IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	ID# 0906002133
	)	
v.	)	
	)	
JEFFREY SCHNEIDER,	)	
	)	
Defendant.	)	
	)	

Submitted: September 16, 2009
Decided: October 15, 2009

Upon Defendant's Motion to Suppress Evidence.
DENIED.

MEMORANDUM OPINION

Caterina Gatto, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State.

Kevin T. O'Connell, Esquire, Assistant Public Defender, Office of the Public Defender, Wilmington, Delaware, Attorney for Defendant.

COOCH, J.

I. Introduction

This Motion to Suppress Evidence arises out of a motor vehicle stop on June 2, 2009, at which time a police officer responded to a call (apparently to 911) from a citizen advising that Defendant was presently behind the wheel of a motor vehicle drinking alcohol while parked in the

parking lot of an elementary school, apparently observing Little League Baseball games. The Delaware State Police responded by sending Trooper Amy Lloyd to that location, who met briefly (approximately thirty seconds) with the reporting witness in a face-to-face encounter until Defendant then began to exit the parking lot in his vehicle. The officer activated the police cruiser's emergency equipment on Brownleaf Road right outside the parking lot and stopped Defendant. Trooper Lloyd has not made any independent observations that Defendant was under the influence of alcohol. Immediately after the stop, the officer noticed a strong odor of alcohol from Defendant and performed several field sobriety tests, which indicated to the police officer that Defendant was intoxicated. Defendant was arrested and charged with Driving Under the Influence (Fourth Offense) and Driving While Suspended or Revoked.

The issue raised by Defendant's Motion to Suppress Evidence is whether the information provided by the informant, based on the totality of the circumstances and without independent police corroboration, was sufficient to establish reasonable and articulable suspicion under both the United States and Delaware Constitutions to justify the detention of Defendant's vehicle when the citizen-informant was only able to (1) personally observe Defendant drinking alcohol in his automobile; (2)

accurately identify the vehicle owned by Defendant, and; (3) speak to the responding officer about her knowledge of Defendant briefly but face-to-face.[1] For the following reasons, the Court finds that Trooper Lloyd had reasonable and articulable suspicion to conduct an investigatory stop of Defendant. Defendant's Motion to Suppress Evidence is **DENIED**.

II. Facts

On June 2, 2009, at about 7:40 p.m., the Delaware State Police received a report from a witness that a man parked in the parking lot of Gallagher Elementary School was drinking alcohol, while sitting in the driver's seat of his green Chevrolet Venture minivan, apparently watching Little League games.[2] The Delaware State Police responded by sending Trooper Amy Lloyd to the location described by the witness. When Trooper Lloyd arrived "[she] was immediately flagged down by a female, which [was the] reporting person."[3] At the suppression hearing, Trooper Lloyd testified that she met with the witness for about thirty seconds and during that time the witness confirmed she was the source of the tip and also reported that she was familiar with the defendant because "[she had] partied

[1] The only issue raised by Defendant is the constitutionality of the automobile stop. Defendant does not argue the sobriety testing and post-stop observations were otherwise invalid and has only argued that the testing and the post-stop observations were invalid because they were a product of an unlawful automobile stop.
[2] Tr. of Sept. 18 Suppression Hearing at 7-8.
[3] *Id.* at 8.

with him in the past" and "[she had] hung out with him before."[4] Trooper Lloyd further testified that the witness told her that she "was extremely concerned for the safety of the citizens in the area and the children[.]"[5]

However, and before the officer could further question the witness, Defendant began to exit the parking lot of the school in his vehicle. According to Trooper Lloyd's testimony, the witness confirmed the automobile pulling out of the parking lot belonged to Defendant because the witness "pointed and said, '[t]hat's the green van, that's the guy. . . .'"[6] Trooper Lloyd activated her emergency equipment and stopped Defendant's automobile right outside the parking lot on Brownleaf Road.[7] As the officer approached the car and in "making contact with [Defendant], [she] immediately smelled alcohol . . . ."[8] The officer then asked Defendant to exit the vehicle and performed several field sobriety tests all of which, in her view, Defendant failed. Defendant was arrested and charged with Driving Under the Influence (Fourth Offense) and Driving While Suspended or Revoked.

