IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
Plaintiff,	)	
	)	
	)	
v.	)	**Case No.: 104022279**
	)	
BOBBY J. HALL,	)	
	)	
Defendant.	)	
	)	

Date Submitted: December 14, 2011
Date Decided: February 2, 2012

MEMORANDUM OPINION ON DEFENDANT'S MOTION TO SUPPRESS

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WELCH, J.

I. Introduction

Pending before the Court is the decision on Defendant's Motion to Suppress which was filed and docketed with the Court on December 13, 2010. Defendant was previously charged by Information filed by the Clerk of the Court with several motor vehicle violations; First, the charging documents allege that on April 19, 2010 the defendant… "[d]id on W. 4th Street, Wilmington, DE stop/decrease speed without notice" allegedly in violation of 21 *Del.C.* §4155(c). In Count 2, defendant was charged with a violation of 21 *Del.C.* §4177(a) "driving his motor vehicle under the influence of alcohol in New Castle County." *Id.*

A hearing was held on defendant's Motion to Suppress on December 14, 2011. This is the Court's final Order and Opinion.

II. The Facts

Patrolman Mark B. Ivey ("Officer Ivey") testified at the suppression hearing. Officer Ivey has been employed with the City of Wilmington Police Department for the past three (3) years. His current duties are uniform services patrol, investigating DUIs, and monitoring other alleged motor vehicle moving or Title 21 violations. Officer Ivey received previous State Police Training which consisted of a forty (40) hour NHTSA Course. Officer Ivey was also trained on the Intoxilizer during his Police Academy Training in 2008.

On April 19, 2010 Officer Ivey was employed with the Wilmington Police Department and was performing his official duties at 4:00 a.m. in the area of the 900 block of West 4th Street. Officer Ivey was on routine patrol in a marked police vehicle. He was contacted by two Wilmington police officers at Central who informed him on a RECOM call that a silver Dodge Neon at 4th and Delaware Avenue was allegedly involved in a possible drug transaction. At that time, Officer Ivey was traveling on the 900 block of West 4th Street when he received the

RECOM call. He therefore traveled northbound on West 4th Street with his patrol partner and observed defendant's motor vehicle on a public street at approximately 4:00 a.m. at that location.

Defendant's Dodge Neon was eastbound on 4th Street. There was no other traffic in the vicinity. Officer Ivey observed the defendant make a "brief stop" and then observed the defendant's Dodge Neon travel southeast down on East 4th Street. The motor vehicle then changed lanes without a signal. Officer Ivey then observed the defendant at 4th and Jackson Street make a right turn from the wrong lane and travel under the I-95 overpass at 9th and Jackson Street. Officer Ivey then tracked the defendant's motor vehicle traveling eastbound from his patrol vehicle.

Officer Ivey testified that as soon as defendant made a right turn and failed to use his signal, he followed the defendant for several blocks and stopped the defendant on North Jackson Street.

Officer Ivey approached the driver's side of the vehicle and made contact with the defendant Bobby J. Hall ("defendant").

The defendant rolled down his window. Officer Ivey observed an "odor of alcoholic beverages" from the defendant's person as well as odor of alcoholic beverages emanating from the motor vehicle. The defendant conceded to Officer Ivey he had consumed two (2) beers prior to the traffic stop. Officer Ivey also identified a female in the passenger seat. Officer Ivey described the defendant as very "uncooperative".

Defendant was removed from his motor vehicle because he was disorderly, cursing and yelling at Officer Ivey. Officer Ivey temporarily detained defendant and when he exited the motor vehicle, he told the defendant he was temporarily being detained for officer safety, but was not, in fact, under arrest. He observed a "flushed red face" and an "odor of alcoholic

beverage" from defendant's breath. Officer Ivey described the defendant as having "glassy", "bloodshot eyes".

Officer Ivey testified he performed two (2) separate investigations; one for drugs and one for driving under the influence in violation of 21 *Del.C.* §4177.

When questioned, Officer Ivey learned that the defendant had a Pennsylvania driver's license.

Next, the defendant gave both Wilmington Police Officers verbal consent to search his motor vehicle which turned "negative results".

Because of the observations of the defendant, Officer Ivey performed several field sobriety tests of the defendant. First, defendant was instructed under the NHTSA guidelines and performed the Walk and Turn Test on the sidewalk at North Jackson Street. Officer Ivey described the weather as "clear." He gave the defendant proper instructions under the NHTSA guidelines for the Walk and Turn Test, including how to "walk heel-to-toe" and complete steps 1-9 and then turn around with a pivot turn and walk 9 steps backwards. Officer Ivey testified he observed eight (8) possible clues of the defendant while performing the Walk and Turn NHTSA Test. He considered the results a "failure". According to Officer Ivey, on steps 1-9, the defendant stepped off line and "nearly stumbled." When the defendant turned he did not make a complete pivot turn correctly. On steps 9-1 back the defendant stopped walking; he missed heel-to-toe; raised his arms; failed to finish the test; and otherwise did not complete the nine (9) steps back.

