

IN THE SUPERIOR COURT OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE                    )  
  )  
                          v.                    ) ID Nos. 9907015850  
  )                    9907015833  
PENELOPE MARSHALL,                 )  
                          Defendant.         )

Submitted: May 8, 2001  
Decided: June 29, 2001

**UPON APPEAL FROM A DECISION  
OF THE COURT OF COMMON PLEAS:  
REVERSED AND REMANDED**

**MEMORANDUM OPINION**

R. David Favata, Esquire, Deputy Attorney General, Department of Justice,  
Wilmington, Delaware for the State

Eugene A. Maurer, Jr., Esquire, Wilmington, Delaware and Henderson Hill,  
Esquire, of Ferguson, Stein, Wallas, Adkins, Gresham, & Sumter, P.A., of  
Charlotte, North Carolina for the Defendant

ABLEMAN, JUDGE

This is the Court's decision on an appeal filed by the State of Delaware challenging a decision of the Court of Common Pleas. The decision granted defendant's motion to suppress all evidence obtained by a police officer after a traffic stop of defendant and *sua sponte* dismissed all Informations against the defendant. The State filed a timely Notice of Appeal pursuant to 10 *Del. C.* § 9902. For the reasons set forth hereafter, this Court finds that the Court of Common Pleas committed an error of law by dismissing the Informations without affording the parties an opportunity to present evidence at a hearing. The decision of the Court of Court of Common Pleas is hereby reversed and the case is remanded for an evidentiary hearing consistent with this Court's rulings herein.

#### Statement of Facts

Since the Court of Common Pleas did not conduct a hearing, the facts in this case have otherwise been gleaned from the briefs of the parties, the summonses, the warrants, and the Affidavit of Probable Cause.

According to the Affidavit of Probable Cause, at approximately 11:15 p.m. on July 22, 1999, a motorist appeared at the Smyrna Police Department and reported that he had been threatened by another motorist with a gun in the Smyrna area. The reporting motorist, who did not divulge his name, described the alleged gun-wielding driver as a white male, traveling north on Route 13, in an unknown vehicle with Delaware temporary license tag number X745765. A broadcast of the

information provided by the reporter was put out through RECOM shortly thereafter at about 11:30 p.m.

At the time, Corporal Hibbert of the Delaware State Police was driving a marked vehicle northbound on Route 13 near Odessa, Delaware. When he heard the broadcast he began to follow a vehicle traveling northbound with a temporary tag bearing number X745062. Corporal Hibbert followed the vehicle from its location on Route 13, across the C&D Canal bridge on Route 1, to the vicinity of Route 72 (Wrangle Hill Road), clocking the vehicle's speed at 75 miles per hour. At about 11:45 p.m., Corporal Hibbert stopped the vehicle, using his lights and siren, approximately one and one half miles north of the C&D Canal bridge. The vehicle was being driven by Defendant, Penelope Marshall.

Once the vehicle was stopped, two back up units positioned themselves around the stopped vehicle. Corporal Hibbert then used his public address system to order the driver to exit the vehicle with hands raised. It was not until the command to exit the vehicle was repeated,<sup>1</sup> and one of the back up officers had pointed a gun in her direction, that the defendant got out of the vehicle. Defendant repeatedly asked why she should get out and proclaimed that she had done nothing wrong. When the defendant finally did leave the car, she refused to show her hands

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<sup>1</sup> The State contends that this command was repeated six times. State's Opening Brief on Appeal at 3.

as requested. Thereupon, the defendant was directed to lie face down on the pavement. The defendant again refused, stating that she was not going to get onto the dirt. After repeating the command to lie face down,<sup>2</sup> the defendant finally dropped as far as her hands and knees.

After conducting a pat down search of defendant and discovering that she was unarmed and that no one else was in the vehicle, Corporal Hibbert then assisted the defendant to her feet and asked about her whereabouts. The defendant refused to provide any information except her driver's license. After the gun-menacing report was explained to defendant, she declined a request to search her vehicle. Corporal Hibbert processed a citation for speeding. The defendant refused to sign the summons and refused to produce her insurance and registration cards unless permitted to get them from her vehicle unassisted. Corporal Hibbert did not permit her to do so, whereupon he wrote "refused" on the summonses and placed her under arrest.

