IN THE SUPREME COURT OF THE STATE OF DELAWARE

OMAR BROWN,	§	
	§	No. 297, 2011
Defendant Below-Appellant,	§	
	§	Court Below: Superior Court of the State of Delaware in and for New Castle County
v.	§	
	§	
STATE OF DELAWARE,	§	ID No. 1009013840
	§	
Plaintiff Below-Appellee.	§	

Submitted: October 10, 2011
Decided: October 31, 2011

Before **HOLLAND**, **JACOBS**, and **RIDGELY**, Justices.

O R D E R

This 31st day of October 2011, it appears to the Court that:

1) Defendant-Below/Appellant Omar Brown appeals from a Superior Court ruling denying Brown's motion to suppress drugs and money found on his person during a search incident to arrest. Brown contends that the officers unlawfully seized him prior to the arrest and search, when Brown provided the officers with what they believed to be a false name. We find no merit to Brown's appeal and affirm.

2) At approximately 1:00 a.m. on September 16, 2010, Wilmington police officers observed a male at the corner of 5th Street and Madison. When the officers began to walk toward him, he turned the corner. The officers radioed

Corporal Deshaun Ketler and Officer Peter Erwin, who were in a marked police cruiser nearby. Ketler and Erwin saw the man, pulled up beside him in their vehicle, and asked if they could talk to him. The man responded "yeah, sure." Ketler and Erwin then exited the vehicle and asked the man for his name. He responded "Amere Watson."

3) Based on his own knowledge, Ketler believed the man to be Omar Brown and not Watson. To confirm that, Ketler ran the two names through DELJIS in his vehicle's computer and reviewed the photographs associated with those names; this inquiry confirmed that the man was in fact Omar Brown. DELJIS also showed that Brown had two active bench warrants. The officers then took Brown into custody, and conducted a search incident to arrest. During the search, they found 2.28 grams of crack cocaine and $1,241 on his person.

4) At the suppression hearing, Brown testified to a different version of events. He said that he had been walking to a bar when police officers approached in their vehicle, traveling the wrong direction on Monroe Street, and said "Mr. Brown, hold it." Brown identified Ketler as the police officer who said his name. On cross-examination, Brown testified that he had provided the false name of Amere Watson after the police had called out to him as "Mr. Brown." Ultimately, the Superior Court rejected Brown's testimony and accepted Ketler's.

5) Brown was indicted on charges of: possession with intent to deliver; possession of a controlled substance within 1000 feet of a school; possession of a controlled substance within 300 feet of a park; and criminal impersonation. Brown filed a motion to suppress on December 29, 2010. After holding an evidentiary hearing, the Superior Court denied the motion. The Superior Court credited Ketler's testimony that Brown was free to leave, and not Brown's testimony that the police had told Brown to stop: "[I]t is less likely that the police immediately told Defendant to 'hold it,' and it is more likely the police began the encounter by asking Defendant if they could speak with him. . . . Defendant's testimony to the contrary notwithstanding, they did not demand that he stop." After a stipulated trial, the Superior Court found Brown guilty of all charges. Brown was sentenced as a habitual offender to a total non-suspended period of three years at level V. This appeal followed.

6) We review the Superior Court's denial of a motion to suppress for abuse of discretion.[1] To the extent the Superior Court's decision is based on factual findings, we review for whether the Superior Court abused its discretion in determining whether there was sufficient evidence to support the findings and whether those findings were clearly erroneous.[2] To the extent that we examine the

[1] *Williams v. State*, 962 A.2d 210, 214 (Del. 2008) (citing *Lopez-Vazquez v. State*, 956 A.2d 1280, 1284 (Del. 2008)).
[2] *Id.*

Superior Court's legal conclusions, we review them *de novo* for errors in formulating or applying legal precepts.[3]

7) Brown contends that Ketler and Irwin converted a consensual encounter into an unlawful seizure, based on their belief that Brown had provided them with a false name. This Court has explained the distinction between a consensual encounter and a seizure as follows:

