IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

State of Delaware	)	
	)	
v.	)	ID #1203000747
	)	
Dr. Jahi Issa	)	

MEMORANDUM: MOTION TO SUPPRESS

CONTEXT OF THE CASE

Delaware State University is an HBCU owned and operated by the State of Delaware. Defendant has previously written pursuant to notions of academic freedom regarding nationwide efforts to eliminate black students and faculty from HBCUs and in some instances to eradicate the historical mission of HBCUs. This exercise of 1st Amendment rights and academic freedom has resulted in the harassment by DSU officials. One DSU official, Meredith Franklin, directed the police to harass Defendant on the date of his arrest because of the substantive content associated with his exercise of 1st Amendment rights.

At DSU white students and faculty are allowed to gather and protest including the use of horses that deposited equine excrement all over campus as part of the protest to the detriment of the health safety and welfare of the other students on campus without any record of permission being granted, arrests being made, or even the existence of a protest. This is the definition of white skinned privilege.

The Court is supposed to believe the fiction that the Equestrian team protest never happened because it is not in the official record. This is what as known as creating reality. This is in line with the traditional methodology that has been used by law enforcement, prosecutors, and courts to cover up the lynching of black people.

It is inappropriate for the Office of the Attorney General to prosecute Defendant under such circumstances. It is tantamount to defending the actions that have taken place on the DSU campus. The continued prosecution of this case stands for the proposition that in Delaware black people do not have equal protection under the law as required by federal and state constitutions.

The State of Delaware has a long history in all aspects of society of disregarding and trampling the rights of black people and people of color in general. Not only are the black students and faculty being disrespected as human beings, the white students and faculty on campus are being taught that as white people they are entitled to rights that black people do not have. In other words, the white students are learning that the Constitutions protect them but not black students. This is an effort to perpetuate what many thought were outdated ways of operating in Delaware. The continuation of this prosecution suggests the more things change the more they stay the same. It is the role of judicial officers to bring a halt to this type of action when it is brought to their attention.

PROCEDURAL POSTURE

Defendant Dr. Jahi Issa was charged with Resisting Arrest in violation of 11 Del. C. § 1257(b), Disorderly Conduct in violation of 11 Del. C. § 1301(1) (e) and Resisting Arrest in violation of 11 Del. C. § 1257(b).

Defendant filed a Motion to Suppress. A hearing was commenced on Defendants' Motion to Suppress. After the State completed presentation of their case by calling two witnesses, the Court decided to review the testimony provided by the State. Defendant requested that the Motion be granted based on the presentation by the State. Defendant specifically requested that the two witnesses called by the State remain available as part of Defendant's presentation. Defendant had multiple witnesses present to testify as well. The testimony presented was also part of the combined hearing regarding the Motion to Dismiss for Selective Prosecution.

At the conclusion of the proceedings the State invited the court to act in an unfair manner and preclude Defendant from presenting its portion of the motion and deny the motion. If the Court acts in this manner the public credibility of Delaware courts will be jeopardized. It will give the appearance that the case was scheduled and presented by the State so that there would not be time for Defendant to call witnesses so that the State could then argue to the court not to allow Defendant to call witnesses and rule in favor of the State. Defendant hopes that the Court does not fall into the trap that it has been invited to step into by the State.

This is Defendant's mid-hearing memorandum.

DISORDERLY CONDUCT

The version of Disorderly Conduct in dispute is defined by statute as follows:
"§ 1301. Disorderly conduct; unclassified misdemeanor.
A person is guilty of disorderly conduct when: (1) The person intentionally causes public inconvenience, annoyance or alarm to any other person, or creates a risk thereof by: …
e. Congregating with other persons in a public place and refusing to comply with a lawful order of the police to disperse."

The mens rea associated with this specific intent crime requires the intent to cause or create a risk of causing public inconvenience, annoyance or alarm to any other person. This mens rea language does not describe a harm, or a risk of a harm. State v. Ausmus, 336 Or 493, 85 P3d 864 (2004) The proscribed conduct is twofold:

1. Congregating with other persons in a public place;
2. Refusing to comply with a lawful order of the police to disperse.

In other words a Defendant must engage in two forms of conduct with the requisite mens rea:

1. Congregate with other persons in a public place with the intent to cause or create a risk of causing public inconvenience, annoyance or alarm to any other person.
2. Refuse to comply with a lawful order of the police to disperse with the intent to cause or create a risk of causing public inconvenience, annoyance or alarm to any other person.

It was apparent to the police officials that the people who were exercising 1st Amendment rights were present with the intent to exercise 1st Amendment rights not the intent to cause or create a risk of causing public inconvenience, annoyance or alarm to

any other person. This version of Disorderly conduct restrains conduct that the Delaware and U.S. Constitutions protect.

