

**COURT OF COMMON PLEAS  
FOR THE STATE OF DELAWARE**

KENT COUNTY COURTHOUSE  
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DOVER, DELAWARE 19901  
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CHARLES W. WELCH, III  
JUDGE

June 27, 2016

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RE: Kristian T. Hardy v. Scott Vein, Division of Motor Vehicles  
C.A. No.: CPU5-15-001164

Decision on Appeal from Division of Motor Vehicles Probable Cause Hearing

Dear Mr. Beauregard and Ms. Cordo:

The appellant, defendant-below, Kristian T. Hardy (hereinafter “Hardy”) has filed an appeal from a decision of the Division of Motor Vehicles (hereinafter “DMV”) pursuant to 21 *Del. C.* § 2744 and Court of Common Pleas Civil Rule 72.1. After a thorough and careful review of the hearing officer’s decision and the record for this matter, the DMV’s decision is affirmed.

**PROCEDURAL BACKGROUND**

On July 23, 2015, Hardy appeared before the DMV for a hearing to determine, (1) with respect to 21 *Del. C.* § 2742, whether there was probable cause to believe Hardy was driving, operating or had physical control of a vehicle while under the influence in violation of 21 *Del. C.* § 4177; and (2) whether Hardy refused to permit chemical testing after being informed of the revocation penalty under 21 *Del. C.* § 2742. On August 26, 2015, the hearing officer, based on the preponderance of the evidence, ruled in favor of the State, finding that there was probable cause to believe that Hardy was driving under the influence and that Hardy refused to permit chemical testing after being informed of the revocation penalty under 21 *Del. C.* § 2742. The hearing officer revoked Hardy’s driver’s license for a period of 12 months pursuant to § 2742(b)-

(c). DMV mailed Hardy a notice of revocation, dated August 31, 2015, with an effective revocation date of September 4, 2015. Hardy appealed the DMV's decision to this Court.

### **FACTS<sup>1</sup>**

On the night of April 17, 2015, the arresting officer, Corporal Rodriguez, of the Delaware State Police, was dispatched to a report of a single vehicle collision involving injuries at the intersection of Whiteleysburg Road and Vernon Road in Harrington, Kent County, Delaware. The officer testified that upon arrival at the scene, he observed Hardy's vehicle in a ditch and tire tracks which ran approximately 670 feet from the intersection of Whiteleysburg Road and Vernon Road through a field. Hardy was also observed bleeding heavily from a laceration on his head.

The officer made contact with Ella Hardy, Hardy's mother, who was also at the scene. She advised the officer that Hardy had consumed alcohol prior to driving and that she was following behind him on Whiteleysburg Road southbound when Hardy pulled out in front of a tractor trailer and then crashed into a ditch.

While on the scene, Harrington EMS ("EMS"), who was on the scene prior to the officer's arrival, informed the officer that the driver, Hardy, refused treatment and that after a series of questions, they determined he was in the right frame of mind to refuse treatment.

The officer then continued to observe Hardy's condition. Hardy had trouble maintaining his balance as he nearly fell over and had to be assisted by another officer that was on the scene. Hardy continued to bleed heavily from the laceration on his head. Based on the amount of blood, the officer contacted Kent-Com and ordered EMS to return and transport Hardy to the hospital. Due to his medical condition, no sobriety field tests were conducted.

While at the hospital, the officer stated he observed a strong odor of alcohol emanating from Hardy's breath, slurred speech, and bloodshot and glassy eyes. The officer requested Hardy to submit to a portable breathalyzer test ("PBT") and a blood draw for purposes of

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<sup>1</sup> The Court's findings of relevant facts are based on the evidence provided at the DMV hearing.

determining blood alcohol concentration but Hardy refused. The officer asked, "What is your reason for refusing?" Hardy responded, "I don't want to."

An implied consent form was provided and read to Hardy. The form indicated that Hardy refused to submit to a PBT and blood draw. The form also outlined the consequences of refusing to permit chemical testing. Hardy refused to sign the implied consent form.

In opposition, Hardy testified that he sustained his injuries prior to the accident, at a party at his brother's house. He refused to sign the implied consent form because he was feeling lightheaded due to the loss of blood.