Next, after a proper foundation and NHTSA instructions, Officer Ivey requested the defendant perform the Horizontal Gaze Nastagnus Test ("HGN Test"). Officer Ivey

administered proper NHTSA instructions and testified he observed a total of six (6) clues of the defendant while administering the HGN Test.

After the HGN test, Officer Ivey testified that the defendant became more "uncooperative." When Officer Ivey observed the defendant when walking and the defendant showed a "lack of balance" during NHTSA Test and also was required to grab the side of his motor vehicle when he exited his motor vehicle to perform the field tests.

Based upon these observations officer Ivey testified that defendant was placed in handcuffs and transported to the Wilmington Police Department for the charge of Driving Under the Influence in violation of 21 *Del.C.* §4177(a).

On cross-examination Officer Ivey testified he actually had "one year on the street." In August 2009 Officer Ivey finished his Wilmington Police Officer field training. He testified he was westbound on 4th Street near the Hilltop area to investigate a possible drug transaction and was provided no other details by RECOM. Officer Ivey testified the defendant "properly" pulled over his motor vehicle. The defendant told Officer Ivey that he did not know where all the drugs were. Officer Ivey testified that he searched the motor vehicle and, in fact, found no drugs. Officer Ivey testified that defendant was placed in the squad car and hand cuffed when he was arrested for a violation of 21 *Del.C.* §4177. He observed the defendant's "glassy bloodshot eyes" and testified it may also be possible in the spring time for defendant's eyes to be bloodshot due to allergies.

On cross-examination Officer Ivey testified he is familiar with the NHTSA standards. He checked both defendant's eyes for four (4) seconds. Officer Ivey testified that it took one minute to complete the test and agreed NHTSA indicates 90 seconds as the NHTSA standard.

The defendant also took the stand and testified at the suppression hearing. Mr. Hall testified he was eastbound on 4th street. He believes he used his turn signal and did not commit any motor vehicle violations. The defendant also testified he observed two Wilmington Police Officers in their motor vehicle. When they approached him after the initial traffic stop they asked, "Where are the drugs?" The defendant testified he believed it wasn't a DUI investigation and believes he was, in fact, actually cooperative with the police. He testified the Police searched his motor vehicle for fifteen (15) minutes and could not find any drugs. He testified that he had exited the motor vehicle "very quickly" and was properly using his balance. He believes the Wilmington officers had a "attitude" because they found no drugs in his motor vehicle.

On cross-examination the defendant testified he was not drinking at the time; but, in fact, had a vodka drink earlier in the night. He believed he used his turn signal on Jackson Street and was 100% sure that he did not commit a motor vehicle violation. He testified he had however, in fact, committed a motor vehicle violation for failure to signal in 2008, contrary to his earlier testimony. On further cross-examination he testified he concedes he is a convicted felon.

III. Standard of Review.

"A defendant moving to suppress evidence bears the burden of establishing that a search or seizure violated his rights under the U.S. Constitution, the Delaware Constitution, or the Delaware Code."[1]

IV. The Law.

Under *State v. Maxwell*, 624, 926, 929-930, Del. Supr., (1993) probable cause has been defined as follows:

[1] *See Rakas v. Illinois*, 439 U.S. 128, 130 N.199 S.Ct. 421, 58 L.Ed.2d 387 (1978); *State v. Dollard*, 788 A.2d 1283, 1286 (Del. Supr. 2001; *State v. Bien-Aime*, 1993 WL 138719 at *3 (Del. Supr. March 17, 1993).

> …A police officer has probable cause to believe defendant has violated 21 *Del.C.* §4177… 'when the officer possesses' information which warrant a reasonable man in believing that such a crime has been committed. *Clendaniel v. Voshell*, Del.Supr., 562 A.2d 1167, 1170 (1989)… A finding of probable cause does not require the police officer 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. (citation omitted) . . . the possibility there may be a hypothetically innocent explanation of each of several facts revealed during the course of an investigation does not preclude a determination that probable cause exists for an arrest. (citation omitted) . . . 'probable cause exists where the facts and circumstances within [the officer's] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that 'an offense has been or is being committed.' (citation omitted).

