SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
1 THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947
(302) 856-5257

June 19, 2017

Benjamin Warshaw, Esquire
Office of the Public Defender
14 The Circle, 2nd Floor
Georgetown, DE 19947

Matthew Keating, Esquire
Department of Justice
114 E. Market Street
Georgetown, DE 19947

RE: *James V. Auwerda v. State of Delaware*, Def. ID# 1401013792

DATE SUBMITTED: April 3, 2017

Dear Counsel:

Pending before the Court is the appeal of James V. Auwerda ("appellant" or "Auwerda") from several rulings of the Court of Common Pleas ("CCP") rendered when appellant was prosecuted in that court on a driving under the influence ("DUI") charge. This is my decision affirming the judgment below.

On January 23, 2014, appellant was arrested on a DUI charge. He sought a trial in CCP. He agreed to a non-jury trial. A bench trial commenced on December 9, 2014. Appellant was represented by private counsel at this point.

Before the trial started, the prosecutor explained to the Court that he was involved in several other matters occurring at the same time, some of which were taking place in Justice of

the Peace Court. He detailed the coverage he had on the other matters. He also explained that, at some point, he would need a break from the Auwerda trial to address at least one of those unrelated matters. The record makes clear that the prosecutor had control of all of the unrelated matters at the time the trial started, was focused on the trial, and was ready to start prosecuting this DUI trial. These facts are noteworthy because appellant maintains that the prosecutor did not have everything under control and thus, argues that the prosecutor wanted a mistrial to be ordered. The record does not support appellant's unsubstantiated statements that the prosecutor was harried and not prepared for trial.

Because appellant's motion to suppress was pending, CCP first heard testimony which pertained to this motion to suppress. The plan was that if, ultimately, the motion to suppress was denied, then CCP would incorporate by reference all of the admissible testimony offered in the suppression phase and move on with the trial testimony.

The first witness to testify was the individual who called 911 to report appellant as a possible impaired driver. This witness, who was an Emergency Medical Technician, was at the drive-through lane at McDonald's on Route 1 near Rehoboth, Delaware. The witness saw, in front of him, appellant driving a small green[1] sedan. Appellant was positioned too far from the drive-through window and had to get out of the car to pay for his food. When the witness reached the drive-through window, he discussed with the McDonald's employees their impression that appellant was intoxicated. The witness followed appellant and called 911, giving the 911 dispatcher the tag number and make and model of appellant's vehicle. While the witness was following appellant, he observed appellant drive into a snow bank as well as swerve a couple of

[1]Another witness later testified the color of the vehicle was silver, not green.

times to the right through the snow and back onto the road. Finally, appellant came to a stop at a residence. The witness stayed on the phone with the 911 Center and continued to report his observations.

The prosecutor attempted to submit a 911 DVD as well as a Certification from the 911 Call Center with an attachment which details information that is included on the 911 call. A dispute arose as to the admissibility of the Certification and attachment as well as the 911 DVD. Although defense counsel objected to the admissibility, he did question the relevance of the 911 tape since the witness already had testified to what he reported to 911.

The witness needed to establish the admissibility of the evidence was on her way to the trial to testify.[2]

The proceedings then broke for a few minutes. After the break, during a discussion at sidebar, the prosecutor reported that he and the police officer had smelled alcohol coming from the area of appellant. The prosecutor stated:

> And what I want – what I'd like is – we can go through the trial. I don't have a problem with that, but I don't want to come back and have him get another attorney and say that I showed up 'cause I was drinking, or anything else, and want a new trial because – I mean, he's going to have to put on the record that he's going to waive any right if he was drinking, is drinking, I don't know. But it – we can smell it. ....[3]

Defense counsel reported the following to the Court below. He had spoken with appellant after the prosecutor brought the smell issue to his attention. Defense counsel did not smell anything on appellant. Appellant told defense counsel he had been drinking the previous night

---

[2]Transcript of 12/9/14 Proceedings in CCP at 35.

[3]*Id.* at 47-48.

and that appellant did not feel he was under the influence. Defense counsel explained that he had told the prosecutor that if the prosecutor had concerns, then he could bring them to the Court's attention.

