SUPERIOR COURT
OF THE
STATE OF DELAWARE

CHARLES E. BUTLER
JUDGE

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Re: *State v. Kyle Watson*
Def. I.D.: 1311009804

Dear Counsel:

Before the Court is the State's motion to reargue this Court's November 10, 2014 decision[1] granting the defendant's motion to suppress evidence. "A motion for reargument is granted only if the Court has overlooked a controlling precedent

[1] *See* Docket Item 41.

or legal principles, or the Court has misapprehended the law or facts such as would have changed the outcome of the underlying decision. A motion for reargument is not an opportunity for a party to revisit arguments already decided or to present new arguments not previously raised."[2]

The facts relevant to the consideration of the instant motion are as follows. Two "Safe Streets" officers in an unmarked police vehicle approached the defendant, Kyle Watson, who was walking down a city street. According to the testimony, the officers advised Mr. Watson that they "believed that he was currently wanted and that [they] wanted to check that."[3] There was, in fact, no outstanding capias for Mr. Watson at the time of that confrontation. Once so confronted, Mr. Watson began making furtive gestures towards his waistband, the officers searched him, and a handgun was discovered. This Court granted the defendant's motion to suppress the handgun as the fruit of an illegal seizure.

The State reargues that this was not a "stop" for constitutional purposes. It is quite understandable that the State would take this position because if it was not a stop, but merely a "consensual encounter," then the defendant's subsequent

[2] *State Farm Fire & Cas. Co. v. Middleby Corp.*, 2011 WL 2462661, at *2 (Del. Super. Ct. June 15, 2011) (citations omitted).

[3] Suppression Hr'g Tr. at 9 (Oct. 31, 2014).

furtive gestures would supply all the reasonable suspicion needed to justify the subsequent frisk and discovery of the weapon found pursuant thereto.

But the stop is what gummed up the State's argument and thus, the State asks the Court to recast it as something else. The Court demurs.

The law is quite clear: a "stop" occurs when "a reasonable person would have believed he or she was not free to ignore the police presence."[4]

While it certainly colors the Court's view of the "reasonableness" of this encounter, we will dispense with the ambiance of the moment. As made abundantly clear in the hearing, these officers were not interested in trading niceties with Mr. Watson. They shared a low opinion of Watson and the Court was left with no doubt but that their approach to Watson was aggressive and hostile. We can put it all aside to the extent the State asks us to consider only the stop itself.

In the Court's view, the fatal flaw in the State's position is the officers' informing Watson of their belief that there was an open capias. Once the

[4] *Jones v. State*, 745 A.2d 856, 869 (Del. 1999) (The question of "when a seizure has occurred under Article I, § 6 of the Delaware Constitution requires focusing upon the police officer's actions to determine when a reasonable person would have believed he or she was not free to ignore the police presence."); *Williams v. State*, 962 A.2d 210, 215-16 (Del. 2008) ("Only when the totality of the circumstances demonstrates that the police officer's actions would cause a reasonable person to believe he was not free to ignore the police presence does a consensual encounter become a seizure."); *Ross v. State*, 925 A.2d 489, 493 (Del. 2007) ("[T]he standard to determine a seizure, as set forth in *Jones*, is when 'a reasonable person would have believed that he is not free to ignore the police presence.'"); *Jones v. State*, 28 A.3d 1046, 1051 (Del. 2011).

defendant was so informed, he was not "free to ignore the police presence" as a matter of law.

While cited by neither party, the Court finds *State v. Barnes*[5] instructive. In that case, an Officer Moran spotted Mr. Barnes, whom he knew to be a small time drug offender from previous experiences.[6] He also had a subjective (but mistaken) belief that there was an outstanding warrant for Barnes.[7] Moran encountered Barnes on the street and asked him to wait while Moran checked on the warrant status.[8] The Washington Court held:

> A reasonable person would not have felt free to walk away at this point, regardless of whether the exact words were, '*please* wait right here,' or '*why don't you* wait right here,' or '*would you mind* waiting right here,' instead of just plain 'wait right here.' The ensuing interaction was a detention, not a social encounter. Once Officer Moran communicated his belief or suspicion that lawful grounds existed to detain Mr. Barnes, the encounter ceased to be consensual. [9]

The State asks us to consider the six "factors" outlined in *Jones v. State*.[10] So without further ado, the factors are: First, whether the encounter occurred in a

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[5] *State v. Barnes*, 978 P.2d 1131 (Wash. Ct. App. 1999).

