IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
v.	)	ID. NO. 0012006520
	)	
ANGEL L. MATOS,	)	
	)	
Defendant.	)	

Submitted: August 6, 2001
Decided: October 2, 2001

Memorandum Opinion

Upon Consideration of
Defendant's Motion to Suppress.
GRANTED in part, DENIED in part.

Cynthia R. Kelsey, Deputy Attorney General, 820 N. French Street, Wilmington, Delaware, 19801. Attorney for State.

Joseph A. Hurley, Esquire, 1215 King Street, Wilmington, Delaware, 19801. Attorney for Defendant.

SLIGHTS, J.

This matter is presently before the Court on defendant's Motion to Suppress

Evidence. For the reasons that follow, the motion is **GRANTED in part and DENIED in part**.

I. FACTS

During the early morning hours of December 10, 2000, Officers Ragonese and Groark, two police officers from the City of Wilmington Police Department, approached the intersection of Conrad and North Harrison Streets in Wilmington, Delaware in a marked police cruiser. Officer Groark testified that while approaching the intersection, he observed the Defendant, Angel L. Matos ("Mr. Matos"), exiting the driver's side of a vehicle parked partially on Conrad Street and partially on the adjacent sidewalk. The parties do not dispute that the vehicle was parked illegally in violation of 21 *Del.C.* §4180.

The officers testified that upon exiting the vehicle Mr. Matos walked briskly into a nearby alley. Officer Groark attested to his familiarity with this particular alley, explaining that:

> I know it is a known open air drug market. There is an individual who is known to sell illegal drugs out of his backyard through his fence, through the gate.[1]

[1]Suppression Hr'g Tr. at 8 (May 7, 2001).

Officer Groark then witnessed Mr. Matos exit the alley while apparently engaging in a conversation with another person still in the alley.[2] The officers decided to investigate the situation further and moved closer to Mr. Matos. As Mr. Matos stood motionless, the two officers exited their police cruiser and approached him.

Officer Ragonese explained that Mr. Matos appeared nervous as the officers approached. He testified that when they confronted Mr. Matos his movements were exaggerated and his speech was hesitant and argumentative (raised voice). Based on these observations, Officer Ragonese concluded that a "fight or flight" reaction was about to occur. In response, Officer Ragonese grabbed Mr. Matos' arm, escorted him to a nearby parked vehicle, and instructed him to place his hands on its hood.

Mr. Matos initially complied with Officer Ragonese's instruction and placed his hands on the hood of the vehicle. Mr. Matos acknowledged, however, that his compliance was short-lived and that he removed his palms from the car's hood on several occasions. When Mr. Matos continued to ignore the officers' instructions to keep his hands on the vehicle, Officer Groark "put [Mr. Matos] in handcuffs because

[2]The officers were not able to confirm the existence of anyone other than Mr. Matos in the alley.

of his behavior."[3] Once handcuffed, Mr. Matos was subjected to a "pat down" search by Officer Ragonese.

Officer Ragonese testified that while conducting the pat down search of Mr. Matos, he felt a bulge in Mr. Matos' pocket. He asked Mr. Matos what was in his pocket; Mr. Matos answered "nothing."[4] Officer Ragonese testified that Mr. Matos then "gave me permission to check it."[5]

According to Officer Groark, he heard Officer Ragonese ask Mr. Matos whether the bulge was either a weapon or contraband and heard Mr. Matos respond in the negative and then offer: "you can check."[6] Officer Groark recounted to the Court that he was within ten feet of Mr. Matos and his partner (he had traveled to and from the alley intermittently) when this verbal exchange occurred and that he was able to overhear the conversation between his partner and Mr. Matos clearly, including Mr. Matos' consent to the search of his pocket.

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[3]Suppression Hr'g Tr. at 10 (May 7, 2001).

[4]Suppression Hr'g Tr. at19 (July 2, 2001).

[5]*Id.*

[6]Suppression Hr'g Tr. at 30-32 (May 7, 2001).

