

WHARTON, J.

I. INTRODUCTION

Appellant Daniel Slaney (“Slaney”) filed a Notice of Appeal on May 20, 2016, requesting appellate review of his April 5, 2016 conviction in the Court of Common Pleas for driving under the influence of alcohol in violation of 21 *Del. C.* § 4177. Slaney contends that the Court of Common Pleas erred when it denied his Motion to Suppress and when it found that probable cause existed for his arrest.

In considering this appeal, the Court must determine whether the trial court’s decision is supported by sufficient evidence and free of legal error. Factual findings of the court below are given deference and reviewed for clear error. Legal determinations are reviewed *de novo*. Upon consideration of the pleadings before the Court and the record below, the Court finds that there is sufficient evidence to support the trial court’s ruling, and the trial court did not make a legal error in reaching its decision. Accordingly, the Court of Common Pleas’ decision is **AFFIRMED**.

II. FACTUAL AND PROCEDURAL CONTEXT

On July 27, 2014, at approximately 12:04 a.m., Corporals Frey and Calio of the Delaware State Police were investigating an active complaint on Glasgow Avenue.¹ During their investigation, they observed a silver pickup truck traveling

¹ Transcript of Motion to Suppress, 29:5-19.

southbound.² Corporal Frey testified that the truck's engine was "revving very loudly" and was "accelerating very quickly" towards another vehicle.³ Corporal Frey decided to follow the truck in his patrol car.⁴ Corporal Frey caught up with the truck and saw that the truck was "swerving back and forth" behind the other vehicle and was "following [it] very closely."⁵ At some point, the truck passed the vehicle that it had been following.⁶

Corporal Frey activated his emergency lights, and he eventually pulled alongside the truck and ordered the driver to pull over.⁷ Corporal Frey approached Slaney, the driver, who was seated in the truck and observed that he had "somewhat of a dazed look on his face."⁸ Furthermore, when Slaney spoke to Corporal Frey, Corporal Frey detected an odor of alcohol emanating from his breath.⁹ Corporal Frey then instructed Slaney to shut off his vehicle and hand him the keys to prevent Slaney from fleeing the scene.¹⁰

Corporal Frey called the stop into his dispatcher, and as a result, Corporal Calio arrived at the scene.¹¹ Corporal Calio asked Slaney about his reckless

² Tr. 8:12-14.

³ Tr. 8:15-17.

⁴ Tr. 9:1-5.

⁵ Tr. 9:11-15.

⁶ Tr. 10:2-4.

⁷ Tr. 9:21, 10:5-7.

⁸ Tr. 11:13-14.

⁹ Tr. 11:14-15.

¹⁰ Tr. 11:20-23.

¹¹ Tr. 12:2-7.

driving, and Slaney stated that he was “joking around” with the operator of the other vehicle whom he knew.¹² During this conversation, Corporal Calio detected a “moderate odor” of alcohol emanating from Slaney’s breath and observed that he had “glassy” eyes.¹³ Corporal Calio also asked Slaney for his vehicle keys. Slaney searched for his keys, but was unsuccessful in finding them because he had already given his keys to Corporal Frey.¹⁴

Corporal Calio proceeded to ask Slaney about the smell of alcohol on his breath.¹⁵ In response, Slaney stated that he had just left McGlynn’s Pub in Peoples Plaza where he had consumed three Miller High Life beers over two and one-half hours.¹⁶

Corporal Calio thereafter administered the following standardized field sobriety tests: (1) the horizontal gaze nystagmus (“HGN”), the walk-and-turn (“WAT”), and the one-leg stand (“OLS”). Corporal Calio testified that he was certified to administer all three of these tests to Slaney.¹⁷

After administering the HGN, Corporal Calio directed Slaney to perform the WAT. Following the National Highway Traffic Safety Administration’s (“NHTSA”) protocol, Corporal Calio asked Slaney whether he had any injuries

¹² Tr. 32:8-12.

¹³ Tr. 32:2-6.

¹⁴ Tr. 32:17-19.

¹⁵ Tr. 32:20-22.

¹⁶ Tr. 33:1-2, 82.