The Court discussed with counsel scenarios which could play out in this situation. It could request that a Portable Breath Test ("PBT") be administered to appellant and if he showed a reading, then the Court would declare a mistrial. If the Court did not order the PBT or if appellant refused the PBT and the Court allowed the trial to continue, then appellant, if convicted, could seek a new trial on the ground that his inebriation prevented him from effectively assisting his attorney. The Court also speculated that the prosecutor's allegation in a DUI case is a problem in and of itself, and stated, "So you might have poisoned the well already by bringing this to my attention...."[4] The prosecutor noted, and the Court agreed, that he had no choice but to bring the matter to the Court's attention. The Court also stated that it did not "think this is something ... [the prosecutor] wanted to do."[5] The Court further stated: "I gather it's not just you. It's other staff that noticed this, other people."[6] There was more discussion about various options available, particularly if a PBT was taken and no alcohol registered. The Court mentioned that no matter what, a mistrial most likely had to be declared.

Thereafter, a conference in Chambers was held. Defense counsel reported that he met with appellant and discussed with him about taking the PBT. Appellant refused to take the PBT. Appellant wanted to go forward with the trial. Defense counsel noted, however, that he agreed

---

[4] *Id.* at 50.

[5] *Id.* at 53.

[6] *Id.* at 54.

with the Court's opinion that there was no choice but to declare a mistrial.[7] The prosecutor stated that he felt, as an officer of the court, he had to bring the matter to the Court's attention and he did not raise the issue to create a mistrial.

A mistrial was declared.

Defense counsel moved for a dismissal of the charges on the ground that jeopardy had attached, and asserted that "[t]he State, without any independent evidence, completely eviscerated Mr. Auwerda's right to a fair trial by making the unsubstantiated accusation of alcohol consumption and/or impairment."[8]

Thereafter, defense counsel moved to withdraw, and CCP granted that motion.

In early March, 2015, CCP informed appellant that he needed to contact the Public Defender's Office for representation. In mid-May, 2015, appellant was sent a briefing schedule on the motion to dismiss and he was given 2 months to submit a brief. Appellant did not obtain representation by the Public Defender's Office and instead filed, *pro se*, a June 30, 2015, letter. Therein, he stated:

Concerning my case, I make a few points below. Some constitutional issues.

1. NOT Driving.
2. No warrant, let in by senior citizen.
3. No Miranda Rights.
4. Double Jeopardy.
5. No known audio or video.
6. No witnesses, Driving behind, no possible facial recognition. Described Green Car, my Car is silver.
7. Transcript requested no response from state. Funds sent in.
8. Mistrial. Not near any officer or prosecutor.

---

[7]Transcript of 12/9/14 Chambers Discussion at 2.

[8]Motion to Suppress Evidence at ¶ 6.

The case was assigned to another CCP Judge. After considering the *pro se* submission as well as the State's submission, the CCP Judge denied the motion to dismiss, ruling in an Order dated August 31, 2015, as follows.

Six of appellant's eight issues were not applicable to the motion to dismiss.

As to the Double Jeopardy claim, the Court found:

> The Defendant, through previous counsel's motion to dismiss, has alleged that the State made an unsubstantiated accusation that he was drinking on the day [sic] trial. After reviewing the record, there is no evidence that the prosecutor goaded the Court into declaring a mistrial. In fact, after lengthy discussion between the State, defense counsel, and the Court in chambers and in the courtroom, defense counsel agreed with the Court that there was no choice but to declare a mistrial. Defense counsel also agreed with the Court at trial that the State did not want to provoke a mistrial. [Footnotes and citations omitted.][9]

The Court interpreted appellant's last ground as an argument that declaring the mistrial was improper. The Court ruled:

> In this instance, the Court *sua sponte* declared a mistrial after speaking with the State and defense counsel, who both agreed with the Court's reasoning. At the end of the proceedings, the trial judge declared on the record that the facts he learned could have a prejudicial impact on the outcome of the case. [Footnote and citation omitted].[10]

The Court ruled the mistrial was declared out of manifest necessity and denied appellant's motion to dismiss.

Thereafter, the Public Defender's Office entered its appearance on appellant's behalf. Defense counsel renewed the defense's motion to dismiss on the issues of prosecutorial misconduct and double jeopardy. The Court denied the renewed motion summarily.

---

[9] 8/31/15 Order at 2.

[10] *Id.* at 2-3.

New counsel also demanded a jury trial, which CCP allowed.