The manner by which Officer Groark became aware of Mr. Matos' alleged consent to search his pocket is disputed in this case. Mr. Matos' attorney, Joseph A. Hurley, Esquire ("Mr. Hurley"), took the stand at the suppression hearing and testified that, in lieu of a preliminary hearing, he interviewed Officer Groark via telephone concerning the events of December 10, 2000. The substance of that conversation, according to Mr. Hurley, was that Officer Groark did not overhear Mr. Matos' consent. Mr. Hurley testified instead that Officer Groark stated that Officer Ragonese informed him after-the-fact that Mr. Matos consented to the search.

Mr. Matos' version of the events is, for the most part, in accord with the version presented to the Court by the two officers. The one major discrepancy, however, is significant. Mr. Matos denies consenting to Officer Ragonese's request to search his pocket. Mr. Matos testified that based on his knowledge of the contraband located in his pocket, he absolutely did not want the officers searching him. Significantly, Mr. Matos confirmed the officers' reports that, contrary to the officers' directions, he removed his hands from the vehicles' hood on several occasions.[7]

[7]Suppression Hr'g Tr. at 44 (May 7, 2001).

The search of Mr. Matos' pocket yielded a bag of clear white powder, later identified as cocaine. Officer Ragonese then placed Mr. Matos under arrest for possession of a narcotic substance.[8] At some point, Mr. Matos' vehicle was searched and additional contraband was seized. When, where, and by whom the vehicle was searched was not addressed at the suppression hearing.

Mr. Matos was issued a citation for illegally parking on the sidewalk. Officer Groark testified that he informed Mr. Matos that the car would be towed from the scene. He added that when a vehicle is towed, an inventory search routinely is undertaken.[9]

II. DISCUSSION

[8]Officer Groark testified that Mr. Matos' vehicle was parked partially on the sidewalk, that their patrol car was parked immediately adjacent to his vehicle on the street, and that the pat down search and arrest took place immediately adjacent to the police cruiser. All told, Officer Groark opined that when Mr. Matos was arrested Officer Ragonese and Mr. Matos were little more than one car length from the vehicle Mr. Matos had been operating (between 10 and 15 feet).Suppression Hr'g Tr. at 33-34 (May 7, 2001).

[9]Suppression Hr'g Tr. at 39 (May 7, 2001).

On a Motion to Suppress, the State bears the burden of establishing that the challenged search or seizure comported with the rights guaranteed Mr. Matos by the United States Constitution, the Delaware Constitution, and Delaware statutory law.[10] The burden of proof on a motion to suppress is proof by a preponderance of the evidence.[11] Here, Mr. Matos does not challenge the officers' authority temporarily to detain him based on "[t]he nature of the neighborhood, the hour of the night, [and] the defendant's entry into the alleyway adjoining a residence [known to be a center for drug activity]."[12] Instead, Mr. Matos advances that the officers failed to establish the reasonable basis necessary to justify a "pat down" search under *Terry v. Ohio*,[13] its progeny, the Delaware Constitution and statutory law. Mr. Matos also challenges the police officers' assertions that he consented to their search of his person. Finally, he challenges the post-arrest search of his vehicle as being neither a valid search incident to arrest nor a valid inventory search. The State must carry its burden to establish that the searches were lawful.

A. The Pat Down Search

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[10]*Hunter v. State*, Del.Supr., No. 279, 2000, Steele, J. (Aug. 22, 2001)(Mem. Op. at 5-6).

[11]*State v. Bien-Aime*, Del.Super., Cr. A. No. 1K92-08-326, Toliver, J. (March 17, 1993)(Mem. Op.)(citations omitted).

[12]Def.'s Post Hr'g Mem. at 6.

[13]392 U.S. 1 (1968).