¹⁷ Tr. 27:18-19; 28:5-12.

that would prevent him from performing the WAT.¹⁸ Slaney stated that he tore his right MCL approximately three years earlier while he was playing ice hockey.¹⁹ Slaney also told Corporal Calio that his MCL was repaired and that he was no longer undergoing physical therapy for this injury.²⁰ However, Slaney noted that his knee still “cracks back” and “isn’t right.”²¹ Corporal Calio asked Slaney whether he could comfortably perform the test, and he stated that he could.²² Slaney performed the test, and Corporal Calio testified that his performance indicated a likelihood of impairment.²³

Corporal Calio then instructed Slaney on how to perform the OLS²⁴ and asked him if he could comfortably perform this test.²⁵ Also, Corporal Calio gave Slaney the option to choose which leg he would prefer to stand on during the test.²⁶ Slaney stated that he could comfortably perform the test, and chose to stand on the leg that he had previously injured.²⁷ Corporal Calio testified that Slaney’s performance on the OLS also indicated a likelihood of impairment.²⁸

¹⁸ Tr. 52:16-20.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Tr. 85:11-18; State’s Ex. 3.

²² Tr. 86:11-12.

²³ Tr. 60:16-17.

²⁴ Tr. 61:9-22; 62:1.

²⁵ Tr. 86:11-12.

²⁶ Tr. 92:18-21.

²⁷ Tr. 91:13-17.

²⁸ Tr. 62:22-23; 63:1.

Finally, Corporal Calio conducted a portable breath test (“PBT”).²⁹ Corporal Calio testified that the PBT was properly calibrated for use and that he observed Slaney for twenty-three minutes before administering the test.³⁰ However, Corporal Calio had difficulties administering the PBT because it was a new model, and as a result of this, Corporal Calio asked Corporal Frey for assistance.³¹ Nevertheless, Slaney took the PBT, and it showed that he was legally intoxicated.³² Corporal Calio subsequently arrested Slaney and charged him with, among other crimes, driving under the influence of alcohol (“DUI”) in violation of 21 *Del. C.* § 4177.³³

On December 9, 2014, Slaney filed a Motion to Suppress.³⁴ He contended that the totality of the circumstances did not establish a fair probability that he was under the influence of alcohol, and therefore, the trial court should suppress all evidence related to his arrest for DUI.³⁵

On December 1, 2015, the trial court held a hearing on the Motion to Suppress. The trial court heard testimony from Corporals Frey and Calio, and it also watched the video of the stop, which was created by the mobile video

²⁹ Tr. 63:5-8.

³⁰ Tr. 63:12-14; 73:15-21.

³¹ Tr. 69.

³² Tr. 88:14-22.

³³ Tr. 75:14-17.

³⁴ Appellant’s Mot. to Suppress.

³⁵ *Id.*

recorder.³⁶ The trial court denied the motion.³⁷ Slaney then filed a Motion to Reargue on December 7, 2015, and the trial court denied this motion as well on January 20, 2016.³⁸

On April 15, 2016, the trial court held a stipulated trial and found Slaney guilty of DUI. He was sentenced on May 20, 2016. Slaney appeals the Court of Common Pleas' decision.

III. THE PARTIES' CONTENTIONS

Slaney makes four arguments. First, he argues that the trial court erred when it relied upon the WAT and OLS results in its probable cause determination because he was disabled.³⁹ Second, he argues that the trial court erred when it determined that Corporal Calio was properly trained to administer the PBT.⁴⁰ Third, he contends that the trial court erred when it determined that Corporal Calio complied with the NHTSA protocol in administering the OLS.⁴¹ Fourth, he argues that the trial court committed legal error when it found, under the totality of the circumstances, that probable cause existed to arrest him.⁴²

³⁶ Tr. 77.

³⁷ Tr. 109. However, the trial court did in fact suppress the HGN because Corporal Calio significantly deviated from NHTSA protocol. Tr. 49:11-16; 109.

³⁸ *State v. Slaney*, 2016 WL 281464 (Del. Com. Pl. Jan. 20, 2016).

³⁹ Appellant's Opening Brief, at 15.

⁴⁰ *Id.* at 23.

⁴¹ *Id.* at 18.

⁴² *Id.* at 19.

