SUPERIOR COURT
OF THE
STATE OF DELAWARE

FRED S. SILVERMAN
JUDGE

NEW CASTLE COUNTY COURTHOUSE
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February 28, 2014

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RE: *Christopher Davis v. State of Delaware*
ID# 1103005290 FSS

Submitted: December 11, 2013[1]
Decided: February 28, 2014

On Appeal from the Court of Common Pleas – AFFIRMED.

Dear Counsel:

This is an appeal from a Driving Under the Influence conviction[2] after a bench trial. Defendant alleges four errors: First, he challenges the denial of his motion to suppress, arguing Defendant was arrested without probable cause. Second, he challenges the evidence's sufficiency. Third, he challenges his sentencing as a second offender, which was based on an out-of-state conviction. Finally, he challenges the trial court's summary denial of his motion for re-argument.

[1] Defendant's request for oral argument was denied October 8, 2013. The file was located by the Prothonotary and delivered to chambers December 11, 2013. See docket.
[2] 21 *Del. C.* § 4177.

Almost three years ago, a state trooper found Defendant at the scene of a nighttime one-car collision. From tire tracks, the car's position in the ditch, and other circumstantial evidence, the officer had cause to believe the driver failed to turn when entering a T-intersection, had driven across a stop-sign and into a ditch, 50 feet off the road.

After speaking with the Defendant at the scene, the trooper had cause to believe that Defendant was the driver and had been drinking. Defendant smelled of alcohol, his eyes were red and watery, and he admitted, "I had a few beers earlier." Then, Defendant performed three field sobriety tests with mixed results. Defendant passed two, but did not perform the other correctly. Defendant refused a portable breath test.

After that, because the trooper was alone and it was raining lightly, he decided to handcuff Defendant and take him to Delaware State Police Troop 9 to continue his investigation. At the police station, Defendant refused an intoxilizer test, and refused to perform more field tests. He also failed the Horizontal Gaze Nystagmus test and a balance test.

Defendant's refusing the intoxilizer test and failing the HGN and balance tests are the only evidence obtained after Defendant was handcuffed. In the end, the trial court placed little weight on them, focusing instead on the officer's testimony. So, Defendant's suppression motion was almost pointless. The trial court found probable cause was not required because taking Defendant to the station was only an investigatory detention, not an arrest. Actually, however, before he handcuffed Defendant, the state trooper had probable cause to arrest.

As to probable cause, Defendant's smell, appearance, his admission to drinking and his refusing to take a PBT, combined with his impaired driving, gave the state trooper ample reason to believe Defendant violated 21 *Del. C.* §4177, and to arrest him. The trooper was justified in taking Defendant to the police station for

further testing and investigation, including an intoxilizer test. In reaching that conclusion, the court is not ignoring the weather as a possible explanation for Defendant's driving. A possible innocent explanation, however, does not itself, knock-out probable cause. Further, it can be said that the weather increased the need for drivers to be more alert and sober at the time.

The probable cause analysis just provided, also justified the guilty verdict even if the trial court had not considered the HGN and balance tests. The trial court's decision to admit but then limit the weight of the HGN and balance tests at the police station was correct. But, taking all the evidence into account, if that were not true, the resulting error would be harmless beyond a reasonable doubt. Again, Defendant admittedly was drinking, his appearance and coordination reflected that. He feared what a PBT and an intoxilizer would show. And, he failed to control his vehicle to keep it on the road.

Defendant's challenge to his conviction as a second offender, based on an out-of-state conviction, is unadorned by details. Defendant merely recaps the State's position on sentencing as: "The State classified this plea as 'substantially similar to what would be reckless driving alcohol related in Delaware.' The State did not establish that the Maryland plea was a plea to a substantially similar statute nor did the State provide a certified copy of Defendant's driving record." That is Defendant's argument in toto. Delving into it, it appears the argument below centered on whether Defendant had been convicted in Maryland.

Twenty-one *Del. C.* §4177(e)(1) specifically defines a prior conviction to include conviction or other adjudication of guilt, participation in an educational course, or conditional adjudication of guilt or other diversionary program under a similar statute of any other state.[3] Defendant acknowledged serving 18 months probation before judgment for Driving While Impaired by Alcohol in Maryland, after

[3] *Stewart v. State*, 930 A.2d 923, 926 (Del. 2007).

blowing a .23. The trial judge found that satisfied 21 *Del. C.* §4177(e)(1)(d) and, accordingly, sentenced Defendant properly as a second offender.

Finally, it cannot be said that the trial court ignored the motion for re-argument. The trial judge specifically stated that the motion was denied and the matters raised through the re-argument would be pursued through the appeal. The denial of the re-argument, therefore, was not procedurally incorrect.[4]

Taking everything into consideration, there was more than enough evidence to justify what the arresting officer did. Moreover, there was more than enough evidence from which the trial court could find Defendant guilty, without even considering the evidence obtained after Defendant was handcuffed and placed in a police car. Further, it appears that Defendant was properly sentenced as a second offender, based on his plea and sentence in Maryland. And, his motion for re-argument was given due consideration.

For the foregoing reason, Defendant's October 11, 2011 conviction for Driving Under the Influence is **AFFIRMED.**

IT IS SO ORDERED.

Very truly yours,

/s/ Fred S. Silverman

FSS: mes
cc: Prothonotary (Criminal)

[4] *See Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26, 40 (Del. 2005).