The matter was scheduled for jury trial on December 4, 2015. Before the trial began, CCP entertained appellant's suppression motion. Because the suppression motion took so much time, the Court dismissed the jury. Thus, only the motion to suppress was addressed on December 4, 2015. The issues on the motion were: 1) whether the arrest was legal because the police officer did not have a warrant to arrest appellant and the police officer did not observe appellant in physical control of the vehicle, and 2) whether there was probable cause to arrest appellant for driving under the influence.

The first witness to testify was Kay Carrier, who works for the Delaware State Police at the 911 Center. She is the manager of the 911 Center and most of her work day consists of "making recordings from our audio system that we have and supplying attorneys and the Attorney Generals with the CAD sheet, which is our computer-aided dispatch records, and our audio records."[11] Through her, the State introduced a certification letter that is sent out with all requests, the CAD report and the CD audio of the 911 call. These materials are the items the prosecutor was having trouble introducing at the initial trial.

The arresting officer testified next. He testified to the following.

He was dispatched to a residence outside Rehoboth Beach, Delaware. Dispatch told him that there was a possible intoxicated driver about whom a reporting person had called and it gave him the vehicle's license number as well as the vehicle's location. He was not told there were any motor vehicle infractions. He parked on the street and observed a Silver Nissan Altima with the same license plate number given him by dispatch. He went to the front door and knocked. An

[11]Transcript of 12/4/15 Proceedings at 17.

older gentleman[12] answered the door. The officer introduced himself and the older gentleman asked what he could do for him. The officer asked who was driving the Nissan Altima and the older gentleman replied it was his son, who had just returned home. The officer asked if he could speak with him and the older gentleman told him he could, invited him in, and informed him that his son was in the kitchen.

The officer found appellant in the kitchen eating and observed a McDonald's bag and food. The officer asked him who was driving and appellant responded that he was driving and he had just returned from McDonald's. The officer could smell a strong odor of alcohol coming from appellant. When the officer asked him if he had been drinking, appellant informed him that he had had a scotch and beer the night before. Appellant's appearance was orderly, but his speech was extremely slow, he mumbled, and his eyes were very glassy and red. The officer also observed resting nystagmus, which is where the eyes were involuntarily jerking as appellant was trying to focus. The officer had learned that is an indication of a high intoxication level. The Court ultimately gave no weight to the nystagmus testimony because of the lack of an appropriate foundation.

The officer asked appellant if he would step outside and perform a standardized field sobriety test. Appellant agreed and willingly got up and walked out of the house with the officer. As they walked to the outside, appellant was extremely off balance, was stumbling, was stepping side to side and had difficulty walking. The officer verified appellant was not diabetic. Appellant failed every field test.

---

[12]The older gentleman was appellant's father. He was present to testify at the first trial. However, he died soon before this second proceeding.

The officer, considering the strong odor of alcohol, the slurred speech, and the clues from the failed field tests, concluded appellant was "highly, highly intoxicated."[13] Again, although the officer discussed resting nystagmus, the Court below did not consider that testimony.

The officer arrested appellant for a DUI.

The defense maintained that the arrest occurred when appellant was taken out of his home. The defense argued that the officer could not arrest appellant in this situation because he did not have a warrant for appellant's arrest and there were no exceptions to this warrantless arrest. According to the defense, 21 *Del. C.* § 4177(i)[14] limits a warrantless arrest to when a defendant is at a hospital or at a medical treatment facility, or when there has been an accident. The defense further argued that if the Court should find a warrantless arrest was legal, the police officer lacked probable cause to arrest appellant.

The Court below ruled as follows on the suppression motion. Appellant's father granted

---

[13]Transcript of 12/4/15 Proceedings at 54.