In response, the State contends that the trial court's factual findings are sufficiently supported by the record and are the product of an orderly and logically deductive process, and thus, the trial court's findings are not clearly erroneous.⁴³ The State also contends that the trial court did not commit legal error when it found that Corporal Calio had probable cause to arrest Slaney.⁴⁴

IV. STANDARD OF REVIEW

The Superior Court is authorized to consider appeals from the Court of Common Pleas in criminal matters.⁴⁵ When addressing appeals from the Court of Common Pleas, the Superior Court acts as an intermediate appellate court, with the same function as that of the Supreme Court.⁴⁶ In considering an appeal from the Court of Common Pleas to the Superior Court, the Superior Court determines whether there is legal error and whether the factual findings made by the trial judge are sufficiently supported by the record.⁴⁷ Factual findings by the Court of Common Pleas are given deference and are reviewed for clear error.⁴⁸ Legal questions are reviewed *de novo*.⁴⁹

V. DISCUSSION

⁴³ Appellee's Responding Brief, at 9.

⁴⁴ *Id.* at 13.

⁴⁵ 11 *Del. C.* § 5301(c).

⁴⁶ *Fiori v. State*, 2004 WL 1284205, at *1 (Del. Super. May 26, 2004) (citing *State v. Richards*, 1998 WL 732960, at *1 (Del. Super. May 28, 1998)).

⁴⁷ *Onkeo v. State*, 957 A.2d 2, at * 1 (Table) (Del. 2008).

⁴⁸ *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

⁴⁹ *DiSabatino v. State*, 808 A.2d 1216, 1220 (Del. Super. 2002).

A. The Trial Court's Findings Regarding the Standardized Field Tests and the PBT Were Not Clearly Erroneous.

1. The trial court did not err when it considered the WAT and OLS in its probable cause determination because Slaney was not disabled.

At the suppression hearing, Slaney argued that the WAT and OLS results should be suppressed because Corporal Calio did not conduct those tests in accordance with NHTSA protocol.⁵⁰ Under NHTSA protocol, if an individual informs the investigating officer that he or she has a disability, then no sobriety field tests shall be administered to that individual.⁵¹ Here, Slaney told Corporal Calio that he tore his MCL three years prior to the stop. Furthermore, he told Corporal Calio that his knee still “cracks back” and “isn’t right.”⁵² Therefore, Slaney argued that Corporal Calio should not have had him perform these tests.

The trial court did not agree. The trial court noted that it may disregard a field test when an officer is aware of the driver’s disability and still performs the test. However, the trial court found that weight should be given to the WAT and OLS results because Slaney was not disabled.⁵³

On Appeal, Slaney makes this same argument. This Court must accept the trial court’s findings unless those findings were clearly erroneous. In *State v.*

⁵⁰ Tr. 98; *see also Slaney*, 2016 WL 281464 at *3.

⁵¹ Tr. 55:14-20.

⁵² Tr. 85:11-18; State’s Ex. 3.

⁵³ *Id.*

Ministero, an officer stopped the defendant for driving recklessly.⁵⁴ During the stop, the officer smelled alcohol on the defendant's breath.⁵⁵ The officer decided to administer standardized field tests to the defendant.⁵⁶ Before administering the WAT and OLS, the defendant told the officer that he had surgery on his neck and his back.⁵⁷ The officer still conducted these tests, and the Court of Common Pleas subsequently suppressed them because they were not administered in accordance with NHTSA protocol.⁵⁸ On Appeal, this Court held that it is within the appropriate discretion of the trial court to determine what weight to give sobriety tests, and "so long as there is evidence in the record to support the trial court's decision, this Court is not in a position to overturn that assessment."⁵⁹ Moreover, the Court stated that if "the field tests were not conducted within the NHTSA guidelines, the trial court was free to disregard them when assessing if probable cause existed."⁶⁰

Additionally, in *State v. King*, the defendant was involved in a motor vehicle accident.⁶¹ The defendant told the officers that he had been drinking, so they

⁵⁴ 2006 WL 3844201, at *1 (Del. Super. Dec. 21, 2006).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at *4.

⁵⁸ *Id.*

⁵⁹ *Id.* at *5. See *State v. Iyer*, 2011 WL 976480, at *10 (Del. Super. Feb. 23, 2011).

⁶⁰ *Ministero*, 2006 WL 3844201 at *5. See *Iyer*, 2011 WL 976480 at *10.

⁶¹ 2007 WL 1153058, at *1 (Del. Super. Mar. 30, 2007).

decided to conduct standardized field tests.⁶² Before administering the WAT and OLS, the defendant told the officers that he had a ruptured disk in his back and that he reaggravated this injury at work on the day of the collision.⁶³ Nonetheless, the officers performed the test, and the defendant was later arrested. Relying on *Ministero*, this Court suppressed these two physical field tests because the defendant told the officers that he was disabled.⁶⁴

Unlike *Ministero* and *King*, the trial court here did not err when it considered the standardized field tests because sufficient evidence exists to find that Slaney was not disabled. Before Slaney performed the WAT and OLS, Corporal Calio asked him whether he had any injuries that would inhibit his ability to perform the test. Slaney stated that he tore his MCL three years earlier, but he also stated that his knee was repaired and that he was no longer undergoing physical therapy for it.

