

The question presented is whether a traffic stop was unconstitutionally prolonged when occupants were removed from a vehicle in order to accommodate a K-9 sniff test. Defendant Gary Stanley (“Stanley”) is charged with Aggravated Possession, Drug Dealing, Conspiracy Second Degree, and Possession of Drug Paraphernalia. Stanley moves to suppress evidence collected from his vehicle by the Dover Police Department after officers conducted a search incident to a K-9 sniff test.

FACTS AND PROCEDURAL HISTORY

The facts of this case are somewhat complex which requires the Court to engage in a fairly copious analysis. On June 16, 2015, Corporal Robert Barrett (“Cpl. Barrett”) was assigned to a patrol unit as a K-9 handler and was performing a routine patrol. While Cpl. Barrett was traveling on South Little Creek Road near Fox Road, a black Acura pulled in front of him from a stop sign. Cpl. Barrett noticed the Acura had a severely cracked windshield and muffler that was swinging loose from the vehicle. He then turned on his emergency lighting to initiate a traffic stop. A mobile video recorder (“MVR”) mounted to Cpl. Barrett’s patrol car should have come on at that time, but it did not. Thus, the MVR does not show the initial portion of the traffic stop. The Acura turned on its right turn signal, but instead of pulling to the shoulder, the Acura continued further down the road, made a right turn into Barrister Place, and pulled into a driveway on the east side of the road. Cpl. Barrett testified that the car continued to Barrister Place despite having many opportunities to safely pull over onto the shoulder. He thought it odd that the car would travel between 400 and 500 yards before coming to a stop. After the Acura came to a stop in the

driveway, Cpl. Barrett approached the driver and asked him to back the Acura out of the driveway and into the road.¹

The DVD recording of the MVR record began with a timestamp of 18:43.² By that time, the initial contact between Cpl. Barrett and Stanley had occurred. Cpl. Barrett testified that when he approached the car, he noticed that Stanley was leaning forward in the seat with the fingers of his right hand in a bag between his legs. Cpl. Barrett could see in the bag and knew there was no weapon. He also noticed three cellular telephones sitting on the center console and that Stanley's hands were visibly shaking when asked for additional paperwork. Approximately three to four minutes had passed between the point where the traffic stop was initiated and the point where Cpl. Barrett returned to the patrol car. Upon returning to the patrol car to write a warning citation, he ran a criminal history check and called for backup.³ Cpl. Barrett

¹ A DVD record of the MVR recording was played at the hearing, but the initial portion of the traffic stop was not recorded on the DVD. The DVD shows a record of the traffic stop from the point where Stanley had already backed out of the driveway. The DVD began with a time stamp of June 15 at 18:43. Cpl. Barrett testified that the MVR was damaged and the time and date were not accurate, but stated that the timestamp would keep an accurate record of the elapsed time. The actual MVR tape was played at the second day of the hearing and showed the traffic stop beginning at a timestamp of 18:41 and thus showed two extra minutes at the beginning of the traffic stop. However, the MVR tape began to play after Stanley had pulled into the driveway, so initial moments of the traffic stop are not recorded on either the MVR tape or the DVD.

² As noted above, the timestamp was not accurate. Cpl. Barrett testified that the traffic stop began on June 16, 2015 at 10:33 a.m.

³ Cpl. Barrett testified that he required backup so that he could remove the passengers from the vehicle while he had his K-9 partner perform a sniff test. Cpl. Barrett stated that Dover Police Department procedures require occupants be removed from a vehicle before a sniff test is performed for the occupants safety as well as the officer's safety. An officer cannot watch his K-9 for alert cues and the occupants of the vehicle at the same time.

testified that he had decided to walk his K-9 partner around the vehicle before he had written the warning citation. His decision to perform the K-9 sniff test was based on numerous factors which included the time it took Stanley to pull over, the position in which Stanley was sitting in the vehicle, finding three cellular telephones on the center console,⁴ Stanley's decision to pull into Barrister Place (which Cpl. Barrett described as a high crime area), Stanley's visibly shaking nervous condition when approached, and Stanley's extensive police record which included multiple drug convictions (which cannot be used as a determining factor at this stage to perform the sniff test). The recording showed Cpl. Barrett returned to his patrol car at 18:44:51 after verifying insurance on the Acura.