Because Mr. Matos has conceded that the two officers were justified in approaching and detaining him under *Terry* and 11 *Del. C.* § 1902, the first issue the Court must resolve is whether Officer Ragonese was justified in conducting a "pat down" search of Mr. Matos after the detention. According to § 1903:

> A peace officer may search for a dangerous weapon any person whom the officer has stopped or detained to question as provided in § 1902 of this title, whenever the officer *has reasonable ground to believe that the officer is in danger if the person possesses a weapon*. If the officer finds a weapon, the officer may take and keep it until the completion of the questioning, when the officer shall either return it or arrest the person. The arrest may be for the illegal possession of the weapon. (Emphasis added)

In determining whether this standard has been met, Delaware courts commonly seek guidance from the United States Supreme Court's decision in *Terry*.[14] There, the Court determined that "when the circumstances give the officer justification to believe that the individual is armed and presently dangerous, the officer may conduct a pat down search of that person for weapons."[15] The test to determine whether a pat down search was justified is "'whether a reasonably prudent man in the circumstances

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[14] *e.g. Jones v. State*, Del.Supr., 745 A.2d 856, 861 (1999).

[15] *See Caldwell v. State*, Del. Supr., 770 A.2d 522, 531 (2001)(citing *Terry*, 392 U.S. at 24, 88 S. Ct. at 1868).

would be warranted in the belief that his safety or that of others was in danger.'"[16]

[16] *Id.* (citing *Terry*, 392 U.S. at 24, 88 S. Ct. at 1868).

This standard clearly was satisfied in this case. The two police officers encountered an individual whose behavior (in light of the totality of the surrounding circumstances) provided them with reasonable grounds to suspect that he was engaging in criminal activity. Mr. Matos concedes as much and, to reiterate, acknowledges that based on "[t]he nature of the neighborhood, the hour of the night, [and] the defendant's entry into the alleyway adjoining a residence . . . ,"[17] the two officers were justified under *Terry* and § 1902 in detaining him.[18] The officer's investigation, however, did not stop there. Two additional facts, specific to the suspect, added to their wariness of Mr. Matos.

[17]Def.'s Post Hr'g Mem. at 6.

[18]11 *Del. C.* § 1902(a) provides: "A peace officer may stop any person abroad, or in a public place, who the officer has reasonable ground to suspect is committing, has committed or is about to commit a crime, and may demand the person's name, address, business abroad and destination."

Officer Ragonese's immediate observations of Mr. Matos upon his approach are particularly relevant on this issue. Officer Ragonese described Mr. Matos' behavior as nervous and agitated. This characterization was supported by specific observations that Officer Ragonese was able to articulate at the suppression hearing. For example, Officer Ragonese testified that Mr. Matos' nervousness manifested itself through exaggerated movements and a hesitant and, at times, argumentative tone of voice. Officer Ragonese took these factors into account and, in doing so, formed the opinion that Mr. Matos' behavior indicated that a "fight or flight" reaction was about to occur. Officer Ragonese detained Mr. Matos, taking him by the arm and escorting him to a nearby vehicle. Officer Ragonese then instructed Mr. Matos to place his hands on the vehicle's hood. At this point, Officer Ragonese probably possessed sufficient facts to justify a pat down search. Mr. Matos' subsequent behavior, however, solidified this justification considerably. It is clear that, despite specific instructions from Officer Ragonese, Mr. Matos repeatedly removed his hands from the hood of the car. In addition, Officer Ragonese observed Mr. Matos' nervous behavior intensify significantly after the instruction to place his hands on the hood. According to his testimony, Mr. Matos was physically shaking and his demeanor became more resistant and aggressive toward Officer Ragonese. Officer Ragonese

responded with a pair of handcuffs and a pat down search.[19]

[19]The fact that Officer Ragonese handcuffed Mr. Matos prior to patting him down for weapons does not convert the encounter into an arrest in this instance. The additional intrusion of handcuffs during the *Terry* stop was justified by Mr. Matos' failure to comply with Officer Ragonese's instructions to keep his hands on the vehicle. The use of handcuffs was a reasonable measure to ensure the officers' safety. *See United States v. Taylor*, 9th Cir., 716 F.2d 701, 708-709 (1983)(holding that the handcuffing and subsequent frisk of the defendant was justified by the defendant's failure to obey the officer's order to raise his hands twice and the defendant's furtive movements where his hands could not be seen and that such restraint did not transform the *Terry* stop into an arrest).