Defendant was arrested for Speeding, 21 *Del. C.* § 4169(A)(1)(b), Failure to Have Registration in Possession, 21 *Del. C.* § 2108, Failure to Have Insurance, 21 *Del. C.* § 2118(p), Resisting Arrest, 11 *Del. C.* § 1157, and, subsequently, for refusing to take photos and submit to fingerprints, 11 *Del. C.* § 8522(b). As

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<sup>2</sup> According to the State, this command was repeated five times before the defendant responded

Corporal Hibbert was double locking the handcuffs on the defendant, she eluded his grasp and ran a short distance away from him. Trooper Dalton and Corporal Hibbert caught defendant, who struggled with the officers as they escorted her to the police car.

The defendant was taken to Troop 2 in New Castle County where she was photographed and fingerprinted. Again, the defendant refused to cooperate with the officers by failing to provide responses necessary to complete the booking paperwork and refusing to sign the fingerprint card.<sup>3</sup> The defendant was taken before a magistrate where she was released on \$1,000.00 unsecured bail on the misdemeanor charges and on her own recognizance on the traffic charges.

The case was transferred from the Justice of the Peace Court to the Court of Common Pleas at defendant's request, whereupon Informations were filed on September 14, 1999. In January 2000, Defendant filed a pretrial Motion to Dismiss the 11 *Del. C.* § 8522(b) violation, along with a Motion to Suppress Statements and Fruits of Unlawful Arrest. The Court of Common Pleas did not conduct a fact finding hearing or receive any admissible exhibits before issuing its decision on October 23, 2000. From its written opinion, it appears that the Court

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to the request. *Id.* at 4.

<sup>3</sup> In her brief, defendant contends that she “respectfully declined to sign the fingerprint card, informing the officer that she would sign it if ordered to do so by a judicial officer or upon advice of counsel.” Defendant’s Reply Brief on Appeal at 3.

relied only upon the briefs of the parties, an unauthenticated transcript, and the police officer's affidavit, which it rejected as not credible.

In concluding that “the stop was illegal and not supported by a reasonable articulable suspicion,” the Court held that “[t]he anonymous tip fail[ed] to meet the totality of circumstances standard that is required.”<sup>4</sup> Accordingly, the trial court granted defendant's motions to suppress and dismiss.

On October 27, 2000, the State filed a Motion for Reargument. Although scheduled for a hearing on November 30, 2000, the State filed a timely Notice of Appeal on November 23, 2000<sup>5</sup> pursuant to 10 *Del. C.* § 9902(a),<sup>6</sup> based upon the trial court's dismissal of the Informations,<sup>7</sup> before the motion for reargument was decided.

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<sup>4</sup> *State v. Marshall*, Del. CCP, Cr. A. No. N99-08-0884, Smalls, J., at 9 (Oct. 23, 2000).

<sup>5</sup> Pursuant to Super. Ct. Crim. R. 39(d) the “Superior Court shall operate as a stay of . . . proceedings in the court below . . . .”

<sup>6</sup> 10 *Del. C.* § 9902(a) provides: “The State shall have an absolute right to appeal to an appellate court a final order of a lower court where the order constitutes a dismissal of an indictment or information or any count thereof . . . .”

<sup>7</sup> The Notice of Appeal was filed under ID No. 9907015850. However, the charges appealed therein were the 21 *Del. C.* §§ 2118 and 4169 (Speeding and Failure to Have an Insurance Card) and 11 *Del. C.* §§ 1257 and 8522 (Resisting Arrest and Failure to Comply with Fingerprinting Procedures) charges. The latter of these two charges were under case ID No. 9907015833. The Court presumes that the State filed its Notice of Appeal as it did since the lower court issued its decision solely under ID No. 9907015850 (although the decision disposed of the charges in both cases). In addition, the Court notes that the State did not include the charge of Failure to Have Registration, 21 *Del. C.* § 2118(p), in its Notice of Appeal.