At 18:47:50, Officer Brian Wood ("Officer Wood"), the officer dispatched to assist Cpl. Barrett, approached Stanley's car with a written warning in his hand. Officer Wood testified that he was asking Stanley and the passenger to step out of the vehicle so he could explain the warning citation to Stanley and so Cpl. Barrett could conduct a K-9 sniff test. At 18:48:25, Cpl. Barrett appeared on the recording with his K-9 partner. At 18:49:15, Stanley and his passenger exited the car and Cpl. Barrett commenced the K-9 sniff test. While the test was in progress, Officer Wood and Stanley were standing in front of the police car. Officer Wood testified that he attempted to get Stanley to sign the written warning, but at 18:49:37 Stanley made a gesture with his hand indicating he refused to sign the warning. Officer Wood

⁴ Cpl. Barrett testified that in his experience having more than one cell phone could be indicative of criminal activity.

testified that under normal circumstances he would have allowed Stanley to sign the warning without exiting the vehicle. For a short period of time between the time Stanley apparently refused to sign the warning and the time Cpl. Barrett's K-9 partner alerted on the passenger door of Stanley's car, Officer Wood was standing in the front of the patrol car with the ticket pad in his utility belt with Stanley standing next to him. At 18:49:58, Cpl. Barrett's K-9 partner alerted on the passenger side door of the vehicle Stanley was driving. At 18:51:04, the warning citation was handed to Stanley, and at 18:52:08, a search of the interior of Stanley's car commenced. The search revealed that the bag between Stanley's legs contained heroin. Stanley was placed under arrest and charged with Aggravated Possession, Drug Dealing, Conspiracy Second Degree, and Possession of Drug Paraphernalia. Stanley has filed this motion to suppress evidence seized when the vehicle he was driving was searched subsequent to a routine traffic stop.

DISCUSSION

A two part disjunctive test determines whether the driver or occupant of a vehicle has been subjected to a separate seizure in the course of a routine traffic stop. The first element of the test addresses the practical aspect of the investigation and asks whether any investigation of the vehicle or its occupants was beyond that required to complete the purpose of the traffic stop.⁵ The second element of the test addresses the temporal aspect of the investigation and asks whether there was any *measurable* extension of the duration of a traffic stop beyond that required to

⁵ See *Caldwell v. State*, 780 A.2d 1037, 1047 (Del. 2001).

complete the purpose of the traffic stop.⁶ Under the second element, a driver stopped for “a minor traffic violation cannot be detained at the scene of the stop for longer than it takes, or reasonably should take, to issue a citation for the traffic violation that the motorist committed.”⁷ Thus, a measurable extension of time may occur even though the elapsed time from the beginning of the traffic stop to the completion of any additional investigation did not exceed the normal time required to complete a similar traffic stop.⁸ If the answer to either query is affirmative, then a separate seizure has occurred and that seizure must be supported by independent facts sufficient to justify the additional intrusion.⁹

In *Caldwell v. State*, an officer initiated a traffic stop on a car parked in a fire lane after recognizing the vehicle’s occupant as a person suspected of involvement in drug dealing.¹⁰ After the vehicle pulled away from the curb, the officer activated his emergency lights.¹¹ As the vehicle pulled over, the officer could see the driver look at him in the rearview mirror and do something on the side with his hand. The officer immediately called for backup. The officer asked the driver to exit the vehicle

⁶ *Murray v. State*, 45 A.3d 670, 674 (Del. 2012) (citing *Arizona v. Johnson*, 555 U.S. 323, 333-34 (2009)).

⁷ *Caldwell*, 780 A.2d at 1048 n.23 (quoting *Pryor v. State*, 716 A.2d 338, 340 (Md. Ct. Spec. App. 1998)).

⁸ *Caldwell*, 780 A.2d at 1048 (citing *Charity v. State*, 753 A.2d 556, 572 (Md. Ct. Spec. App. 2000)).

⁹ *Id.* at 1047.

¹⁰ *Id.* at 1042.

¹¹ *Id.* at 1043.

and asked him the identity of his passenger. The driver claimed not to know the identity of the passenger. The officer then frisked and handcuffed both the driver and the passenger and waited for backup to arrive. When questioned about what he was doing with his right hand, the driver replied that he was putting a razor blade in the center console. A subsequent search of the vehicle revealed plastic bags containing crack and powdered cocaine. The Superior Court held the officer had probable cause to conduct a warrantless search based on conflicting statements by the driver and passenger, the driver's assertion that he did not know the name of the passenger, the officer's inability to locate the razor blade that had allegedly been placed in the center console, and the driver's nervous behavior.¹²

On appeal, the Supreme Court of Delaware found the frisk and detention of the driver were entirely unrelated to the parking violation and therefore constituted a second, independent investigation.¹³ The Court found that “[t]he duration and execution of a traffic stop is necessarily limited by the initial purpose of the stop.”¹⁴ Any additional investigation not supported by independent facts is a separate seizure. Once the basis for the traffic stop has concluded, the vehicle must be released unless the driver provides voluntary consent for a continued investigation or the officer uncovers facts that warrant additional investigation.¹⁵ Because the actions of frisking

¹² *Caldwell*, 780 A.2d at 1045.