During the hearing, Ella Hardy also testified. She stated that she lied to the officer on the night of the accident. She did not see Hardy drinking and she was not with him that night prior to or at the time of the accident. She testified that she received a phone call to go to her son's house, Hardy's brother. On the way she observed a car and tractor trailer almost collide on Whiteleysburg Road. On the way back from her son's house, after being informed that Hardy had left, she thought that the car that almost collided with the tractor trailer could have been Hardy's. She traveled back to Whiteleysburg Road and there, she and her husband found Hardy's vehicle in a ditch.

After the conclusion of the hearing, the DMV hearing officer found that the officer had probable cause to believe that, with respect to 21 *Del. C.* § 2742(b)-(c), Hardy was in violation of 21 *Del. C.* § 4177, driving while under the influence. The decision was based on the evidence that (1) there was a one vehicle collision; (2) Hardy traveled 670 feet through a field and landed in a ditch; (3) Hardy had a strong odor of alcohol emanating from his breath, slurred speech, and bloodshot and watery eyes; (4) Hardy refused treatment from EMS and that EMS determined he was in the right frame of mind to refuse treatment; and (5) Hardy refused a PBT and blood draw and refused to sign an implied consent form, stating "I don't want to." Accordingly, the hearing officer ordered Hardy's license to be revoked for a period of 12 months. Hardy now appeals that decision.

## STANDARD OF REVIEW

On appeal, the appellant, defendant-below, has the burden of proof. A decision of the Division of Motor Vehicles revoking an operator's license is reviewable, on appeal, by this Court on the record. Ct. Com. Pl. Civ. R. 72.1(a); 21 *Del. C.* § 2744. "The scope of review of an appeal . . . is limited to correcting errors of law and determining whether substantial evidence of record exists to support the findings of fact and conclusions of law." *Eskridge v. Voshell*, 593 A.2d 589, 1991 WL 78471, at \*3 (Del. Apr. 17, 1991) (TABLE). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Howard v. Voshell*, 621 A.2d 804, 806 (Del. 1992).

If substantial evidence exists, this Court "may not re-weigh and substitute its own judgment for that of the Division of Motor Vehicles," because "the hearing officer is in the best position to evaluate the credibility of witnesses and the probative value of real evidence." Findings of the hearing officer will not be overturned so long as they are "sufficiently supported by the record and [are] the product[s] of an orderly and logical deductive process." However, "when the facts have been established, the hearing officer's evaluation of their legal significance may be scrutinized upon appeal."

*Spencer v. Cohan*, 2013 WL 5494718, at \*2 (Del. Com. Pl. Oct. 1, 2013) (citation omitted).

## DISCUSSION

### **I. *Substantial Evidence Exists to Support the Hearing Officer's Finding of Probable Cause***

Hardy has appealed the decision of the DMV hearing officer on the grounds that the hearing officer erred as a matter of law in her determination that the arresting officer had probable cause to believe Hardy to be in violation of 21 *Del. C.* § 4177, driving while under the influence. Hardy raises several objections. First, he argues that the observations used to establish probable cause such as his slurred speech, trouble maintaining his balance, and bloodshot and watery eyes can be the result of his head injury that he suffered from the accident. Second, no field sobriety tests were conducted. Third, there was no admission of consumption of alcohol prior to driving. Furthermore, Hardy contends that the arresting officer failed to question his mother in-depth about her knowledge that Hardy had drank alcohol prior to driving.

“To establish probable cause, the totality of the facts and circumstances within the officer's knowledge at the time of the arrest must be sufficient to warrant a person of reasonable caution to believe that criminal activity has been or is presently being committed.” . . . [O]ne must view the totality of the circumstances from the standpoint of a reasonable officer in light of his or her experiences and training. The police need only “present facts suggesting . . . that a fair probability exists that the defendant has committed a crime.” “The possibility that there may be a hypothetically innocent explanation for each of several facts revealed during the course of an investigation does not prevent a determination that probable cause exists for an arrest.”

*Spencer*, 2013 WL 5494718, at \*3 (citation omitted).

“In the context of DUI arrests, probable cause is generally based on the arresting officer’s observations of the arrestee, which may include field sobriety tests” but which are not necessary to prove impairment. *Rybicki v. State*, 119 A.3d 663, 671 (Del. 2015); *Stevens v. State*, 129 A.3d 206, 210 (Del. 2015).