### Standard and Scope of Review

In reviewing appeals from the Court of Common Pleas, this Court sits as an intermediate appellate court.<sup>8</sup> As such, its function is the same as that of the Supreme Court.<sup>9</sup> Therefore, this Court's role is to "correct errors of law and to review the factual findings of the court below to determine if they are sufficiently supported by the record and are the product of an orderly and logical deductive process."<sup>10</sup> The standard of review in this case is two-fold – whether the Court has committed an error of law, or whether it has abused its discretion by ignoring recognized rules of law or practice and has exceeded the bounds of reason so as to produce injustice.<sup>11</sup>

### Contentions of the Parties

The State argues that the Court of Common Pleas committed errors of law and abused its discretion in dismissing valid Informations prior to the reception of evidence to support them and without affording the parties an opportunity to present evidence. In addition, the State argues that the lower court erroneously relied upon an unauthenticated, allegedly incomplete, transcript of a tape recording

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<sup>8</sup> *State v. Richard*, Del. Super., Cr. A. No. 96-09-1381, Toliver, J. (May 28, 1998)(Opinion and ORDER).

<sup>9</sup> *State v. Huss*, Del. Super., Cr. A. No. IN93-04-0294AC, Gebelein, J. (Oct. 9, 1993)(Mem. Op.), citing *Shipkowski v. State*, Del. Super., Cr. A. No. IK88-03-0033A, Steele, J. (July 28, 1989).

<sup>10</sup> *Steelman v. State*, Del. Super., ID No. 9708009409, 2000 WL 972663, Vaughn, J., at 3 (May 30, 2000), citing *Levitt v. Bouvier*, Del. Super., 287 A.2d 671, 673 (1972).



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<sup>11</sup> *Firestone Tire & Rubber Co. v. Adams*, Del. Supr., 541 A.2d 567, 570 (1988).

without admitting the tape recording itself and without determining whether the transcript was accurate. Further, the State contends that the content of the transcript alone could not have provided a logical and orderly basis to support the Court's factual conclusion that the Officer's sworn affidavit was not credible and that the defendant was not speeding. Finally, the State submits that a pretrial motion, without a hearing, is not a permissible basis to address the sufficiency of the State's case.

The defendant does not address the procedural issues raised by the State in this appeal. Instead, she argues the broader constitutional violations premised upon her contention that the traffic stop was pretextual.<sup>12</sup> In reliance upon decisions in two other states, defendant advocates an extension of the protection of the Fourth Amendment to pretextual stops in Delaware, although no Delaware case has so held. Defendant argues that, since the traffic stop was pretextual<sup>13</sup> and the arrest violated her Fourth Amendment rights, the trial court's dismissal of the speeding charges was proper. Finally, she argues that dismissal of the additional

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<sup>12</sup> The defendant acknowledges that the United States Supreme Court has held that pretextual stops do not violate the Fourth Amendment, *Whren v. United States*, 517 U.S. 806, 813 (1996), but asserts that Delaware's constitutional protections are broader. *Jones v. State*, Del. Supr., 745 A.2d 856, 861 (1999). Defendant also cites extensive legal commentary to support her position that *Whren* was wrongly decided and that Delaware should not be constrained by the federal precedent. In her brief, defendant elaborates extensively upon the dangers of pretextual traffic stops and condemns the arbitrary use of police power through racial profiling.

<sup>13</sup> In her brief, defendant asserts that the State conceded the pretextual nature of the traffic stop in its pretrial brief. The position taken by the State in this appeal does not include such a concession.

charges was also proper because evidence of those charges was illegally seized in violation of the Fourth Amendment.