III. Contentions of the Parties

[4] *Id.* at 10.
[5] *Id.* at 14.
[6] *Id.* at 11.
[7] *Id.* at 14.
[8] *Id.* at 15.

Defendant argues in support of his motion that the information provided by the witness, without any independent corroboration by the police officer, was insufficient to give "reasonable articulable suspicion that the [defendant] has committed or [was] about to [] commit a crime or motor vehicle violation[,]"[9] under both the United States Constitution and the Delaware Constitution. Defendant contends that the most that Trooper Lloyd could have done at that moment was to follow the defendant's vehicle to observe his driving behavior, but that she was not permitted to stop Defendant's vehicle based on (1) an informant's report of non-criminal activity or (2) the police officer's "hunch" that Defendant was possibly driving under the influence.[10] Defendant asserts that, unlike other cases analyzing information from informants, the informant in the present case did not actually see Defendant do anything illegal.[11]

All that was observed by the informant was Defendant (whom she knew) drinking alcohol in a parked motor vehicle from an open container, which, Defendant contends, is not a crime according to 21 *Del. C.* § 4177J.[12] Section 4177J provides that

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[9] Mot. to Suppress at 3 (*citing Delaware v. Prouse*, 440 U.S. 648, 663 (1979)).
[10] *See* Tr. of Sept. 18 Suppression Hearing at 17-18.
[11] Mot. to Suppress at 3.
[12] Defendant raised this argument under 21 *Del C.* § 4177J for the first time at oral argument.

> No person shall consume an alcoholic beverage while driving a motor vehicle upon the highways of this State. "Consume," as used in this subsection, shall mean the ingestion of a substance containing alcohol while in the act of operating a motor vehicle in the presence of, or in the view of, a police officer.[13]

Defendant alleges that no crime occurred because 21 *Del. C.* § 4177J states that alcohol must be consumed on a "highway" and also "in the presence of, or in the view of, a police officer."[14] Here, Defendant argues, no crime occurred because Trooper Lloyd was not present when alcohol was consumed on private property and, therefore, did not have reasonable and articulable suspicion to stop Defendant's vehicle.

In response, the State asserts that the officer did have the needed reasonable and articulable suspicion required for this particular automobile stop. The State argues that, based on the totality of the circumstances, it was reasonable for the police officer to have inferred "that a crime has occurred, is occurring, or is about to occur."[15] The State further contends that the information provided by the informant was enough, even without independent police corroboration, to infer that a crime was about to be committed.[16] The State argues that 21 *Del C.* § 4177J is immaterial to this case because the police officer was permitted to make a "rational inference

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[13] 21 *Del. C.* § 4177J (2009).
[14] *Id.*
[15] Ans. to Mot. to Suppress at 3 (*citing Prouse*, 440 U.S. at 663).
[16] *Id.*

[] that a person who is drinking alcohol in a vehicle who within ten minutes drives away may be driving under the influence."[17] Finally, the State argues that "if the officer would have waited to see if any Title 21 violation would have occurred . . . [the officer would have] risk[ed] and harm[ed] people just to form a basis for the stop".[18]

IV. Discussion

The issue raised by Defendant's Motion to Suppress Evidence is whether the information provided by the informant, based on the totality of the circumstances and without independent police corroboration, was sufficient to establish reasonable and articulable suspicion under both the United States and Delaware Constitutions to justify the detention of Defendant's vehicle when the citizen-informant was only able to (1) personally observe Defendant drinking alcohol in his automobile; (2) accurately identify the vehicle owned by Defendant, and (3) speak to the responding officer about her knowledge of Defendant briefly but face-to-face.