[14]Therein, it is provided:

> (i) In addition to any other powers of arrest, any law-enforcement officer is hereby authorized to arrest without a warrant any person who the officer has probable cause to believe has violated the provisions of this section, regardless of whether the alleged violation was committed in the presence of such officer. This authority to arrest extends to any hospital or other medical treatment facility located beyond the territorial limits of the officer's jurisdiction provided there is probable cause to believe that the violation of this section occurred within the officer's jurisdiction. This authority to arrest also extends to any place where the person is found within 4 hours of the alleged driving of a vehicle if there is reason to believe the person has fled the scene of an accident in which that person was involved, and provided there is probable cause to believe that the violation of this section occurred within the officer's jurisdiction.

the officer permission to enter his house.[15] Appellant was not in custody when he went outside with the police officer to take the field tests. The Court below stated: "The reasonable person would believe that they were not required at that point to comply with the order and that they did have the ability to say no."[16] The Court ruled:

> And I'm satisfied that under [21 *Del. C.*] § 4177(i) relying on Judge Smalls' ruling in the *Lawrence*[17] case which specifically addressed this, the warrant was not necessary under the circumstances and facts of this case. Having said that, the Motion to Suppress is denied.[18]

Trial in the matter finally took place on March 2, 2016, and appellant was found guilty and sentenced. He thereafter appealed to this Court.

Appellant advances the following two arguments on appeal: CCP erred in denying appellant's motion to dismiss the case on double jeopardy grounds and CCP erred in denying

---

[15]Appellant's father died soon before this December 4, 2015 hearing and thus, was unavailable to testify. There was some posturing and argument about whether the father granted this permission to enter and whether testimony on this issue could be heard; however, these arguments are irrelevant at this point.

[16]Transcript of 12/4/15 Proceedings at 101.

[17]*State v. Lawrence*, 2001 WL 1558338 (CCP May 17, 2001). In *Lawrence*, the defendant was arrested roadside for a DUI. The police officer did not see him driving, but was informed about his driving behavior. The defense made the same argument as was advanced here: that the section only pertains to those situations where the defendant is involved in an accident and is taken to a medical treatment facility or where the defendant has fled the scene and is found at another location. CCP ruled:

> ... I am not inclined to read this language as limiting the officer's ability to only those two situations. To engage in such statutory analysis would be to assign the first sentence of the statute little or no value. This is inconsistent with the principles of statutory construction and I decline to follow the suggestion of defendant.

[18]Transcript of 12/4/15 Proceedings at 113.

appellant's motion to suppress.

Standard of Review

As recently noted in *Slaney v. State*, 2016 WL 5946485, *3 (Del. Super. Oct. 7, 2016):

> The Superior Court is authorized to consider appeals from the Court of Common Pleas in criminal matters. FN 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. FN 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. FN 47 Factual findings by the Court of Common Pleas are given deference and are reviewed for clear error. FN 48 Legal questions are reviewed *de novo*. FN 49
>
> FN 45 11 *Del. C.* § 5301(c).
>
> FN 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)).
>
> FN 47 *Onkeo v. State*, 957 A.2d 2, at * 1 (Table) (Del. 2008).
>
> FN 48 *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).
>
> FN 49 *DiSabatino v. State*, 808 A.2d 1216, 1220 (Del. Super. 2002).

Questions of statutory construction are reviewed *de novo*[19] as are constitutional claims.[20]

Discussion

1) Double jeopardy

The first argument addressed is that double jeopardy prevented appellant's retrial.

A defendant may be retried if a mistrial was declared *sua sponte* by the trial court for reasons of manifest necessity.[21] An exception to this general rule exists where the prosecutor

---

[19] *Freeman v. X-Ray Associates, P.A.*, 3 A.3d 224, 227 (Del. 2010).

[20] *Butler v. State*, 95 A.3d 21, 31 (Del. 2014); *Sullins v. State*, 930 A.2d 911, 915 (Del. 2007).

[21] *Sullins v. State*, 930 A.2d at 914; *Bailey v. State*, 521 A.2d 1069, 1075 (Del. 1987).

intends to provoke the mistrial.[22] The Court relies on the objective facts and circumstances in determining whether there was prosecutorial misconduct.[23]

Appellant argues the factors to employ to determine if the State provoked a mistrial are those set forth in *State v. McCoy*.[24] In *McCoy*, the Superior Court explained that some factors the courts have used to determine if a prosecutor has provoked a mistrial are: 1) whether there were a series of overreaching acts prior to the misconduct, 2) whether the prosecutor resisted and was surprised by the motion for mistrial, 3) whether the case was going well for the prosecutor at the time of the misconduct, and 4) the prosecutor's level of experience.