### Decision

Notwithstanding the extensive and thorough effort on defendant's part to have this Court address the broader constitutional issues, as a basis to affirm the lower Court's ruling, the decision on this appeal turns on a more basic procedural principle. The Court simply cannot consider the legal arguments raised because the Court below failed to conduct a hearing and did not provide an opportunity to the parties to present evidence and assess the credibility of witnesses through cross-examination. By making findings of fact and conclusions based upon selective submissions of the parties, the Court of Common Pleas denied the parties the opportunity to develop a factual foundation to support their respective arguments or to refute those of the opposing party. The Court's precipitous ruling, based upon a woefully incomplete record, has also precluded this Court from any meaningful appellate review.

The issues of whether there was probable cause to support the traffic stop, and whether the custodial arrest was proper are *factual* questions to be determined by the court below. These determinations must be based upon all of the facts surrounding the incident, not simply a partial or incomplete rendition of what occurred. Indeed, the Court below recognized that the standard for determining the

propriety of the stop was the “totality of the circumstances.” Yet, the circumstances upon which the Court based its determination cannot support any conclusion based upon a totality standard. By relying solely on a transcription of the RECOM recording, prepared and submitted by the defendant without the State’s awareness of its existence, and not authenticated or properly admitted as evidence,<sup>14</sup> the Court based its credibility decisions on inadmissible evidence and an incomplete record. At the very least, the State is entitled to establish that probable cause existed for the stop through the testimony of the officer, as well as through any other admissible evidence it may choose to present.

Moreover, the transcript relied upon by the Court of Common Pleas to support its factual conclusion that the defendant was not speeding is merely a recording of dispatch conversations intended to direct police officers to particular geographical locations for investigation or to determine the validity of license numbers. It is not a substitute for a descriptive police report or police testimony nor does it contain a log or record of each and every activity and observation of a

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<sup>14</sup> Under Delaware Uniform Rule of Evidence 901(a), a condition precedent to the admissibility of evidence is the requirement of authentication or identification that the matter in question is what its proponent claims. *Trichoche v. State*, Del. Supr., 535 A.2d 151 (1987). The Rule sets forth that evidence may be authenticated or identified by testimony of a witness with knowledge that can testify that a matter is what it is claimed to be. D.R.E. 901(b)(1). As to a recorded conversation, the best evidence is the recording itself. D.R.E. 1002. Before the Court may rely on a transcript of an audio recording, the audio tape itself must first be found to be relevant and admissible, and the transcript must be deemed an accurate rendition of the tape. In addition, use of a transcript is only permitted as a aid to understanding the recording and any conflict must be resolved by the resorting to the recording itself. *Adkins v. State*, Del. Supr., 523 A.2d 539, 544-545 (1987).

particular officer. Even if the transcript were admissible, it is simply not relevant to the question of the defendant's speed.

In addition, had the trial court conducted an evidentiary hearing, not only would the court have had a factual basis to support any conclusions it might reach, but defendant would also have had the opportunity to present evidence related to the constitutional issues which she now raises in this appeal. Absent an adequate factual record, this Court is hardpressed to reach any determination about the pretextual nature of the stop, racial profiling, or any of the other constitutional arguments that defendant urges the Court to consider.

Finally, even if the defendant had presented sufficient facts to justify suppression of evidence, the court erred in dismissing the State's case upon its prediction of the weight and persuasiveness of the State's evidence that it had yet to receive. At the pretrial stage of the criminal case the Court should not have dismissed the charges based on its view of the insufficiency of the evidence without affording the State an opportunity to prove those charges.<sup>15</sup>

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<sup>15</sup> *United States v. DeLaurentis*, 3rd Cir., 230 F.3d 659, 660 (2000).

For all of the foregoing reasons, the Decision of the Court of Common Pleas must be **reversed** and the case **remanded** to the Court for evidentiary hearings and any further proceedings consistent with this Opinion.

**IT IS SO ORDERED.**

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Peggy L. Ableman, Judge

oc: Prothonotary  
xc: Court of Common Pleas  
R. David Favata, Esq.  
Eugene Maurer, Esq.  
Henderson Hill, Esq.