“An officer need not rule out potentially innocent, alternative explanations for a driver’s conduct.” *Rybicki*, 119 A.3d at 671. Determining whether a person is impaired under § 4177 is “within the realm of common knowledge.” *Stevens*, 129 A.3d at 210 (citation omitted).

In *Rybicki v. State*, the Delaware Supreme Court affirmed a Superior Court finding of probable cause that relied on the following evidence: defendant was involved in a one-vehicle accident; he was disoriented and smelling of alcohol; defendant’s vehicle had crossed over a grass embankment ending up perpendicular to oncoming traffic; and defendant refused to submit to field and chemical testing. *Rybicki*, 119 A.3d at 670-672.

In this matter, the hearing officer relied on similar facts and observations as in *Rybicki*. Hardy was involved in a one-vehicle accident; Hardy’s vehicle traveled 670 feet through a field and landed in a ditch; there was a strong odor of alcohol emanating from his breath, slurred

speech, and bloodshot and watery eyes; and Hardy refused a PBT and blood draw. The record also indicated that Hardy had trouble maintaining his balance and had to be assisted.<sup>2</sup>

Hardy contends that his head injury caused his slurred speech and bloodshot and watery eyes. The fact that Hardy had a head injury does not negate the fact that probable cause existed as the arresting officer need not rule out hypothetically innocent explanations. The nature of Hardy's accident, showing erratic driving, combined with the officer's observations of Hardy constitutes probable cause to believe that Hardy was driving under the influence. Furthermore, neither Hardy nor Hardy's head injury provides any explanation for why there was a strong odor of alcohol emanating from his breath.

Hardy also suggests that the lack of field sobriety tests and lack of an admission of consumption of alcohol show that the officer lacked probable cause. However, a field sobriety test or an admission of consumption of alcohol is not necessary to prove that the defendant was driving under the influence. The arresting officer's observation of Hardy and the nature of Hardy's accident were sufficient to establish probable cause.

Lastly, Hardy's argument that the officer failed to inquire in-depth about Hardy's mother's knowledge that Hardy had drank alcohol prior to driving is without merit as the hearing officer's finding of probable cause did not rely on Hardy's mother's testimony.

The Court finds that the facts relied upon by the hearing officer supported a finding of probable cause that Hardy was driving under the influence in violation of 21 *Del. C.* § 4177.

**II. *Substantial Evidence Exists to Support the Hearing Officer's Finding that Hardy Refused Chemical Testing after being Informed of the Revocation Penalty under 21 Del. C. § 2742***

Hardy contends that he lacked the mental capacity, due to his head injury, to understand or sign the implied consent form and, thereby refuse chemical testing.

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<sup>2</sup> Although the DMV hearing officer did not appear to rely on it, there is also evidence provided on the record that Hardy's mother advised Corporal Rodriguez that Hardy had drank alcohol prior to driving on the night of the accident.

Section 2742 of Title 21 of the Delaware Code does not state whether refusal must be knowingly or intelligently but only that the right of refusal is triggered after being informed of the revocation penalty. Nor have Delaware courts specifically addressed whether a defense of mental incapacitation can excuse a refusal under 21 *Del. C.* § 2742 or whether the act of refusal itself triggers the implications of the statute.

However, the Court need not address this issue as Hardy has failed to introduce any evidence of mental incapacitation other than his statement that he lacked mental capacity. Moreover, his defense is contradicted by the fact that the EMS, after a series of questions, determined that he had the capacity to refuse treatment.

Furthermore, the Court finds that there was substantial evidence to support a finding that Hardy refused to permit chemical testing. Hardy's refusal to take a PBT or blood draw, refusal to sign the implied consent form after being informed of the revocation penalty, and Hardy's statement, "I don't want to", as his reason for his refusal, clearly support a finding that Hardy opted to refuse chemical testing under 21 *Del. C.* § 2742.

### **CONCLUSION**

In conclusion, the DMV hearing officer's findings (1) that probable cause existed to believe that Hardy was driving under the influence in violation of 21 *Del. C.* § 4177 and (2) that Hardy refused to permit chemical testing as required under 21 *Del. C.* § 2742 were sufficiently supported by the record and is the product of a logical deductive process. The decision of the Division of Motor Vehicles is AFFIRMED.

**IT IS SO ORDERED.**

Sincerely,



Charles W. Welch, III

CWW: mek