IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE)	
v.) Case No. 101001	4627
STEVEN M. DAILEY,)	
Defendant.)	

Submitted: March 13, 2012 Decided: August 23, 2012

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Opinion

Steven M. Dailey ("Defendant") was arrested on October 20, 2010 for the offense of Driving A Motor Vehicle Under the Influence of Alcohol in violation of 21 Del. C. § 4177(a). The case was transferred to the Court of Common Pleas, New Castle County on February 18, 2011 and the State filed Information on March 4, 2011. Case Review was held on April 13, 2011, and the matter was set for trial on August 10, 2011. On August 10, 2011, the matter was continued at Defendant's request to November 9, 2011, and subsequently continued to January 5, 2012.

The trial commenced on January 5, 2012 and Corporal David Diana of the Delaware State Police testified as the State's witness. Trooper Diana testified he

observed the vehicle at 10:13 p.m. in the Town and County Center where the Arby's restaurant is located at 2713 Philadelphia Pike, Claymont, New Castle County Delaware. The Arby's restaurant appeared to be closed . . . it was dark inside and he did not see any customers in the building. The vehicle was visible from Philadelphia Pike, parked near street lights, and the engine was running. He was doing crime checks in the area as a result of recent commercial burglaries, and the Defendant's vehicle was the only car in the lot.

Trooper Diana testified when he asked Defendant why he was in the parking lot, he responded that he was in the restaurant and his car broke down. He detected a strong odor of alcoholic beverage; his eyes were watery and bloodshot. When asked had he consumed any alcoholic beverage, the Defendant first stated he had only one beer but later stated he had several beers. The Trooper asked Defendant to exit to perform field sobriety tests.

The first test administered was the Horizontal Gaze Nystagmus (HGN) and he detected 6 clues which indicate a .77% probability of impairment. On the second test, which was the Walk-and-Turn test, Defendant staggered off the line during all 18 steps; on the first 9 steps, he missed heel-to-toe on all steps; did not perform the turn properly; and on the second 9 steps missed heel-to-toe on all steps. On the third test, which was Balance test, he swayed and put foot down at counts 2, 3, 13, and 28. Based upon the results of the field test and physical observation, the defendant was then taken into custody.

The defendant moved to suppress the stop on the basis the Trooper did not have probable cause to arrest. I concluded that based upon the Trooper's observations and the defendant's performance on the field test, there was probable cause to take the Defendant into custody. Accordingly, the motion was denied.

During Corporal Diana's testimony, the State attempted to introduce evidence of the calibration and operation of Intoxilyzer machine No. 68-011970. These documents were offered to indicate the machine was operating properly before and after samples of Defendant's breath were taken. The Defendant objected to the admission of the Intoxilyzer certifications on the basis they were prepared and signed by Cynthia McCarthy, Delaware State Police Forensic Chemist, who had not been certified as an expert by any Delaware Court. Consequently, the Court heard all the evidence but reserved decision on Intoxilyzer certification and requested briefing on Ms. McCarthy's qualifications.

Discussion

The issue before the Court is whether Cynthia McCarthy, Delaware State Police Forensic Chemist, is qualified as an expert in the State of Delaware, such that she may certify the operation of the Intoxilyzer 5000 and 5000EN machines, so that police officers may rely upon such certification that the machines were functioning properly and accurately measuring the test breath samples.

It is well established in Delaware that the prerequisite to introducing the results of the Intoxilyzer test into evidence, the State must show that the Intoxilyzer machine as operating properly. To meet this requirement in part, the State must

show that calibration checks were performed by the State Chemist before and after defendant's breath was tested. *McConnell v. State*, 1994 WL 43751 (Del. Supr. 1999). The State must also show that the State Chemist who conducted the test certifying the machine is qualified to conduct the calibration checks and certify the machine.

The State argues that on September 29, 2011, the Superior Court after hearing testimony in *State v. Spruill*, C.A. 1103002449 (Supr. Sept. 29, 2011) involving McCarthy's qualification, held there was a sufficient basis to conclude she was an expert with qualifications to perform the necessary testing and make the required certifications.

The defense argues, relying upon a Superior Court's opinion in *State v. Anderson*, C.A. 1006007816 (Del. 2, 2010) that the Court should reject the certification because that case held McCarthy was not a qualified expert to certify the accuracy of the Intoxilyzer machines. He points to the Court's language which stated: "... the issue was the admissibility of the Intoxilyzer report without an expert, and my decision is that under these circumstances, because McCarthy has never been qualified and has never been scrutinized, I will not accept the Intoxilyzer report." Defendant thus argues that since he was arrested and tested prior to the September 29, 2011 certification of McCarthy, her testing before that date is not reliable and admissible.

Defendant's argument regarding the timing of McCarthy being held to be an expert is misplaced. In *Spruill*, McCarthy testified she had been employed with the Delaware State Crime Lab as a forensic chemist, for two (2) years as of December,

University of Pittsburgh, two courses at the Robert F. Berkenstein Institute on Alcohol and Highway Safety, and the Intoxilyzer 5000EN course at CMI, the manufacturer of the unit. Therefore, at the time McCarthy conducted the calibration checks on the machines involving the Defendant's October 20, 2010 arrest, she had completed all of her educational requirements. Further, she had been performing the duties of a forensic chemist for more than 12 months. McCarthy need only possess the education and training at the time she performed the calibration checks, the fact that she was found to be an expert by a court at a later date does not affect or invalidate her credentials. Thus, there is no merit to Defendant's argument the subsequent holding her as an expert is akin to an expest facto law.

Defendant next argues that the evidence is not sufficient to support a finding of guilty beyond a reasonable doubt for the charge of Driving While Under the Influence of Alcohol. Defendant argues that when he was first approached by the Trooper, he was legally parked in the Arby's restaurant parking lot on Philadelphia Pike, Claymont, Delaware. Since there was no driving and he was legally parked, there was no legal basis for the Trooper to approach his vehicle. This issue was resolved by the Court's ruling on Probable Cause and there is no basis to revisit the issue here.

Defendant argues that the State charged in the Information that he was driving the vehicle and there is no evidence of driving because he was parked when approached by the Trooper. This argument fails to take into account the language of

21 Del. C. 4177(C)(3) which provides, "Drive shall include driving, operating or having actual physical control of a vehicle." A Defendant has actual physical control of a vehicle when it is parked, with the engine running, the keys in the ignition, and the individual is in the driver position or in such proximity such that he is deemed to be in the driver position based upon the circumstances as observed by the Officer. The facts here clearly establish Defendant was in actual physical control and is properly charged in the Information.

I conclude that the facts establish that Defendant was properly detained and taken into custody for further testing. I further conclude Cynthia McCarthy is qualified to perform calibration checks on the Intoxilyzer on September 23, 2010 and October 26, 2010, thereby certifying the machine was functioning properly at the time Defendant's breath was analyzed. Thus, State's exhibits 1-6 are admitted.

The Intoxilyzer measured the Defendant's alcohol content as .166 at 11:13 p.m. This reading is greater than that provided in the statute; therefore, I am satisfied the evidence proves beyond a reasonable doubt that Defendant on October 20, 2010 was driving (i.e., actual physical control of) a vehicle while under the influence of alcohol, and he is found guilty.

So Ordered

Alex J. Smalls

Chief Judge

cc: Clerks' Office – The Clerk will schedule the case for sentencing

Dailey-OP July 2012