Moreover, before administering the field tests, Corporal Calio asked Slaney whether he could comfortably perform them, and he stated that he could. After the tests, Corporal Calio again asked, and Slaney affirmed that he was “okay.” Also, when Corporal Calio asked Slaney to perform the OLS, Corporal Calio told him that he could choose the leg on which he wanted to perform the test, and Slaney chose to balance his body weight on the knee that he had previously injured.

⁶² *Id.* at *2.

⁶³ *Id.* at *3.

⁶⁴ *Id.*

While Slaney stated that his knee still “cracks back” and “isn’t right,” the evidence shows that the “previous injury did not constitute a disability that would hinder him from being able to perform the tests.”⁶⁵

2. The trial court did not err when it found that Corporal Calio was certified to administer the PBT.

During the traffic stop, Corporal Calio had difficulties administering the PBT. In particular, Corporal Calio had trouble using the button on the PBT in order to obtain a reading of Slaney’s blood alcohol concentration. At the suppression hearing, Corporal Calio was asked whether he had “any training with that particular unit.”⁶⁶ In response, Corporal Calio stated that he did not have any training with this unit because it was a new model that was recently assigned to him.⁶⁷ When Slaney challenged Corporal Calio’s certification to administer the PBT, the trial court found that “the fact that the officer took some time in asking questions as it pertained to securing the reading” of the PBT did not amount to a “nullification of the quality of the test.”⁶⁸

⁶⁵ *Slaney*, 2016 WL 281464 at *6–7; Tr. 85:11-18; State’s Ex. 3. Slaney would have this Court establish a blanket rule for situations like those encountered here—that is, he would have this Court find that if a DUI suspect tells an officer that he or she has an injury, and an officer administers field tests nevertheless, then the results of those tests shall always be excluded. The Court does not accept this blanket rule, for such a policy would inevitably encourage those suspected of DUI to disclose any injury that he or she has ever incurred to prevent an officer from administering field tests regardless of whether the injury was presently disabling.

⁶⁶ Tr. 88:22-23.

⁶⁷ Tr. 89:1.

⁶⁸ Tr. 108:15-18.

Slaney argues that Corporal Calio was not properly certified to administer the PBT because it was a new model. He argues that Corporal Calio should have had training and certification to administer that particular PBT model, and without such training and certification, the trial court should not have considered the PBT results in its probable cause determination.

The Court finds that the trial court had sufficient evidence in the record to conclude that Corporal Calio had proper certification to administer the PBT. Corporal Calio testified that he obtained the necessary certification from the Delaware Police Academy to administer the PBT. Furthermore, Corporal Calio stated that the PBT was calibrated and that it was properly functioning at the time he gave the test to Slaney. Finally, Corporal Calio testified that he followed protocol by observing Slaney for twenty-three minutes before administering the test. With this evidence, the trial court reasonably found that Corporal Calio was properly certified to administer the test, despite the minimal difficulties he had in using the PBT itself.

3. Slaney did not argue in the court below that Corporal Calio failed to comply with NHTSA standards in administering the OLS with respect to instructing him to look down at his foot.

Slaney argues that Corporal Calio failed to administer the OLS in accordance with NHTSA protocol. Under NHTSA protocol, officers are instructed to tell the individual performing the OLS to look down at his or her foot while

balancing on one leg. Slaney contends that Corporal Calio did not provide this instruction to him, and thus, the trial court should not have considered this test.

According to Superior Court Civil Rule 72(g), “Appeals shall be heard and determined by the Superior Court *from the record of proceedings below*, except as may be otherwise expressly provided by statute.”⁶⁹ Therefore, because this argument was not addressed below, the Court will not consider it on appeal for the first time.

B. The Trial Court Did Not Commit Legal Error When It Found that, Under the Totality of the Circumstances, Probable Cause Existed to Arrest Slaney for Driving Under the Influence.