An individual's right to be free from unreasonable search and seizure is enshrined in both the Fourth Amendment to the United States

[17] Tr. of Sept. 18 Suppression Hearing at 33.
[18] *Id.*

Constitution[19] and in Article I, Section 6 of the Delaware Constitution.[20] However, despite the broad protection afforded by both constitutions, a police officer may conduct a brief, investigatory seizure of a citizen based on the officer's reasonable and articulable suspicion that criminal activity "has occurred, is occurring, or is about to occur."[21]

An officer's suspicion of criminal activity cannot be based on a mere "hunch."[22] Instead, the officer's suspicion must be based on an "adequate quantity of information of sufficient quality to create a reasonable and articulable suspicion that a crime has occurred, is occurring, or is about to occur."[23] An officer is permitted to rely on the information provided by an informant, without independent police corroboration, to establish reasonable

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[19] *See* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

[20] *See* DEL. CONST. art. I, § 6 ("The people shall be secure in their persons, houses, papers and possession, from unreasonable searches and seizures . . . .").

[21] *See Bloomingdale v. State*, 842 A.2d 1212, 1217 (Del. 2004); *see also Prouse* 440 U.S. at 648; *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

[22] *See Terry*, 392 U.S. at 27 ("[I]in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience."); *see also United States v. Sokolow*, 490 U.S. 1, 7 (1989) (stating that an "unparticularized suspicion or hunch" is not enough to establish reasonable suspicion); *State v. Huntley*, 777 A.2d 249, 254 (Del. Super. 2000) (stating that "[r]easonable suspicion is more than an ill-defined hunch").

[23] *Bloomingdale*, 842 A.2d at 1217. *See Coleman v. State*, 562 A.2d 1171, 1174 (Del. 1989) (stating that an officer must have "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.").

and articulable suspicion for stopping an automobile[24] if the officer can show that the information provided by the informant is reliable.[25] To determine whether the information provided by the informant in this case was sufficiently reliable to establish reasonable and articulable suspicion for a vehicle stop, some courts have examined: (1) the identity of the informant; (2) the quantity of information provided to the officer; (3) the quality of information provided to the officer, and (4) the information provided by the informant that illegal activity has occurred, is occurring, or will arise in the near future.[26] This Court follows that approach.

A. Identity of the Informant

In assessing the information provided to a police officer by an informant, numerous cases recognize a distinction between an anonymous informant and an identified informant.[27] When an officer's suspicion is

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[24] *See generally, Bloomingdale*, 842 A.2d at 1217; 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE 570-98 (4th ed. 2004).

[25] *Bloomingdale*, 842 A.2d at 1217 (citing *United States v. Wheat*, 278 F.3d 722, 726 (8th Cir. 2001)); LAFAVE, 570-98.

[26] In a South Dakota case with remarkably similar facts to the present case, the Supreme Court of South Dakota held the automobile stop constitutional based on four factors. *See State v. Satter*, 766 N.W.2d 153 (S. D. 2009). Additionally, the Delaware Court of Common Pleas has also relied on these factors. *See State v. Beddia*, 2009 WL 2857962 (Del. Com. Pl. 2009).

[27] *See, e.g., Florida v. J.L.*, 529 U.S. 266, 276 (2000) (Kennedy, J., concurring); *United States v. Valentine*, 232 F.3d 350, 354 (3d Cir. 2000) (stating that an in person informant is more reliable because police have the "opportunity to assess the informant's credibility and demeanor."); *United States v. Christmas*, 222 F.3d 141, 144 (4th Cir. 2000) (stating that an identified informant opens himself up to the possibility of retaliation); *United States v. Salazar*, 945 F.2d 47, 50-51 (2d Cir. 1991) (stating that a face-to-face informant

"aroused" by an anonymous tip, "whether that 'tip suffices to give rise to reasonable suspicion depends on both the quantity of the information it conveys as well as the quality . . . of that information, viewed under the totality of the circumstances.'"[28] In contrast, identified informants are potentially more reliable because officers are often more easily able to assess the credibility and demeanor of the informant,[29] and the informant can be exposed to risk of retaliation from the person named or from the police for falsely reporting a crime.[30] If an informant places his anonymity at risk, a court may consider this as a factor to determine whether the tip was sufficiently reliable to establish reasonable and articulable suspicion for the automobile stop.