When Mr. Matos' behavior is considered in light of the other factors discussed above, a reasonably prudent man in these circumstances clearly would be justified in fearing for his own safety as well as the safety of his partner.[20] Based on the nature of the neighborhood, the hour of the night, Mr. Matos' entry into an alleyway known to be frequented by drug dealers and adjacent to a known drug house, Mr. Matos' nervous behavior indicating that a "fight or flight" response was imminent, and Mr. Matos' repeated recalcitrance in the face of clear instructions, Officer Ragonese possessed sufficient justification to effectuate a pat down search of Mr. Matos.[21] Accordingly, Officer Ragonese's pat down search of Mr. Matos withstands scrutiny under the applicable constitutional and statutory standards discussed above.

B. Seizure of the Cocaine

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[20]*Caldwell,* 770 A.2d at 531; *Terry*, 392 U.S. at 24.

[21]During the suppression hearing, defense counsel asked Officer Groark to articulate specifically the facts upon which he based his determination that a "reasonable ground to believe" that Mr. Matos was armed and dangerous existed such that a pat down search for weapons was justified. Officer Groark responded that he could point to nothing in particular; instead, he was simply following "standard procedure" when he directed Mr. Matos to place his hands on a parked vehicle and then proceeded to search him. Suppression Hr'g Tr. at 28-9 (May 7, 2001). *Terry* and its progeny require that a pat-down search for weapons be based upon an officer's reasonable suspicion developed specifically with respect to each individual suspect as opposed to suspicions based on generalities, assumptions and "standard procedures." *State v. Dollard*, Del.Super., Cr.A.No.0004006790, Slights, J. (Jan. 11, 2001)(Mem. Op. at 4). The Court, however, may make an independent determination of the reasonableness of the officer's suspicions based upon the facts and circumstances presented in the evidence. The Court is not bound in its analysis by the officer's subjective beliefs as expressed at the hearing. *See United States v. Day*, 3rd Cir., 455 F.2d 456 (1972)(the court is not bound by a police officer's inability to articulate his conclusions if the facts of record clearly demonstrate the existence of probable cause).

Having found that the pat down search of Mr. Matos as lawful, the Court must determine whether the seizure of contraband from within Mr. Matos' pocket was constitutional. In doing so, the Court notes that Officer Ragonese was permitted in the course of a *Terry* "pat down" search to place his hands upon Mr. Matos' clothing to feel for weapons.[22]

[22]392 U.S. at 30-31.

The "plain touch doctrine" provides that "a police officer may seize non-threatening contraband detected during a pat down search if the identity of that contraband is immediately apparent from plain sight or plain touch." [23] The doctrine is based upon the premise that if a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour and mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons.[24]

The issue, then, is whether the character of the object in Mr. Matos' pocket was immediately apparent to Officer Ragonese as he patted down Mr. Matos. Upon perceiving a bulge in Mr. Matos' pocket, Officer Ragonese described its feel as "that plastic sandwich bag feel" that "wasn't like the substance of money or coins or anything other than what I've felt numerous times as packaged–as drugs are normally packaged in that fashion."[25]

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[23] *Mosley v. State*, Del.Supr., No. 451, 1998, Veasey, C.J. (Feb. 29, 2000)(ORDER).

[24] *Minnesota v. Dickerson*, 508 U.S. 366, 376-77 (1993).

[25] Suppression Hr'g Tr. at 21 (July 2, 2001).

Officer Ragonese, upon feeling a bulge in Mr. Matos' pocket, identified that bulge as a plastic bag which, in light of his experience and knowledge, led him to conclude it was contraband. Thus, it was reasonable and lawful for Officer Ragonese to seize the item as evidence.[26]

In addition, the Court is satisfied that Mr. Matos consented to the search of his pocket.[27] Although the Court received inconsistent testimony regarding the manner in which Officer Groark became aware of Mr. Matos' consent to the search of his pocket (either hearing Mr. Matos consent to the search first-hand or through a recap of events by Officer Ragonese), the inconsistency is of little moment and has not affected the Court's ultimate determination with respect to the existence of consent. Both officers testified that Mr. Matos gave his consent to the search of his pocket. The Court finds their testimony credible.[28] And, upon lawfully seizing a package which appeared to contain cocaine from Mr. Matos' pocket, Officer Ragonese then

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[26]*See Hunter v. State*, *supra*, Mem. Op. at 9-10; *State v. Dollard*, *supra*, Mem. Op. at 5.