> [Under Delaware's more stringent standard,] '[l]aw enforcement officers are permitted to initiate contact with citizens on the street for the purpose of asking questions.' This type of interaction is an encounter and, if consensual, neither amounts to a seizure nor implicates the Fourth Amendment. During a consensual encounter, a person has no obligation to answer the officer's inquiry and is free to go about his business. 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.[4]

As to the "totality of the circumstances," we look to the Seventh Circuit's decision in *United States v. Scheets* for six non-exhaustive factors to determine when police have effected a seizure:

> (1) whether the encounter occurred in a public or private place, (2) whether the suspect was informed that he was not under arrest and free to leave, (3) whether the suspect consented or refused to talk to the investigating officers, (4) whether the investigating officers removed the suspect to another area, (5)

[3] *Id.*
[4] *Jones v. State*, --- A.3d ---, 2011 WL 3890129, at *3 (Del. Sept. 2, 2011) (citing *Williams*, 962 A.2d at 215–16).

> whether there was physical touching, display of weapons, or other threatening conduct, and (6) whether the suspect eventually departed the area without hindrance.[5]

8) Here, four of the six factors weigh in favor of finding that the encounter remained consensual while Ketler conducted the DELJIS check: the encounter occurred in a public place; Brown consented to talk to the investigating officers; Brown was not removed from the area prior to his arrest; and there was no physical touching or display of weapons. And while Brown was not informed that he was free to leave so as to satisfy the second factor, there is no evidence that the officers told Brown that he had to wait during the DELJIS check.

9) Brown cites a series of cases from other jurisdictions to argue that a seizure occurred while Brown waited for the DELJIS check. These cases do not support Brown's position. In *State v. Barnes*, the officer asked the defendant to wait while he conducted a warrant check *and* told the defendant that he suspected it would show an outstanding warrant.[6] Finding this to be a detention, the Court of Appeals of Washington explained: "[o]nce Officer Moran communicated his belief or suspicion that lawful grounds existed to detain Mr. Barnes, the encounter ceased to be consensual."[7] Here, the record does not show that Ketler told Brown to wait for the warrant check or conveyed any suspicions as to the result. In *United States*

[5] *Jones*, 2011 WL 3890129, at *4 (citing *United States v. Scheets*, 188 F.3d 829, 836–37 (7th Cir. 1999)).
[6] 978 P.2d 1131 (Wash. Ct. App. 1999).
[7] *Id*. at 1135.

v. Coggins, the Third Circuit held that a seizure occurred where the defendant "yielded to [the federal agent's] authority by sitting back down" after the agent told him to wait to use the bathroom.[8] Here, there was no similar assertion of authority. In *Wilson v. State*, the Supreme Court of Wyoming found that an encounter remained consensual when the police officer requested a computerized warrant check and told the defendant "to stay in the area" while the officer dealt with another incident.[9] Only when the officer told the defendant to wait at a specific street corner—and the defendant obeyed—did a seizure occur.[10] In *State v. Ellwood*, the Court of Appeals of Washington found a detention when the officer had told the defendant and his friend to "[w]ait right here."[11] Here, Ketler did not instruct Brown to wait while the DELJIS check was conducted or otherwise prevent Brown from leaving.

10) The totality of the circumstances—as found by the Superior Court—demonstrates that Brown was free to leave at any time prior to the determination that he had two outstanding warrants. Accordingly, no seizure occurred when the police conducted the DELJIS check. Even if a seizure occurred, on the facts of this case the police had a reasonable articulable suspicion of criminal activity to justify an investigatory stop under 11 *Del. C.* § 1902 after Brown provided false

[8] 986 F.2d 651, 654 (3d Cir. 1993).
[9] 874 P.2d 215, 222 (Wyo. 1994).
[10] *Id*. at 223.
[11] 757 P.2d 547, 549–50 (Wash. Ct. App. 1988).

identification to the officers.[12] The Superior Court did not err when it denied Brown's motion to suppress evidence found during the search incident to arrest.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice

[12] *Loper v. State*, 8 A.3d 1169, 1174 (Del. 2010).