Here, the informant was not an anonymous informant because this case does not involve an anonymous telephone call or anonymous information dispatched to police officers without any direct, face-to-face communications with the informant.[31] Notably, the informant waited in the

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is inherently more reliable); *United States v. Sierra-Hernandez*, 581 F.2d 760, 763 (9th Cir. 1978) (same).

[28] *Bloomingdale*, 842 A.2d at 1217.

[29] *Valentine*, 232 F.3d at 354 (stating that an in person informant is more reliable because police have the "opportunity to assess the informant's credibility and demeanor.")

[30] *Florida v. J.L.*, 529 U.S. at 276 (Kennedy, J., concurring); *Christmas*, 222 F.3d at 144 (stating that an identified informant opens himself up to the possibility of retaliation); LAFAVE, 570-98.

[31] *Florida v. J.L.*, 529 U.S. at 276 (defining an anonymous informant as a person who made a call to police without any sufficiently reliable information to allow police to

parking lot for the police to arrive. In this case there was direct, face-to-face communication between officer and informant. Numerous cases recognize the distinction between in-person informants and anonymous telephone calls.[32]

The informant placed a telephone call (apparently to 911), and, when Trooper Lloyd arrived at the school parking lot, was able to talk directly with the informant. The informant made no effort to hide or conceal her identity. Although the officer did not initially obtain the informant's identifying information, such as her driver's license or vehicle registration (because the police officer suddenly took off after the defendant) before the automobile stop was made, the officer did engage in face-to-face communication with the informant for about thirty seconds and obtained enough information to establish the vehicle Defendant was driving and that the informant knew Defendant personally from previous "partying" with him. The officer likely could have obtained more information from the informant, had there been more time, but the defendant began to exit the parking lot shortly after the officer arrived. The exigency of the circumstances, coupled with the potential danger of an intoxicated driver,

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determine who exactly made the report); *Bloomingdale*, 842 A.2d at 1217 (classifying an anonymous tip as one broadcast over police radio without any indication of who was the source of the information).

[32] *See* cases cited *supra* note 27.

meant that the officer had to act quickly to stop the vehicle.[33] The information provided to the officer by the informant in the face-to-face encounter weighs in favor of the officer's reasonable and articulable suspicion to stop the vehicle because the officer had the opportunity to personally assess the reliability of the tip based on the informant's demeanor, and (potentially at least) the informant risked retaliation from the defendant or from the police by filing a false report.

B. Quantity of Information

In assessing whether the quantity of information provided by the informant was enough to provide reasonable and articulable suspicion for the automobile stop, the Court must also determine whether the information provided by the informant was enough for the officer to determine that the vehicle stopped was the same one identified by the informant.[34]

Here, there was sufficient information for the police officer to have stopped Defendant. The informant identified both the make and model of Defendant's automobile and pointed out the automobile to the police officer when it began to leave the parking lot. Additionally, the informant indicated

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[33] Police officers sometimes have limited options when confronted with reports of intoxicated or potentially intoxicated drivers. However, as the Delaware Supreme Court noted, "[i]f the officer must follow the vehicle to corroborate the allegation . . . the officer risks observing the vehicle actually cause an accident." *Bloomingdale*, 842 A.2d at 1221.

[34] *See United States v. Wheat*, 278 F.3d 722, 731 (8th Cir. 2001); *Bloomingdale*, 842 A.2d at 1222 (stating that an anonymous tipster should provide accurate information such as a description of the vehicle, its location, its license tag number etc.).

that she had personally observed Defendant drinking alcohol in the driver's seat of the automobile. All the information provided by the informant, including the fact that she had "partied" and "hung out" with Defendant in the past, gave the officer sufficient information to know that the vehicle stopped was the same as the vehicle identified by the informant.