Observation of a gathering of people who were viewed as congregating and engaging in Disorderly Conduct was described as the initial reason for the police to interact with Defendant. Any effort by a governmental official to disperse the people gathered was unlawful. A university official Meredith Franklin, serving as a police informant, wrongfully directed a police officer to get the Defendant. A multitude of people were gathered about including some with signs. The police, to this date, never determined who, if anyone, organized this gathering. The law enforcement personnel were solely fixated on getting the Defendant as per the directions given. The testimony revealed that no one was prevented from entering or moving around the Martin Luther King Student Center and the people gathered were peaceful. The university officials themselves disrupted the peace by interfering with the exercise of 1st Amendment rights as part of a greater plan to prevent the exercise of these same rights at the Board of Trustees meeting.

The disorderly conduct statute was designed to proscribe only that type of conduct which has a real tendency to provoke public disorder. This conduct must be of public rather than individual dimension. This conduct is evaluated by considering the nature and number of those attracted, taking into account the surrounding circumstances, including, of course, the time and the place of the episode under scrutiny. Accordingly, a defendant cannot be guilty of breach of the peace if he annoyed no one, disturbed no one, and interfered with no one.

The State has provided no explanation as to the legal foundation for the order to disperse. After the fact, in preparation for the hearing, the State has attempted to introduce documents that the officials had no knowledge of and that have not been authenticated. There is no evidence that the assemblage was unlawful, dangerous or obstructing free passage. There is a lack of probable cause and there is no evidence of the requisite mens rea. There was no probable cause for arresting the defendant for disorderly conduct or offensive touching, so there can be no resisting arrest.

The police testified that no one else was questioned as to their purpose in being gathered. There is no reasonable suspicion or probable cause for the officers to believe that Defendant was congregating with other persons. Mere presence is insufficient. Defendant can speak to other people pursuant to the 1st Amendment. Nor was there any testimony that the defendant was congregating in front of this building for any reason other than to exercise his constitutional rights.

The State did not establish that there was no bona fide intention to exercise a constitutional right or that the interest to be advanced by the Defendant's exercise of constitutional rights were insignificant in comparison to the States assertion that Defendant had the intent to cause public inconvenience, annoyance or alarm to any other person at the time of the incident.

The statute as applied here is clearly an effort to chill or stifle the exercise of constitutional rights and is specifically directed at people of color. The activities that Defendant engaged in are protected by the First Amendment. Officer Downs clearly testified that if the content of expression reflects a protest, it is not allowed. Clearly the mere expression of unpopular views prompted the order to disperse that was allegedly

disobeyed. This is unconstitutional. If the gathering were not viewed as a protest it would not have resulted in governmental interference.

Even if Defendant used words that were unpleasant, insulting, and possibly unwise, but they were not intended to, nor did they, cause a fight, Defendant's alleged words were not fighting words. State v. Cooper, 2004 WL 3312525 (Del. Com. Pl.) The officers had no probable cause to arrest him for disorderly conduct.

OFFENSIVE TOUCHING

The testimony revealed that Defendant was not required to go with the university officials to another location. Officers admitted that the person allegedly offensively touched was not wearing a uniform and the officers could not communicate with each other when standing within a couple of feet of each other, and that the officer alleging to be a victim of offensive touching touched the Defendant from behind after approaching Defendant from behind. The alleged victim committed an unlawful criminal act of offensive touching against the Defendant.

RESISTING ARREST

Resisting Arrest is defined by statute as follows:
§ 1257. Resisting arrest with force or violence, class G felony; resisting arrest, class A misdemeanor.
(b) A person is guilty of resisting arrest when the person intentionally prevents or attempts to prevent a peace officer from effecting an arrest or detention of the person or another person or intentionally flees from a peace officer who is effecting an arrest.

There was absolutely no basis to arrest or detain defendant for the exercise of 1st Amendment rights. The university officials specifically said that protesting against anything is not permitted on campus, but being for something is allowed. This is not a content neutral regulation. The type of speech was the basis for the arrest.
The alleged victim of Offensive Touching did not present evidence of being a police officer and he clearly was not acting in the performance of his duties when he criminally offensively touched Defendant.

A reasonable person under the same circumstances would not have identified the other person as a peace officer when being offensively touched. He approached Defendant from behind, did not wear a uniform, did not show a badge or identification, and the criminal manner in which he acted and conducted himself are relevant as to whether he was reasonably identifiable as a peace officer.