¹³ *Id.* at 1049.

¹⁴ *Id.* at 1047.

¹⁵ *Id.*

and handcuffing the driver exceeded the proper scope of a traffic stop, the Court held that the traffic stop had ended and a second independent investigative detention had begun.¹⁶

The officer had the right to ask the driver to step out of the car and to continue to question the occupants regarding their names, addresses, business abroad and destination, but instead of questioning the occupants, the officer frisked and restrained the driver until backup arrived.¹⁷ The Court noted that “an initially valid traffic stop could not serve as the justifying predicate for the narcotics-related investigation that followed in its immediate wake, notwithstanding the fact that the total length of the stop was brief and did not exceed the normal duration for a traffic stop.”¹⁸ Although a driver and passengers may be ordered out of the car during a traffic stop, that order must be incident to the stop and not “exclusively for the independent purpose of investigating a likely narcotics violation.”¹⁹

The Court also found that the driver’s nervous behavior and assertion that he did not know who his passenger was may or may not have provided reasonable suspicion which would justify further limited questioning.²⁰ However, those facts alone were not enough to justify the additional investigation.²¹ The Court found that

¹⁶ *Id.* at 1049.

¹⁷ *Id.*

¹⁸ *Caldwell*, 780 A.2d at 1048 n.24 (quoting *Charity*, 753 A.2d at 566).

¹⁹ *See Caldwell*, 780 A.2d at 1049 n.27 (quoting *Charity*, 753 A.2d at 566).

²⁰ *Caldwell*, 780 A.2d at 1050.

²¹ *Id.*

“the duration and intrusiveness of the traffic stop were not reasonably related to the justification for the stop (i.e., the parking violation) and were not supported by independent facts justifying the officer's conduct.”²²

In *Murray v. State*, the Supreme Court of Delaware further defined limitations on traffic stops.²³ Here, a vehicle was pulled over for speeding even though, as one officer testified, the purpose of the stop was to investigate drug activity.²⁴ At the completion of the investigation that provided the reason for the traffic stop (speeding), the officers continued to look for drugs.²⁵ Although the dissent defended the continued investigation as a *de minimus* intrusion, the majority noted that United States Supreme Court precedent focuses on whether the duration of the stop was *measurably* extended, not whether the stop was significantly or substantially extended.²⁶ “For something to be measurable, it need not be large; the Court could have used the terms ‘significantly’ or ‘substantially’ if they intended to proscribe only an extension of a comparatively large period of time.”²⁷ Thus, any extension of the duration of the initial detention for the purpose of investigating a separate matter must be considered a separate seizure.

In the case at bar, the traffic stop was extended for the purpose of conducting

²² *Id.* at 1051.

²³ *Murray v. State*, 45 A.3d 670, 674 (Del. 2012).

²⁴ *Id.*

²⁵ *Id.* at 672-73.

²⁶ *Id.* at 674.

²⁷ *Murray*, 45 A.3d at 675.

a separate and independent drug investigation. Cpl. Barrett admitted that although he did not initially suspect drug related activity, the suspicion did surface as he began to interact with Stanley. This suspicion prompted Cpl. Barrett's decision to call for backup so that he could perform a K-9 sniff test. Cpl. Barrett intended to have the backup officer remove Stanley and his passenger from the vehicle and explain the warning citation while Cpl. Barrett completed the K-9 sniff test. This would have theoretically allowed the K-9 sniff test to be completed within the temporal confines of the traffic stop.

After removing Stanley and his passenger from the vehicle, Officer Wood asked Stanley to sign the warning citation that had been written out by Cpl. Barrett, but Stanley refused. At that point, Officer Wood could have handed the warning citation to Stanley and concluded the traffic stop; however, Officer Wood placed the warning citation pad in his utility belt and stood with Stanley at the front of the patrol car while the K-9 sniff test continued. Shortly thereafter, Cpl. Barrett's K-9 partner alerted on the passenger door. At some point prior to Cpl. Barrett's K-9 partner alerting on Stanley's passenger side door, the traffic stop had come to a conclusion and an investigation into drug related activity had begun. Just as the frisking and handcuffing the driver exceeded the proper scope of a traffic stop in *Caldwell*, removing Stanley from his vehicle to allow for a K-9 sniff test exceeded the proper scope of the traffic stop in this case. In this case, as in *Caldwell*, an initially valid traffic stop became the springboard for the narcotics-related investigation that followed.