C. Quality of Information

In assessing the reliability of the information provided by the informant, the "primary determinant of the tipster's reliability is the basis of [her] knowledge[.]"[35] In the instant case, the informant's information came from observations directly relayed to the responding officer. The informant knew Defendant personally from previous "partying" and had observed the defendant drinking in his automobile. The informant immediately relayed the report of Defendant's drinking to the police, so there was no significant lapse in time. The reporting officer was further able to corroborate the information via face-to-face communication with the informant. The only important fact unknown to the reporting officer was the degree and extent of Defendant's being possibly under the influence.

[35] *Wheat*, 278 F.3d at 734; *see also Illinois v. Gates*, 462 U.S. 213, 230 (1983) ("[A]n informant's 'veracity,' 'reliability,' and 'basis of knowledge' are all highly relevant in determining the value of his report . . . .").

The exigency of the circumstances did not permit the police officer to obtain additional information from the informant because Defendant began to drive off immediately after the officer arrived. Therefore, this Court should "balance the government's interest in responding immediately to reports of unsafe driving against the comparatively modest intrusion on individual liberty that a traffic stop entails."[36] The officer was entitled to consider the potentially devastating consequences of an accident caused by a person driving under the influence and the exigency of circumstances.

D. Signs of Criminal Activity

The last factor in establishing reasonable and articulable suspicion to justify an automobile stop is some information that a "crime has occurred, is occurring, or is about to occur."[37] Defendant argues that neither the informant nor the responding officer saw any evidence that a crime was committed or was about to be committed. Furthermore, Defendant argues that a person sitting in an automobile drinking alcohol, without any other observations, is not committing a crime and that, based on the information provided to the police, the officer had not yet established reasonable and articulable suspicion to justify the automobile stop.

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[36] *Bloomingdale*, 842 A.2d at 1221. *See Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990) (characterizing the intrusion on motorists liberty when stopped at a sobriety checkpoint as "slight").

[37] *Bloomingdale*, 842 A.2d at 1217.

Courts have come to different conclusions (based on the particular facts of those cases) regarding the sufficiency of information needed to establish that the offense of Driving Under the Influence is occurring, or is about to occur, based solely on non-driving behavior.[38] Indeed, the recent Delaware Court of Common Pleas case of *State v. Beddia*, upon which Defendant relies, held that there was no reasonable and articulable suspicion to justify a police stop when an anonymous informant reported to a police officer that a driver had "very slurred speech" and "that there was an open container of alcohol in the vehicle."[39] Thus, the information needed to show signs of criminal activity is fact specific and must be examined on a case-by-case basis.

In the present case, the police officer did have a sufficient quantity of information to establish that criminal activity was likely to occur in the near future. The informant told the officer that she had seen Defendant drinking alcohol in his automobile. Assuming, without deciding, that Defendant is correct that mere drinking inside a parked automobile on private property is not a crime, the police officer is nevertheless allowed to draw all reasonable

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[38] *See, e.g., State v. Satter*, 766 N.W.2d 153, 158 (S.D. 2009) (*citing State v. Miller*, 510 N.W.2d 638 (N.D. 1994) (invalidating a traffic stop based on a tip that a driver "could barely hold his head up"); *Stewart v. State*, 22 S.W.3d 646 (Tex. App. 2000) (invalidating a traffic stop based on a tip that driver fell down twice while at a convenience store); *State v. Roberts*, 977 P.2d 974 (1999) (upholding a traffic stop based on a tip that two men had been fighting got into a pickup truck and that the driver could "barely walk.").

[39] *See State v. Beddia*, 2009 WL 2857962 (Del. Com. Pl. 2009).

inferences from criminal or non-criminal activity when assessing a situation to determine whether a crime is likely to occur in the near future.[40] Here, Defendant began to exit the parking lot shortly after the officer arrived. The information available to the officer after the brief interaction with the informant was that Defendant had consumed some unknown quantity of alcohol in the driver's seat of his automobile. Additionally, the informant told the officer that she was "concerned with safety" given that Defendant had consumed an unidentified amount of alcohol in the parking lot of an elementary school.[41] Even assuming that Defendant had not committed a crime when the officer arrived, nevertheless, as soon as Defendant began to leave the parking lot, the officer was permitted to make a rational inference that criminal activity (driving under the influence) was about to occur. The officer did not have probable cause to make an arrest of Defendant based on leaving the parking lot, but the officer did have reasonable and articulable suspicion that Defendant might have been in the process of committing a crime. The officer was, therefore, permitted to stop Defendant on Brownleaf

[40] *Coleman v. State*, 562 A.2d 1171, 1174 (Del. 1989).