In addressing this argument, appellant argues facts not supported by the record. First, appellant argues that the prosecutor did not have control over the case because he was juggling several matters. In fact, the prosecutor detailed for the record how all of the matters were under control and affirmed that he was ready to go to trial. Appellant next implies that the prosecutor sought a mistrial so that he would have the advantage of not having appellant's father at the next trial. This implication is absurd. Finally, appellant makes arguments concerning Kay Carrier, the witness through whom the 911 tapes would be introduced. He omits that she was on her way to the hearing and would have been available to testify if the trial had continued.[25]

The unsubstantiated facts make up the substance of appellant's argument that the prosecutor intended to provoke a mistrial. They are ignored and as a result, appellant has nothing

---

[22]*Sullins v. State, supra* at 916; *Bailey v. State, supra* at 1078.

[23]*Bailey v. State, supra*, citing *Oregon v. Kennedy*, 456 US 667, 679 (1982).

[24]2016 WL 7229893, *4 (Del. Super. Dec. 14, 2016).

[25]Transcript of 12/9/14 Proceedings in CCP at 35.

to support his contention that there was any overreaching and/or that the trial was going poorly for the prosecutor.

The Court below found no prosecutorial misconduct. The record supports this conclusion. Appellant has failed to meet his burden of establishing prosecutorial misconduct. The situation the prosecutor faced was a no win situation, something the prosecutor, the defense attorney, and the Court below acknowledged. The prosecutor smelled alcohol emanating from the area where appellant was. He had to bring the matter to the Court's attention. This was a non-jury DUI trial. The trial court had no choice but to grant the mistrial.

This double jeopardy argument fails.

2) Motion to suppress

Appellant, citing 21 *Del. C.* § 701[26] and 11 *Del. C.* § 1904,[27] argues that he could not be

---

[26]The pertinent portions of this statute provide:

§ 701 Arrest without warrant for motor vehicle violations.

(a) The Secretary of Safety and Homeland Security, the Secretary of Safety and Homeland Security's deputies, Division of Motor Vehicles investigators, State Police, state detectives and other police officers authorized by law to make arrests for violation of the motor vehicle and traffic laws of this State, provided such officers are in uniform or displaying a badge of office or an official police identification folder, may arrest a person without a warrant:

(1) For violations of this title committed in their presence....

[27]This statute provides in pertinent part as follows:

§ 1904 Arrest without warrant.

(a) 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:

(1) In the officer's presence....

arrested without a warrant. Appellant argues that, contrary to the State's position, 21 *Del. C.* § 4177(i) does not provide the officer with the authority to arrest without a warrant. In 21 *Del. C.* § 4177(i), it is provided:

> i) In addition to any other powers of arrest, any law-enforcement officer is hereby authorized to arrest without a warrant any person who the officer has probable cause to believe has violated the provisions of this section, regardless of whether the alleged violation was committed in the presence of such officer. This authority to arrest extends to any hospital or other medical treatment facility located beyond the territorial limits of the officer's jurisdiction provided there is probable cause to believe that the violation of this section occurred within the officer's jurisdiction. This authority to arrest also extends to any place where the person is found within 4 hours of the alleged driving of a vehicle if there is reason to believe the person has fled the scene of an accident in which that person was involved, and provided there is probable cause to believe that the violation of this section occurred within the officer's jurisdiction.

Appellant argues that the first sentence is limited by the second two sentences; i.e., the officer may arrest, without a warrant, for a DUI not committed in the officer's presence only those persons who 1) are in the hospital or other medial treatment facility or 2) are located within 4 hours of the alleged driving if they are believed to have fled the scene of an accident.

"It is well settled that statutory language is to be given its plain meaning and that when a statute is clear and unambiguous there is no need for statutory interpretation."[28] The plain language of the statute shows that the first sentence of 21 *Del. C.* § 4177(i) provides an additional situation where a law-enforcement officer can arrest a person without a warrant for a misdemeanor DUI not occurring in his or her presence: where he or she has probable cause to support an arrest for a DUI. The second two sentences extend the locations to where an officer may make an arrest beyond his or her normal jurisdiction. These two sentences do not in any way

[28] *State v. Skinner*, 632 A.2d 82, 85 (Del. 1993).

limit the first sentence. This argument fails.

Appellant argues generally that the Fourth Amendment provides greater protection to a person in their home than in other locations and thus, the statute does not apply in this case. This argument is not developed and thus, fails.