In denying Slaney’s Motion to Suppress, the trial court found the following at the hearing:

The fact that he had an odor of alcohol, admission to drinking alcohol, poor performance on the one-legged stand, walk and turn, and a non-successful result on the PBT, and coupled together with the totality of the circumstances, the Court finds that probable cause has been established to arrest the defendant for DUI.⁷⁰

On Appeal, Slaney argues that the trial court did not consider the totality of the circumstances. Slaney argues that the trial court “deliberately chose to ignore the number of significant factors routinely considered by Courts in the finding of

⁶⁹ Super. Ct. Civ. R. 72(g) (emphasis added).

⁷⁰ Tr. 108:23; 109:1-6.

probable cause.”⁷¹ In particular, Slaney argues that the trial court “completely ignored” facts consisting of Slaneys “cognitive clarity, demeanor, speech fluency, memory, balance, explanation for consumption of alcohol including the temporal aspect and the circumstances of consumption.”⁷² Had the trial court considered these facts, Slaney argues that probable cause would not have been established.

To establish probable cause for a DUI offense, an officer must possess “information which would warrant a reasonable man in believing that [such] a crime ha[s] been committed.”⁷³ Therefore, an officer must “present facts which suggest, when those facts are viewed under the totality of the circumstances, that there is a fair probability” that the defendant has committed a DUI offense.⁷⁴ “The possibility that there may be a hypothetically innocent explanation for each of several facts revealed during the course of an investigation does not preclude a determination that probable cause exists for an arrest.”⁷⁵

The trial court did not commit legal error in determining that probable cause existed to arrest Slaney for DUI. In *Bease v. State*, an officer stopped the defendant’s vehicle for committing a traffic violation.⁷⁶ During the stop, the

⁷¹ Appellant’s Opening Br., at 22.

⁷² *Id.* at 23.

⁷³ *Lefebvre v. State*, 19 A.3d 287, 292–93 (Del. 2011) (quoting *Garner v. State*, 314 A.2d 908, 910 (Del. 1973)).

⁷⁴ *Id.* (quoting *State v. Maxwell*, 624 A.2d 926, 930 (Del. 1993)).

⁷⁵ *Maxwell*, 624 A.2d at 930.

⁷⁶ 884 A.2d 495, 497 (Del. 2005).

officer smelled alcohol emanating from the defendant's breath.⁷⁷ When asked about this smell, the defendant admitted that he had consumed some alcohol the night before.⁷⁸ Also, the officer observed that the defendant's eyes were "bloodshot and glassy."⁷⁹ With these facts, the Delaware Supreme Court found that sufficient evidence existed to establish probable cause.⁸⁰

In this case, the record contains the following facts: Slaney drove recklessly; he appeared to have a dazed look on his face when his vehicle was stopped; his breath smelled like alcohol; he had glassy eyes; he admitted to drinking before driving his truck; he was unable to remember that he gave his keys to Corporal Frey when Corporal Calio asked for them; his performance on the standardized field tests indicated a likelihood of impairment; and his PBT results indicated that he was legally intoxicated. Similar to the facts in *Bease*, there is overwhelming evidence here to establish probable cause, and the fact that Slaney was cognitively aware of the situation and able to balance does not negate a finding of probable cause.⁸¹ Therefore, the trial court's determination will not be disturbed.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

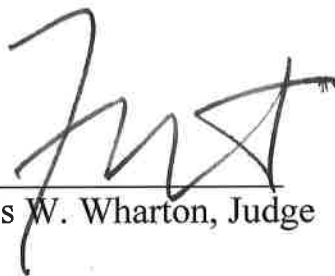
⁸⁰ *Id.* at 499–500. *See also* *Perrera v. State*, 2004 WL 1535815, at *1 (Del. June 25, 2004); *Maxwell*, 624 A.2d at 930–31.

⁸¹ *Slaney*, 2016 WL 281464 at *8 n.17 ("Defendant claims that the Court should have addressed Defendant's openness, honesty, cooperation and demeanor; awareness of his actions and

VI. CONCLUSION

The Court finds that the Court of Common Pleas' decision is supported by substantial evidence and is free of legal error. Therefore, the decision of the Court of Common Pleas is hereby **AFFIRMED**.

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read 'F. Wharton', is written over a horizontal line.

Ferris W. Wharton, Judge

explanation of 'goofing off'; normalcy in exiting his vehicle; unaffected speech, and; balance and posture. Even if the Court did address those facts specifically in its ruling, the Court's finding of probable cause would not have changed.").