[41] Many cases recognize that reasonable and articulable suspicion required for a police stop can be based on concerns for public safety. *See generally*, *State v. Pinkham*, 565 A.2d 318, 319 (Me. 1989) (stating that reasonable suspicion can be based on concerns for safety or safety of driver and others); *Purnell v. Comm'r of Pub. Safety*, 410 N.W.2d 439 (Minn. Ct. App. 1987) (holding that a police officer was allowed to stop a vehicle after a reported assault, although no description of the vehicle was given, where the officer saw the vehicle pulling away because the officer was permitted to "freeze" the situation).

Road, as she did, and investigate whether Defendant was, in fact, under the influence of alcohol.

This result is similar to *State v. Satter*, a case decided by the South Dakota Supreme Court with remarkably similar facts. In *Satter*, an eyewitness "told a police officer [face-to-face] that he had seen two men drinking beer in a van parked next to the eyewitness in a parking lot[,]" and identified the offenders to the responding officer.[42] The officer executed a police stop immediately after Defendant began to exit the parking lot.[43] In holding that there was no violation of the Fourth Amendment to the United States Constitution, the Supreme Court of South Dakota stated that both the witness's face-to-face communications with the officer and also the quality and quantity of the information provided the officer with sufficient information to make a rational inference "that the van driver was intoxicated."[44]

In contrast, the facts in the present case are distinguishable from the facts in *Beddia*. In *Beddia*, the informant was anonymous.[45] Additionally, there is no evidence in *Beddia* that the informant actually observed

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[42] *Satter*, 766 N.W.2d at 154.
[43] *Id.*
[44] *Id.* at 158.
[45] *See Beddia*, 2009 WL 2857962, at *6.

Defendant drinking.[46] All that was observed was Defendant's slurred speech and possession of an open container.[47] The slurred speech could have been attributable to numerous other factors besides alcohol. Additionally, the informant did not personally observe Defendant drinking from the open container.[48]

The facts in the present case are stronger than in *Beddia* in favor of allowing a police stop. The informant personally observed Defendant drinking alcohol in his automobile. Unlike *Beddia*, the witness personally observed the incident, and there is no indication that the informant was simply reporting information observed by another. Additionally, the informant in this case was not anonymous because she engaged in face-to-face communication with the reporting officer. All these factors, combined with the potential that Defendant might soon leave the parking lot, establish a reasonable and articulable suspicion that an intoxicated driver might soon cause injury to person or property. The risk of an automobile accident was outweighed by the "slight intrusion" caused by the motor vehicle stop.[49] The responding officer had reasonable and articulable suspicion that criminal activity (driving under the influence) was occurring or was about to

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[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Bloomingdale*, 842 A.2d at 1221-22.

occur and appropriately made a rational inference that Defendant's consumption of alcohol while in the driver's seat of a motor vehicle indicated that an intoxicated driver might be operating the automobile. Therefore, there was sufficient information provided to the police, even without independent corroboration, for Trooper Lloyd to have believed that criminal activity "has occurred, is occurring, or is about to occur."[50]

V. Conclusion

For the reasons stated above, Defendant's Motion to Suppress Evidence related to the stop of his automobile by the Delaware State Police is **DENIED**. [51]

Richard R. Cooch

oc: Prothonotary
cc: Investigative Services

[50] *Id.* at 1217.

[51] The Court need not consider the merits of Defendant's alternative 21 *Del. C.* § 4177J argument because it is immaterial to this holding as to whether a crime had occurred when the police arrived because the police had reasonable suspicion that a crime was "about to occur." *See Bloomingdale*, 842 A.2d at 1217.