreme Court's directive on remand, the Court finds it theoretically possible that the police could have had reasonable suspicion to believe the defendant operated a vehicle with improper tinting and thus could have had reason to believe the defendant violated Title 21. However, no such suspicion was articulated in their sworn testimony by the police as the justification for the stop. The police failed to testify why they felt that the observed window tint rose to the level of illegal window tint. Moreover, the State explicitly waived that issue during argument at the suppression hearing.

THEREFORE, this Court finds that the police failed to articulate any reasonable suspicion that the defendant operated a vehicle with improper window tint in violation of Title 21 of the Delaware Code.

IT IS SO ORDERED.

/s/ *Mary M. Johnston*

The Honorable Mary M. Johnston

⁸This case illustrates the critical importance of requiring the direct involvement of trial counsel in matters being argued before the Delaware Supreme Court.