The DSU official was engaging in a personal frolic of his own. Defendant was not interfering with the activities of the police officers when the official attacked him without cause or provocation. Although the law requires submission to arrest, Resisting Arrest is not intended to require an arrestee to submit to egregiously unlawful conduct such as unlawful Offensive Touching. The official testified that when he touched Defendant he was trying to get Defendant to come with him. In this case, defendant is not required to submit to unlawful police conduct when there has been no attempted arrest. At the time of the alleged offensive touching the official testified that the police were not engaged in an attempted arrest. Defending himself against an assault by an unknown person is

justified. The official could not reasonably believe that putting his hands on another person from behind was a use of physical force that was necessary. This use of force is not within the performance of his duties and a citizen may properly resist that use of force when the touching is offensive to the citizen. There is no evidence that the Defendant had any knowledge that he was going to be placed under arrest at the time Downes unlawfully offensively touched Defendant.

1ST AMENDMENT

1st Amendment rights extend beyond mere speech to matters related to categories such as Press, Religion, Petition and Assembly. The statutory version of Disorderly Conduct is a direct restraint on the exercise of 1st Amendment rights. It is not a regulation or prevention of specified harm. The statute goes beyond the permissible regulation of damaging conduct or the harmful effects that may result from the exercise of 1st Amendment rights. State v. Ausmus, 336 Or 493, 85 P3d 864 (2004)

On its face the statute is unconstitutionally overbroad, in that it criminalized forms of expression, speech, and peaceable assembly protected under the Delaware Constitution and the First Amendment to the United States Constitution. In addition it is unconstitutionally vague under the Delaware Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The statute does not preclude its application to persons permissibly exercising their 1st Amendment rights. The element of congregating with other persons in a public place includes constitutionally protected conduct such as assembly. The term lawful order does not confine the statute's application to non-1st Amendment conduct. The statute proscribes conduct that occurs after the order to disperse. The range of the conduct that the statute criminalizes must be tested against 1st Amendment rights.

A person intending to exercise a constitutionally protected right is wrongfully criminalized pursuant the statutory language. The application of the statute to only conduct that the constitution does not protect poses practical problems. The statute is unconstitutionally overbroad due to the fact that it prohibits conduct that is constitutionally protected. There is no harmful effect associated with a failure to disperse if there is no unlawful conduct. In this case, the conduct alleged in the relevant Disorderly Conduct subsection is constitutionally protected.

Vagueness exists as applied to the facts of the case. No man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.'' United States v. Harris, 347 U.S. 612, 617, 74 S. Ct. 808, 98 L. Ed. 989 (1954) The proper test for determining if a statute is vague as applied is whether a reasonable person would have anticipated that the statute would apply to his or her particular conduct. The due process vagueness doctrine ordinarily applies to the substantive elements of Disorderly Conduct as charged. The substantive elements have not been defined with reasonable clarity not only so that a defendant may guide his conduct accordingly, but also for police, judges and juries so that they may not apply the law arbitrarily. State v. Cobb, 743 A.2d 1 (1999), cert. denied, 531 U.S. 841, 121 S. Ct. 106, 148 L.Ed. 2d 64 (2000) Here the exercise of Defendant's 1st Amendment rights were criminalized.

The statements and conduct of the people gathered did not rise to the level of fighting words, and their conversations were inextricably intertwined with their political protest, which is protected by the First Amendment. When protected free speech is involved, the offense of disorderly conduct must be interpreted narrowly and as restricting only fighting words. Speech on matters of public concern is at the heart of the First Amendment's protection and is entitled to special protection. Snyder v. Phelps, 131 S. Ct. 1207 (2011). The Disorderly conduct harassment statute, as applied to the Defendant, is overbroad. Defendant was engaged in protected expressive conduct. To be constitutional, the statute must be restricted to prohibiting only fighting words and conduct that is not inextricably linked to protected speech.

SEIZURE

The factual context of this matter is awkward. Normally seizure includes a focus on a person's freedom to leave. Here a triggering element is refusing to comply with a lawful order of the police to disperse with the appropriate mens rea. Because Downes put his hands on Defendant to take him to a location contrary to Defendants ability to exercise 1st Amendment rights, the seizure analysis requires particular focus. The government officials clearly initiated the citizen-police encounter while the Defendant was exercising 1st Amendment rights. The seizure itself actually prevents the Defendant from complying with the unlawful order. Furthermore, many of the people congregating were gathered to go to a Board of Trustees meeting to exercise 1st Amendment rights. Dispersal was imminent as the location where the students were gathered was not the destination.

