

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANTONIO A. DRUMMOND,	§	
	§	No. 81, 2006
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware in and for
v.	§	Sussex County
	§	
STATE OF DELAWARE,	§	Cr. I.D. No. 0407019483
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: September 13, 2006
Decided: October 5, 2006

Before **HOLLAND, JACOBS** and **RIDGELY**, Justices.

ORDER

This 5th day of October 2006, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. Antonio A. Drummond (“Drummond”), defendant below-appellant, appeals from his convictions in the Superior Court of Trafficking in Cocaine and Possession with Intent to Deliver Cocaine. Drummond contends that his arrest was the product of racial profiling in violation of his rights under the Equal Protection Clause of the Fourteenth Amendment. We find no merit to his argument and, therefore, affirm.

2. On July 23, 2004, Detective Ronald Marzec, a Delmar Police Officer assigned to the United States Department of Justice Drug Enforcement

Administration (DEA), began investigating reports of drug dealing at the Burton Village housing complex in Rehoboth Beach, Delaware. Detective Marzec gave Kevin Williams (“Williams”), a confidential informant, \$200 in marked currency and instructed him to attempt to purchase drugs at Burton Village. This was not the first undercover drug purchase at Burton Village. Several people had been arrested for violating drug laws since the Task Force began investigating Burton Village one and one-half years before Drummond’s arrest.

3. Williams drove to Burton Village and spoke with Drummond about purchasing an “eight ball.”¹ After some discussion, Drummond entered a white Ford Explorer and removed a small black bag. Drummond then returned to Williams and removed a set of scales and another bag containing five to six ounces of cocaine from the black bag. Drummond proceeded to weigh a small amount of cocaine to sell to Williams. After the sale was complete, the informant advised Detective Marzec of the approximate amount of cocaine in Drummond’s possession as well as the white Explorer’s license plate number. Jamie Riddle, a Rehoboth Beach police officer, followed Drummond’s vehicle.

4. The informant then met with Detective Marzec and explained the details of the drug transaction. Patrolman Riddle was then instructed to perform a traffic stop of Drummond’s car. Drummond, however, did not stop. After a short

¹ An “eight ball” is slang for one-eighth ounce of crack cocaine.

distance, the vehicle did stop momentarily and a passenger ran out of the car. The passenger, Jesse Drummond, appellant's thirteen year-old cousin, was apprehended with the black bag described by the informant.

5. Drummond continued to drive on for a short distance. He then stopped the vehicle and attempted to flee on foot but was apprehended by the police. The police found over \$1,300 in cash in Drummond's possession, including the marked bills Detective Marzec gave to the informant.

6. While the jury was deliberating, Drummond moved to dismiss all the charges on the basis of racial profiling:

Your Honor, my client has asked me to put something on the record. I don't believe there is any merit to it, but he wanted me to put it on the record. He's asked that the charges be dismissed because of racial profilings [sic], because the reports stated that they were going after a black man. He believes that because of this, you know, the charge should be dismissed.²

The Superior Court acknowledged the motion, but took no further action.

7. We review alleged violations of the United States and Delaware Constitutions *de novo*.³

² App. to Appellant's Opening Br. at A61.

³ *Hall v. State*, 788 A.2d 118, 123 (Del. 2001).

8. The parties agree that the standard of proof for a racial profiling claim is the same as the standard of proof for a selective prosecution claim. The “Constitution prohibits selective enforcement of the law based on considerations such as race.”⁴ To make a *prima facie* case of selective prosecution, two elements must be established. The defendant must show that (1) the policy to prosecute or enforce the law had a discriminatory effect and (2) it was motivated by a discriminatory purpose.⁵ To show a discriminatory effect, the defendant must show that a similarly situated person of a different race could have been arrested for the same offense for which the defendant was arrested, but was not.⁶ To show discriminatory purpose, the defendant must demonstrate that intent to discriminate

⁴ *United States v. Alcaraz-Arellano*, 441 F.3d 1252, 1263 (10th Cir. 2006) (citing *Whren v. United States*, 517 U.S. 806, 813 (1996)).

⁵ *United States v. Armstrong*, 517 U.S. 456, 465 (1996).