See, also Delaware v. Prouse, 440 U.S. 663 (1979); *Coleman v. State*, Del. Supr., 562 A.2d 1171, 1174 (1989).

As indicated in *Spinks v. State*, Del. Supr., 571 A.2d 788 (1990):

> "Probable cause is an elusive concept which is not subject to precise definition. It lies, 'somewhere between suspicion and sufficient evidence to convict' and 'exists when the facts and circumstances within . . . [the officer's] knowledge . . . [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *State v. Cochran*, Del. Supr., 372 A.2d 193, 195 (1977).

"While driving under the influence," in relevant part, as set forth on 21 *Del.C.* §4177(c)(5) has been defined by the Superior Court in *Bennefield v. State*, 2006 WL 258306 (Del. Supr.) as follows:

> [A] According to the Supreme Court, <u>the evidence proffered 'must show that the person has consumed a sufficient amount of alcohol to cause the driver to be less able to exercise the judgment and control that a reasonably careful person in full possession of his or her faculties would exercise under like circumstances.' It is unnecessary that the defendant be 'drunk' or 'intoxicated' to be found guilty of driving while under the influence. 'Nor is it required that impaired ability to drive be demonstrated by particular acts of unsafe driving.' 'What is required is that the</u>

> person's ability to drive safely was impaired by alcohol.' Finally, an accused may be convicted under this statute based on admissible evidence '*other than the results of a chemical test* of a person's blood, breath or urine to determine the concentration or presence of alcohol or drugs.' *See Lewis v. State*, 626 A.2d 1350 at 1355. (Emphasis supplied).

With regards to the reasonable articulable suspicion, …"[Id] it is well settled that reasonable articulable suspicion is required to seize an individual and it must be based upon specific and articulable facts and cannot be based on a mere hunch."[2] Under the reasonable articulable suspicion test, a police officer "must point to specific and articulable facts when which, taken together with rational inferences from those facts reasonable warranting the intrusion."[3]

In *State v. Brohawn*, 2001 WL 1629086, at *3 (Del.Super., March 6, 2001) the Court rejected defendant's contention that the officer who conducted the traffic stop did not have reasonable suspicion because the officer who actually witnessed the traffic violation radioed ahead and another officer and the second Officer was the one who conducted the traffic stop. Such is the case pending here as RECOM contacted Officer Ivey and informed him of an alleged pending drug transaction.

V. Discussion

(a) The Defendant's Position:

The essence of defendant's Motion to Suppress is that he denies committing any traffic violations and steadfastly maintains he turned his signal on at Jackson Street. Defendant asserts there was therefore no reasonable articulable suspicion to stop his motor vehicle. The defendant asserts that a traffic stop is indeed a "seizure," and "hence subject to constitutional scrutiny".[4]

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[2] *See Terry v. Ohio*, 392 U.S. 1 (1968); *Jones v. State*, 745 A.2d 856 (Del. 1999).
[3] *See Coleman v. State*, 562 A.2d 1171, 1174 (Del. 1989) (quoting *Terry*, 392 U.S. at 21.
[4] *See United States v. Arvizu*, 543 U.S. 266, 273 (2002); *Caldwell v. State*, 780 A.2d 1037, 1045-46 (Del. 2001).

Defendant asserts at page three (3) of his Motion to Suppress that Police Officers must have probable cause to believe that a traffic violation has occurred as opposed to a random stop of a motor vehicle.[5] Defendant also asserts in his Motion at page 4 that the traffic stop was pretextual.[6] Hence, defendant's arguments in his Motion to Suppress Memorandum are that there was no reasonable articulable suspicion and probable cause for the stop of his motor vehicle under the totality of circumstances and that the stop was pretextual. Defendant also asserts Officer Ivey lacked probable cause for the violation of 21 *Del.C.* §4177 and §4155(c) charges filed with the Clerk by Information.

Finally, the defendant asserts at page 5 of his January 14, 2012 Motion that the Wilmington Police's actions also exceeded the lawful scope of a former traffic stop.[7] Defendant argues that once "seized" Fourth Amendment scrutiny is triggered and the level of scrutiny will hinge upon the nature of the seizure.[8]

(b) The State's Position:

The State contends in its Answering Memorandum filed with the Court that there is both reasonable articulable suspicion and probable cause for this traffic stop. The State argues at page 4 of its filing that Title 11, Sec. 9902 provides… "[t]hat a police officer may stop a person for investigatory stop when they have reasonable grounds to suspect the person is committing, has committed or is about to commit a crime and then they demand the citizen's name, address, business and destination."[9] The State argues Officer Ivey had reasonable articulable suspicion to stop the defendant for failure to signal an improper turn pursuant to Title 21 §4152(a)(1) and