[27]It should be noted that Officer Ragonese could ask for consent to search Mr. Matos' person even after the justification for the *Terry* stop had passed. *See Ohio v. Robinette*, 519 U.S. 33 (1996).

[28]The Court reconciles the equally credible testimony of Officer Groark and Mr. Hurley by

possessed probable cause to arrest.

Officer's Ragonese's search of Mr. Matos' pocket was lawful incident to a valid pat down search based upon the plain touch doctrine. The Court also is satisfied that the State has carried its burden to establish that Mr. Matos consented to the search. The seizure of the cocaine from Mr. Matos' pocket, therefore, was lawful for this reason as well.

C. Search of the Vehicle

1. Search Incident to Arrest

Mr. Matos has argued that the State cannot justify the officers' search of his vehicle as a search incident to arrest because: (a) the arrest occurred too long after he had exited his vehicle; (b) the arrest occurred too far away from the vehicle; (c) the search occurred too long after the arrest. The Court will address these contentions *seriatim.*

a. Spacial Proximity

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chalking up Officer Groark's inconsistency to a poor memory weakened by the passage of time.

In *Chimel v. California*, the Court held that a police officer may complete a "search of the arrestee's person and the area 'within his immediate control'– construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." [29] In *New York v. Belton,* the Court acknowledged that in interpreting *Chimel* "courts have found no workable definition of 'the area within the immediate control of the arrestee' when that area arguably includes the interior of an automobile and the arrestee is its recent occupant."[30] Thus, the Court held that an officer who makes a custodial arrest of a recent occupant of a vehicle may search the interior of the vehicle as well as any packages within that compartment even after the occupant has been removed from the vehicle and the vehicle's immediate vicinity.[31] The so-called "bright line" rule was intended to remove uncertainty on the part of officers in the field by imposing only two conditions to a lawful search of a vehicle incident to arrest: (1) a lawful arrest of (2) a recent occupant of the vehicle to be searched.

While the Supreme Court took pains to emphasize that its holding in *Belton* "in no way alters the fundamental principles established in the *Chimel* case regarding the

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[29] *Chimel v. California*, 395 U.S. 752, 763 (1969).

[30] *New York v. Belton*, 453 U.S. 454, 460 (1981).

[31] *Id*.

basic scope of searches incident to lawful custodial arrests,"[32] the "bright line" rule ultimately expressed in *Belton* depends little upon officer safety or the preservation of evidence. Indeed, the Supreme Court acknowledged as much:

> The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based upon probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.[33]

[32] *Id.* at 460 n.3.

[33] *Id.* at 461 (citation omitted).

The Court recited this language as justification for the proposition that, notwithstanding *Chimel,* a search of a vehicle incident to arrest may be undertaken even after the suspect is no longer in a proximity to the vehicle which would allow him to retrieve a weapon from it.[34]

[34]Indeed, in Justice Brennan's *Belton* dissent, he observes that the majority decision "turns its back on the product of [the *Chimel*] analysis, formulating an arbitrary 'bright-line' rule applicable to 'recent' occupants of automobiles that fails to reflect *Chimel's* underlying policy justifications." *Id.* 463-4. He adds that "[i]n its attempt to formulate a 'single, familiar standard...to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront' (citations omitted), the Court today disregards these principles, and instead adopts a fiction–that the interior of a car is *always* within the immediate control of an arrestee who has recently been in the car." *Id.* at 466. Justice Brennan went so far as to anticipate the very facts presented here and then postulated: "Under the approach taken today, the result would presumably be the same even if Officer Nicot had handcuffed Belton and his companions in the patrol car before [conducting the search]." *Id.* at 468.