Moreover, although Cpl. Barrett and Officer Wood had the right to ask Stanley and his passenger to exit the vehicle incident to the traffic stop, neither officer claimed Stanley represented a threat.²⁸ Cpl. Barrett testified that when he initially approached the vehicle, he could see in the bag between Stanley's legs and was able to ascertain there was no weapon. As in *Caldwell*, Stanley and his passenger were asked to exit the car exclusively for the independent purpose of investigating a likely narcotics violation. Removing Stanley and his passenger from the vehicle extended the stop for the sole purpose of conducting a drug related investigation in the form of a K-9 sniff test. Cpl. Barrett explained that the K-9 sniff test was to occur simultaneous to Officer Wood explaining the warning citation to Stanley, but the simple act of removing the occupants from the vehicle extended the traffic stop. Cpl. Barrett had no choice but to remove the vehicle's occupants if he was to comply with Dover Police Department regulations, but that does not change the fact that the occupants were removed from the vehicle and the traffic stop extended for the sole purpose of facilitating a separate investigation.

The State also argued that the traffic stop took no longer than the average traffic stop of that type would normally take. But, that is not the proper test to determine whether a traffic stop has been unconstitutionally extended. *Murray* holds

²⁸ Under the Fourth Amendment, an officer may order both the driver and the passengers to exit the car during the course of a valid traffic stop. *See Maryland v. Wilson*, 519 U.S. 408, 412-14 (1997) (citing *Pennsylvania v. Mimms*, 434 U.S. 106, 109-11 (1977)). This rule recognizes the public interest in officer safety. *Id.* *But see Charity*, A.2d at 567 (“Sergeant Lewis’s ordering of the appellant out of the car was not, even in part, an incident of the traffic stop. It was, in our judgment, exclusively for the independent purpose of investigating a likely narcotics violation.”).

that any *measurable* extension of time beyond that needed to complete the traffic stop is a separate seizure. As mentioned above, the simple act of removing the occupants from the vehicle would have the effect of measurably extending the traffic stop, if only by the short amount of time the occupants need to exit the vehicle. Here, in addition to the time required to remove Stanley and his passenger from the vehicle, the recording showed Officer Wood and Stanley standing at the front of the patrol car while the K-9 sniff test continued. Officer Wood had placed the warning citation pad in his utility belt and was no longer talking to Stanley. This was an additional *measurable* extension of time beyond that required to complete the traffic stop and must be considered a separate seizure.

The State argued in the alternative that Cpl. Barrett had the reasonable and articulable suspicion required to effectuate a separate seizure. Cpl. Barrett predicated his belief that drug activity may have been afoot on the time it took Stanley to pull over, the position in which Stanley was sitting in the vehicle, that there were three cellular telephones on the center console, that Stanley pulled into an allegedly high crime area, that Stanley was visibly shaking nervously when approached, and that Stanley had an extensive police record with multiple drug convictions. With minor exceptions, Stanley's behavior is similar to that of the driver in *Caldwell*. Cpl. Barrett's belief that Stanley could have safely pulled over before reaching Barrister Place is subjective and may not have been shared by Stanley. Drug dealers may carry more than one cellular telephone, but so do many employees who are required to carry an employer's cellular telephone with them at all times. As defense counsel

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pointed out, many people who are stopped by a police officer for minor traffic violations appear nervous and may visibly shake. As in *Caldwell*, Stanley's behavior may or may not have provided reasonable suspicion which would have justified further limited questioning, but it could not justify the extended duration of the detention or the more intrusive investigation.

CONCLUSION

The Court finds that the investigation of the vehicle and its occupants was beyond that required to complete the purpose of the traffic stop. The Court also finds that there was a *measurable* extension of the duration of a traffic stop beyond that required to complete the purpose of the traffic stop. Based on these findings, the Court holds that a separate seizure occurred. The Court further holds that the separate seizure was not supported by independent facts sufficient to justify the additional intrusion, nor did the officer receive voluntary consent for a continued investigation. Therefore, the defendant's motion to suppress is **GRANTED**.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

oc: Prothonotary
xc: Zachary A. George, Esquire
Tasha Marie Stevens, Esquire