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[5] *See McDonald v. State*, 947 A.2d 1073, 1077-78 (Del. 2008)(ruling that the driver's failure to signal as he exited the private parking lot was insufficient basis for State Trooper to conduct a traffic stop; *Del. v. Prouse*, 440 U.S. 648, 661 (1979).
[6] *See State v. Heath*, 929 A.2d 390, 411 (Del.Supr. 2006); *State v. Darling*, 2007 WL 1784185, Del. Supr. Witham, R.J., June 8, 2007.
[7] *See Michigan v. Chesternut, 486 U.S. 567, 573-74 (1980).*
[8] *See Alabama v. White*, 496 U.S. 325 (1990); *United States v. Robertson*, 90 F.3d 75 (3d Cir. 1996).

§4155(a) of the Delaware Code and since the defendant committed a traffic offense, the State therefore met its burden of proof for reasonable articulable suspicion.

The State also argues that the stop did not violate the defendant's Fourth Amendment rights because it was not pretextual.[10] Since the State has proven reasonable articulable suspicion existed in the form of a traffic violation, the burden then shifted to defendant to prove that an unrelated purpose motivated the stop and that a reasonable police officer would not have made the stop.[11] According to the State defendant must show the following:

1. He was stopped only for a traffic violation;
2. He was later arrested and charged with a crime unrelated to stop;
3. The crime or evidence of the crime was discovered as a result of the stop;
4. The traffic stop is merely a pretextual purpose, alleging that the officer had a hunch about/or suspected the defendant, of a non-traffic related offense unsupported by reasonable articulable suspicion; and
5. The pretext can be inferred, at least, when the suppression hearing is presented.[12]

The State therefore asserts in this suppression record that the defendant failed to prove any of the elements of a pretextual stop citing *Heath*. The State also asserts that clear probable cause exists in the record for an arrest for a violation of 21 *Del.C.* §4177 because of all NHTSA field tests and Officer Ivey's observance of the defendant which have been detailed into the suppression record indicating the defendant was impaired.

VI. Opinion and Order

The Court has carefully reviewed case law that applies to the instant case. The Court finds the officers observed the two motor vehicle violations of Title 21 before the stop of defendant which was not pretextual and were committed during the following of defendant by Officer Ivey in his plain view, clearly setting forth that reasonable articulable suspicion existed.

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[9] *See* 11 *Del.C.* §1902, *Coleman v. State*, 562 A.2d 1171, 1174, (Del. 1989).
[10] *See State v. Heath*, 929 A.2d 390 (Del.Supr. 2006).
[11] *Heath*, 929 A.2d 403.
[12] *Id.*

The Court also finds that when Officer Ivey received a phone call from RECOM that a drug transaction was being transacted by the defendant in his vehicle at the location on or about where the defendant was stopped, reasonable articulable suspicion existed for the stop of defendant's motor vehicle.. *See State v. Brohawn*, 2001 WL 1629086 (Del.Supr.)(March 6, 2001).[13]

Finally, the Court finds probable cause for this traffic stop and driving under the influence charges, 21 *Del.C* §4177 based upon the case law cited above. The Court finds the observations of the defendant set forth in the statement of facts by Officer Ivey and the fact that the defendant failed NHTSA tests; the Horizontal Gaze Standardized Test and Walk and Turn Test. As detailed above, the officer observed defendant had an "odor of alcohol" emanating from his person, a "flushed red face", "glassy", "bloodshot eyes", "disruptive disorderly behavior", difficulty in standing while exiting his motor vehicle, and a pale complexion. The defendant also made an admission of drinking alcohol, namely, two (2) beers before the stop, and made two (2) Title 21 traffic violations in front of Officer Ivey.[14] Clearly all these facts constitute probable cause for an arrest of §4177 and §4155 as well as reasonable articulable suspicion for the traffic stop and therefore the Court **DENIES** the defendant's Motion to Suppress. The Court also finds probable cause for a violation of 21 *Del.C.* §4155(c).

This matter shall be set for trial with notice to counsel of record at the earliest convenience of the Court.

IT IS SO ORDERED this 2nd day of February, 2012.

/S/ John K. Welch
John K. Welch, Judge

/jb
cc: Ms. Diane Health, CCP Case Manager

[13] The Court also finds reasonable articulable suspicion for the stop when the defendant committed two motor vehicle violations in Officer Ivey's presence while following his motor vehicle.
[14] Officer Ivey was not impeached when he gave this testimony to the Court.