Notwithstanding *Belton*'s clear endorsement of a search incident to arrest after the suspect is removed from the immediate vicinity of the vehicle, some jurisdictions have determined that a suspect is an occupant of a vehicle under *Belton* only when the police officer arrests or initiates contact with the defendant while the defendant is inside the automobile.[35] This Court declines to adopt such a limitation for the simple reason that it does not reflect the "bright line" rule expressed in *Belton*. For its part, the Delaware Supreme Court appears to have embraced *Belton*'s broad holding. It has stated that "[a] search incident to a valid arrest of persons who are in, *or recently have been in*, an automobile extends to the entire passenger compartment and all containers open or closed found there."[36] Courts in other jurisdictions are in step with this reading of *Belton.*[37] Thus, after *Belton*, officers need not consider, on a case-by-case basis, the traditional concerns regarding officer safety and preservation of evidence

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[35]*See Glasco v. Commonwealth*, Va. Supr., 513 S.E.2d 137, 140 (1999); *State v. Wanzek*, N.D. Supr., 598 N.W. 2d 811, 813-15 (1999).

[36]*Thomas v. State,* Del.Supr., No. 143, 1992, Walsh, J. (Nov. 30, 1992)(ORDER)(emphasis supplied). *See also Traylor v. State*, Del. Supr., 458 A.2d 1170, 1174 (1983)(holding that under *Belton*, the fact that the defendant was handcuffed and removed from his vehicle does not invalidate the search of the vehicle incident to his arrest).

[37]*United States v. Humphrey*, 10th Cir., 208 F.3d 1190, 1202 (2000); *Vasquez v. State*, Wyo.Supr., 990 P.2d 476, 482 (1999); *United States v. Lacey*, 10th Cir., 86 F.3d 956, 970 (1996); *United States v. Mitchell*, 7th Cir., 82 F.3d 146, 152 (1996); *United States v. Woody*, 7th Cir., 55 F.3d 1257, 1268-1270 (1995); *State v. Wanzek*, N.D.Supr., 598 N.W.2d 811, 814 (1999); *Scoggins v. State*, Ga.Ct.App., 545 S.E.2d 19, 20-21 (2001); *United States v. McCrady*, 8th Cir., 774 F.2d 868, 871-72 (1985); *United States v. Cotton*, 10th Cir., 751 F.2d 1146, 1147-1150 (1985).

outlined in *Chimel* in the context of searches incident to the arrest of a recent occupant of an automobile.[38]

The Court has already determined that Mr. Matos was the subject of a lawful custodial arrest. Based on *Belton* and its progeny, the search of his vehicle would be

[38]Query whether *Belton* and *Traylor* would withstand scrutiny under the Delaware Constitution which our Supreme Court has held, in the context of search and seizure analysis, "may provide individuals with greater rights than those afforded by the United States Constitution." *Jones,* 745 A.2d at 863. Much to the delight, I'm sure, of the parties here, the Court need not embark on the lengthy journey through constitutional debates and colonial jurisprudence required to answer the question thoughtfully. The question *sub judice* can be answered by applying *Belton* to settled Delaware law. The State constitutional analysis, therefore, will be saved for another day and, with luck, another jurist.

lawful even though Mr. Matos was removed from his vehicle and may even have been secured in handcuffs and placed in the patrol car at the time of the search.[39]

b. Temporal Proximity of Matos' Exit from Vehicle to Arrest

Belton addresses the issue of temporal proximity, but does so in the context of the time which passes from arrest to search of the vehicle.[40] The Court has not found any cases which address specifically a requirement that the suspect be arrested within a certain time frame after exiting his vehicle. Perhaps the absence of case law on this point is explained by the fact that the time between exit of the vehicle and arrest is considered in the context of the analysis of the temporal proximity between arrest and search. In any event, the Court's preference is to follow the analysis set forth in *Belton,* which is to say that the Court will consider the time from Mr. Matos' exit of his vehicle to arrest as part of the analysis of whether the search after arrest was timely.

c. Temporal Proximity of Search to Arrest

[39]As discussed below, the location of the defendant at the time of the search is not in evidence. The Court has gleaned what information it can on this issue from the parties' post-hearing submissions.