⁶ *Id.*

was a “‘motivating factor in the decision’ to enforce the criminal law against the defendant.”⁷ The standard for proving this type of claim is “a demanding one.”⁸

9. Drummond contends that both elements of the test are satisfied because there is direct evidence of discriminatory intent in this case. In support of this argument, Drummond quotes from a footnote in *United States v. Armstrong* as follows: “We reserve the question whether a defendant must satisfy the similarly situated requirement in a case ‘involving direct admissions by [prosecutors] of discriminatory purpose.’”⁹

10. In support of his application to the trial judge, Drummond did not proffer any evidence beyond the evidence adduced at trial. We find that the evidence of record is insufficient to support Drummond’s claim that there is clear, direct evidence of racial profiling.

11. The direct evidence relied upon by Drummond is the report prepared by Detective Marzec detailing the events leading to Drummond’s arrest. Specifically,

⁷ *Alcaraz-Arellano*, 441 F.3d at 1264 (citing *Marshall v. Columbia Lea Reg’l Hosp.*, 345 F.3d 1157, 1167 (10th Cir. 2003)).

⁸ *Armstrong*, 517 U.S. at 463. The reason for a high standard is two-fold. First, as the 10th Circuit noted, “charges of racial discrimination . . . may be easy to make and difficult to disprove.” *Alcaraz-Arellano*, 441 F.3d at 1264. Second, such a claim requires “the judiciary to exercise power over a ‘special province’ of the executive branch, and judicial review of prosecutorial decisions could ‘chill law enforcement by subjecting the prosecutor’s motives and decision-making to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government’s enforcement policy.’” *Id.* (citations omitted).

⁹ *Armstrong*, 517 U.S. at 469 n.3.

Drummond refers to the first page, where Detective Marzec wrote that he “provided the [confidential informant] with \$200.00 (OAF) to purchase crack cocaine from a *black male source of supply, name unknown.*”¹⁰ Drummond claims that this statement constitutes clear evidence that Detective Marzec was interested in arresting only a black male for drug dealing that day. The State disputes Drummond’s reading of the report. The State contends that, because the report was completed ten days after Drummond’s arrest, Detective Marzec was simply memorializing what had occurred, not what was going to occur.

12. The record supports the State’s reading. Both Detective Marzec and Kevin Williams testified that they were not looking to arrest anyone in particular that day.¹¹ In fact, the officers did not plan on arresting anyone at all that day, but

¹⁰ App. to Appellant’s Opening Br. at A9 (emphasis added). The full paragraph reads as follows:

At approximately 3:50 P.M. officers met with CS02-107122, hereinafter referred to as CS, at a neutral location. TFO Whitman and TFO Marzec searched the CS and CS’s vehicle. Both were found to be free of any contraband. TFO Marzec provided the CS with \$200.00 (OAF) to purchase crack cocaine from a black male source of supply, name unknown.

¹¹ Detective Marzec testified as follows:

Q: Did you have any specific target in mind?

A: On that particular day, no. At that complex, no.

Q: Were there any specific characteristics that you were looking for that day?

A: As far as?

Q: As far as the person you were trying to buy from? Any specific characteristics you were looking for?

A: Somebody that was distributing drugs.

Q: Did it matter to you what race they were?

A. No.

Id. at A31.

their policy was not to allow someone to walk away with the amount of drugs Drummond had in his possession.¹² The merit of Drummond's argument is further undercut by the fact that several other people were arrested in the preceding year and a half at Burton Village for selling drugs. Law enforcement officials testified that they did not go to Burton Village simply to arrest a black man. Rather, the undercover purchase was part of a continuing effort to stop drug dealing at that location. Even Drummond's own counsel did not believe that the claim of racial profiling had merit.¹³

13. If the only issue was whether the officers were motivated by a discriminatory purpose, we would remand because there are no findings of fact by the Superior Court on that issue. Drummond, however, must also show that the actions of the police had a discriminatory effect.¹⁴ Here, there was no threshold showing of different treatment of similarly situated persons of other races.¹⁵

The confidential informant, Kevin Williams, also testified that he was not looking for anyone in particular.

Q: And were you looking for anyone in particular when you went out that day?

A: The first day, the first buy, I was, but the second buy when I went out and the defendant was there, I wasn't looking for anybody in particular.

Id. at A34.

¹² *Id.* at A79-80.

¹³ "Your Honor, my client has asked me to put something on the record. I don't believe there is any merit to it, but he wanted me to put it on the record." *Id.* at A61.

¹⁴ *Armstrong*, 517 U.S. at 470.

¹⁵ *Richards v. Pennsylvania*, 2006 U.S. App. LEXIS 17582 (3rd Cir. July 12, 2006).

Because there is no evidence to satisfy this threshold showing, no remand is necessary.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Jack B. Jacobs
Justice