Where the police conduct a stop of a person, that qualifies as a seizure of that person under both the Fourth Amendment of the United States Constitution, and the Delaware Constitution. A question presented is when precisely, as a matter of constitutional law, did the stop occur? For federal constitutional purposes, a stop occurs at the point a reasonable person would believe that he was not free to leave, either because the police exert some physical force or because the person submits to the officers' show of authority. Under the Delaware Constitution, a stop occurs when, under the totality of the circumstances, the police officers' actions would cause a reasonable person to believe that he was not free to ignore the police. In either case, the police must have reasonable suspicion to make the stop. Lopez-Vazquez v. State, 956 A.2d 1280, 1286-87 (Del. 2008). Reasonable suspicion is defined as the officer's ability to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. The use of physical force by Downes at the moment Downes unlawfully and offensively put his hands on Defendant, from behind, constitutes a seizure. Williams v. State, 962 A.2d 210 (Del. 2008)

Whenever a police officer accosts an individual and restrains his freedom to walk away, he has seized that person. Terry v. Ohio, 392 U.S. 1, 16, 19 (1968) Defendant does not have to have awareness that he is being seized as in this case when Defendant is approached from behind by a person who is not in uniform and who according to the hearing record can not prove he is a peace officer in Delaware.

A police officer must justify any seizure of a citizen. The level of justification required varies with the magnitude of the intrusion to the citizen. A limited intrusion

occurred when the police officer initially and illegally put his hands on Defendant to restrain him and escort him against his will to another location. This Terry stop encounter constitutes a seizure and requires that the officer have an articulable suspicion that the person has committed or is about to commit a crime. U.S. v. Hernandez, 854 F.2d 295 (8th Cir. 1988).

The scope of the initial stop and the further investigatory activity must be reasonably related to the initial stop when the officer obtained Defendant's name while in the presence of the informant. Here the stop was extended, by duration or because of additional investigatory activities, when Downes arrived and put his hands on Defendant. A separate seizure occurred and the officers have not identified specific, articulable facts providing independent justification for the additional intrusion. State v. Church, 2008 WL 4947653 (Del. Super.)

REASONABLE ARTICUABLE SUSPICION

The State lacked reasonable articulable suspicion to stop or detain Defendant on the date, time, and place in the charging documents. What crime did the Defendant, a faculty member, commit or was about to commit by being around the Martin Luther King Student Center on the campus of Delaware State University?

A police officer may detain an individual for investigatory purposes for a limited scope, but only if the detention is supported by a reasonable and articulable suspicion of criminal activity. Jones v. State, 745 A.2d 856 (Del. 1999). A determination of reasonable and articulable suspicion must be evaluated by the totality of the circumstances as viewed through the eyes of a reasonable, trained police officer under the same or similar circumstances, combining objective facts with the officer's subjective interpretation of them. The Delaware Supreme Court defines reasonable and articulable suspicion as an officer's ability to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. In the absence of reasonable and articulable suspicion of wrongdoing, detention is not authorized. There is no evidence that there was reasonable suspicion that the defendant had or was about to commit a crime.

PROBABLE CAUSE

Behavior which is susceptible of innocent as well as guilty interpretation cannot constitute probable cause and 'innocuous behavior alone will not generate a founded or reasonable suspicion that a crime is at hand.

The burden of proof to support a motion to suppress is by a preponderance of the evidence. "An arrest by a peace officer without a warrant for a misdemeanor is lawful whenever the officer has reasonable ground to believe that the person to be arrested has committed a misdemeanor in the officer's presence." 11 Del. C. § 1904(a) (1) Reasonable ground to believe is the equivalent of probable cause. Police officers have probable cause to make warrantless arrests when at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that defendant had committed or was committing an

offense. There never existed reasonably trustworthy information that defendant had committed or was committing an offense.

The issue is whether the police had probable cause to arrest the defendant for a criminal offense. While probable cause does not require as much proof as is necessary to sustain a conviction, it does require more than mere suspicion. Conduct which is equally susceptible to innocent or culpable interpretation cannot give rise to probable cause. There was no probable cause to arrest the defendant for disorderly conduct.

What matters is whether, looking at the totality of the circumstances at the time of the arrest, the objective facts available to the officers were sufficient to justify a reasonable belief that an offense was being committed. Johnson v. Campbell, 332 F.3d 199 (3rd Cir. 2003)

The record evidence supports a determination that Downes and the police officers involved were inadequately trained with respect to the offense of Disorderly Conduct and interacting with groups of people. Downes acted without probable cause when he arrested Defendant.

CONCLUSION

Defendant's Motion to Suppress should be granted. Defendant's 1st Amend rights were violated. There was no reasonable articulable suspicion and there was no probable cause to justify the actions of the government officials. The seizure was unreasonable. The arrest and testimonial evidence should be suppressed. The charges should be dismissed.

Respectfully submitted,

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Dated: 12/10/12

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

State of Delaware	)	
	)	
	)	
	)	
v.	)	ID #1203000747
	)	
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	)	
Dr. Jahi Issa	)	

CERTIFICATE OF SERVICE

I, Samuel L. Guy, Esq. do herby certify that two copies of the attached mid-hearing Memorandum were mailed to DAG Lindsay Taylor, Delaware Department of Justice, Criminal Division (KC-CCP), 102 W. Water Street, Dover, DE 19904, this 10th day of December, 2012.

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