[6] *Id*. at 1133.

[7] *Id*.

[8] *Id*.

[9] *Id*. at 1135 (emphasis in original).

[10] *Jones v. State*, 28 A.3d 1046, 1052-53 (Del. 2011) (*citing United States v. Scheets*, 188 F.3d 829, 836-37 (7th Cir. 1999)).

public or private place. Here, it was clearly public. Second, whether the suspect was informed he was not under arrest and free to leave. Here, he was not so informed, indeed, the information was to the opposite effect. Third, whether the suspect consented or refused to speak to the officers. Here, the suspect neither refused nor consented since circumstances changed so quickly after the initial confrontation. Fourth, whether the investigators removed the suspect to another area. Here, they did not. Fifth, whether there was touching, physical contact or other threatening conduct. Here, there was no physical contact but the Court has found that there was indeed threatening conduct. Sixth, whether the suspect eventually departed the area without hindrance. Here, we know he did not: he was arrested and put in a police car.

So, if we were keeping score, we would find two factors favoring the State's position, one factor irrelevant, and three factors favoring the defendant's position, yielding a 3-2, split decision favoring a ruling that this was indeed a "seizure" for constitutional purposes.

The Court is not entirely content with scoring along a list of factors, however analytically simple doing so may be. Indeed, the Delaware Supreme Court cautioned that the list of factors was not intended to be exhaustive and no

one factor was ever intended to predominate over the others.[11] And in considering the genealogy of the *Sheets*[12] opinion upon which *Jones* is based, we are drawn to *U.S. v. Borys*,[13] a case preceding *Sheets* in which the Seventh Circuit peeled away the facts in an airport surveillance encounter and ruled that "when the two agents explained that they suspected Borys of transporting drugs and asked permission to search his luggage, the consensual questioning had ripened into an investigative stop."[14] The *Borys* court further held that "[i]n these circumstances where Borys knew that the agents had positively identified him as a suspect, a reasonable person would not have felt at liberty to leave."[15]

We think the Seventh Circuit's *Borys* opinion helps us understand one of the ways we can discern that delicate point at which a "consensual encounter" can no longer be characterized as such and the police must have some reasonable articulable suspicion to justify the seizure: when law enforcement makes it clear that the particular subject before them is suspected of wrongdoing – be it a drug

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[11] *Jones,* 28 A.3d at1053 (Del. 2011). ("Courts must not rigidly apply these factors but instead should independently analyze the facts of each case. In applying the totality of the circumstances test, 'no one factor is legally determinative, dispositive, or paramount.'").

[12] *United States v. Scheets*, 188 F.3d 829, 836-37 (7th Cir. 1999).

[13] *United States v. Borys*, 766 F.2d 304 (7th Cir. 1985).

[14] *Borys,* 766 F.2d at 311 (7th Cir. 1985) (citing *United States v. Berry,* 670 F.2d 583, 597 (11th Cir.1982) (*en banc*)).

[15] *Id*.

courier in a terminal or a wanted person on a city street - a reasonable person would be justified in believing he is not "free to leave" for purposes of the Fourth Amendment. In this case, the "request," if it be called that, for Mr. Watson to remain to be checked for his warrant status turned any pretense that this was to be a "consensual encounter" into a "seizure" requiring Fourth Amendment protections. As the Washington Court of Appeals said, once the officers announced that they believed there were lawful grounds for the arrest of the defendant, it ceased to be a consensual encounter.[16]

The State has not asked the Court to review its finding that there was no reasonable articulable suspicion justifying the stop. Virtually all Fourth Amendment analysis relies upon the rule of reasonableness.[17] We found it unreasonable that, given the time, the State's admitted lack of an exigency, and the ready availability of the means to confirm or deny the existence of the capias, it was unreasonable to stop the defendant. To call this confrontation anything but a "seizure" under the Fourth Amendment defies the facts as the Court has found them.

For the foregoing reasons, the State's motion to reargue is **DENIED**.

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[16] *Barnes*, 978 P.2d at 1135 (1999) ("Once Officer Moran communicated his belief or suspicion that lawful grounds existed to detain Mr. Barnes, the encounter ceased to be consensual.").

[17] *Florida v. Jimeno*, 500 U.S. 248, 250 (1991) ("The touchstone of the Fourth Amendment is reasonableness.").

IT IS SO ORDERED.

/s/ Charles E. Butler
Judge Charles E. Butler