Appellant further argues that even if the statute is applicable, the police officer lacked probable cause in this situation. Appellant maintains the only information the officer had was a description of the vehicle, the vehicle's location and that there may be a possible DUI.

In the recent decision of *Altizer v. State,*[29] the Superior Court set forth the standard for reviewing a CCP decision addressing probable cause in connection with a motion to suppress:

> ... This Court reviews the Court of Common Pleas' denial of a motion to suppress after an evidentiary hearing for abuse of discretion. Whether probable cause exists is a mixed question of fact and law. Findings of fact are reviewed to determine whether there is sufficient evidence in the record to support those findings. And this Court "must adopt [the trial court's] factual findings and [the trial court's] reasonable inferences as long as there is sufficient evidence in the record to support them and the findings are not clearly erroneous." Those "factual findings can be based upon physical evidence, documentary evidence, testimonial evidence, or inferences from those sources jointly or severally." Also, under this deferential clearly erroneous standard of review, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Once the facts and reasonable inferences therefrom are properly established, "the issue is whether an undisputed rule of law is or is not violated."The trial court's formulation and application of legal concepts are reviewed de novo. And so, giving the proper deference to the Court of Common Pleas' factual findings, this Court reviews de novo whether there was probable cause for an arrest, as a matter of law. [Footnotes and citations omitted].[30]

The Court further explained:

> ... The legal principles involved here are well-established. Probable cause exists

---

[29]2017 WL 111729 (Del. Super. Jan. 11, 2017).

[30]*Id.* at *2.

> when a police officer possesses information which would warrant a reasonable man into believing that a crime has been committed. The wrongdoing at question here is the offense of driving under the influence as defined by Delaware's motor vehicle code. "While under the influence" is defined in Title 21, section 4177(c)(5) to mean that "the person is, because of alcohol or drugs or a combination of both, less able than the person would ordinarily have been, either mentally or physically, to exercise clear judgment, sufficient physical control, or due care in the driving of a vehicle." The evidence need not establish that the person is "drunk" or "intoxicated."
>
> ... Probable cause is measured, not by precise standards, but by the totality of the circumstances through a case-by-case review of ""the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."" In turn, our courts have long-recognized that "[p]robable cause is an elusive concept which avoids precise definition, lying somewhere between suspicion and sufficient evidence to convict." "Probable cause does not require the police to uncover information sufficient to prove a suspect's guilt beyond a reasonable doubt or even to prove that guilt is more likely than not." Rather, probable cause merely requires the State to present facts which are sufficient to show that "there is a fair probability that the defendant has committed a crime." "That hypothetically innocent explanations may exist for facts learned during an investigation does not preclude a finding of probable cause." When determining whether a particular arrest was supported by probable cause, the facts must be viewed under the totality of the circumstances then facing the investigating officer. Under the totality of the circumstances standard, facts are not viewed in isolation to assess the establishment of probable cause. And the totality of the circumstances standard takes into account a police officer's training, experience, observations, investigation, and any rational inferences drawn therefrom. At bottom, "[w]hat is required is that the arresting police officer possess a 'quantum of trustworthy factual information' sufficient to warrant a man of reasonable caution in believing a DUI offense has been committed."
>
> ... As a general rule, the burden of proof is on the defendant who seeks to suppress evidence. But once the defendant has established a basis for her motion, *i.e.*, the seizure was conducted without a warrant, the burden shifts to the State to show that the warrantless seizure was reasonable. And the burden the State must carry on such a motion to suppress is proof by a preponderance of the evidence. [Footnotes and citations omitted].[31]

CCP found that appellant's father granted the officer permission to enter his house and that appellant was not in custody when he went outside with the police officer to take the field

---

[31] *Id.* at **4-5.

tests. The smell of alcohol; appellant's glassy, red eyes; his motor skills problems; appellant's inability to pass the field tests; and the police officer's information that appellant had been driving a short period before the officer encountered him support CCP's conclusion that probable cause existed to arrest appellant for DUI.

The record supports CCP's findings and conclusions. Appellant's argument fails.

Conclusion

For the foregoing reasons, the Court affirms the decision of the Court below.

IT IS SO ORDERED.

Very truly yours,

/s/ T. Henley Graves

T. Henley Graves

cc: Prothonotary's Office
Clerk, CCP
CCP