[40]*Belton,*453 U.S. at 460.

With respect to this critical component of the *Belton* analysis, the Court's analysis is hindered by a glaring void in the record: the State has offered no evidence with respect to the circumstances surrounding the search of the vehicle, *e.g.*, when, where, or by whom it was searched. Officer Groark testified that he and Officer Ragonese first saw Mr. Matos as he was exiting his vehicle, which was parked illegally on the sidewalk. Within minutes and within 10 feet of his vehicle, Officer Ragonese placed Mr. Matos under arrest, having found an illegal substance on his person. Officer Ragonese then placed Mr. Matos in handcuffs and secured him in the police cruiser. The factual record ends here.[41] And, while the State makes a passing reference in its papers to a search "incident to the lawful arrest,"[42] it offers no analysis of the issue.

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[41] If the search of the vehicle occurred at this point, the Court would be satisfied that the search was lawful. *See United States v. Willis,* 7th Cir., 37 F.3d 313 (1994)(brief delay between arrest and search did not render search illegal); *United States v. Hensley,* 8th Cir., 36 F.3d 39 (1994)(same); *State v. Smith*, Idaho Supr., 813 P.2d 888 (1991)(delay of a half hour between arrest and search did not invalidate the search).

[42] State's Reply Memorandum at 3. Likewise, the State has not argued that the search was justified by probable cause separate and apart from the arrest and the Court has not considered that issue.

The State has the burden of proof here.[43] While much of *Chimel* was eviscerated by *Belton*, the State still must establish that the search incident to arrest occurred "as a *contemporaneous* incident" of that arrest.[44] No such evidence has been presented to the Court. Consequently, even though the Court would be prepared to uphold the search notwithstanding that it was conducted while Mr. Matos was handcuffed and in custody, the Court is unable to conclude that the search of Mr. Matos' vehicle was incident to his arrest because the Court has no idea when, in fact, the search of the vehicle occurred.[45]

2. Inventory Search

The State has also attempted to justify the search of the vehicle as a lawful "inventory search" justified by the need to tow Mr. Matos' vehicle after his arrest. Here again, the Court is hampered in its analysis of this issue because it has no evidence upon which to determine the circumstances surrounding the search. Was the search conducted at the scene, at an impound lot, or some other location? Was the search conducted pursuant to the police department's standard procedures for

[43] *Hunter v. State*, Del.Supr., No. 279, 2000, Steele, J. (Aug. 22, 2001)(Mem. Op. at 5-6).

[44] *Traylor*, 458 A.2d at 1174 (citing *Belton,*453 U.S. at 460).

[45] *Traylor* does not help the State here. That case simply stands for the proposition that a lawful arrest for a traffic offense can give rise to a lawful search incident to arrest. *Traylor,* 458 A.2d at 1174. *Traylor* does not, however, relieve the State of its burden to establish that the officers complied with the "bright line" rule expressed in *Belton*, including the responsibility to conduct the

inventory searches or as a result of suspicion or probable cause that the vehicle contained contraband?[46] The answers to these questions are dispositive of the Court's

search of the vehicle "contemporaneously" with arrest. *Id.*

[46]*See Colorado v. Bertine*, 479 U.S. 367 (1987)(inventory search must be conducted "according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity").

analysis. And the Court cannot guess or "fill in the blanks" if it is faithfully to hold the State to its burden.

III. CONCLUSION

The Court concludes that the pat down search of Mr. Matos was based upon a reasonable, articulable suspicion that he might be armed and dangerous, that the search of Mr. Matos' pocket was lawful based upon the plain touch doctrine and based upon Mr. Matos' consent to the search. Accordingly, Mr. Matos' Motion to Suppress Evidence is **DENIED** as it relates to the evidence seized from his pocket. The Court has also determined that the State has failed to carry its burden to establish a lawful search incident to arrest or a lawful inventory search. Consequently, the Motion to Suppress the fruits of the search of Mr. Matos' vehicle must be, and hereby is, **GRANTED.**

IT IS SO ORDERED.

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Judge Joseph R. Slights, III