COURT OF COMMON PLEAS
FOR THE STATE OF DELAWARE
WILMINGTON, DELAWARE 19801

John K. Welch
Judge

October 15, 2009

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Re: *State of Delaware v. John F. Gallagher*
Case No.: 0812009171

Date Submitted: October 7, 2009
Date Decided: October 15, 2009

MEMORANDUM OPINION

Dear Counsel,

Trial in the above captioned matter was held in the Court of Common Pleas, New Castle County Criminal Division on Wednesday, October 7, 2009.

The defendant was charged with two Counts of Traffic Violations filed by Information with the Clerk of the Court by the Attorney General. First, the defendant, John F. Gallagher, Jr., (the "defendant") was charged on or about the 13th day of December, 2008, in the County of New Castle with driving a vehicle upon Silverside Road, Wilmington, Delaware "while under the influence of alcohol or any drug or a combination of drugs and alcohol or with a prohibited alcohol content as set forth in Section 4177 of Title 21, or when said persons blood contains an illicit or

recreational drug as set forth in Section 4177 of Title 21". Second, the defendant was charged "on or about the 13th day of December, 2008, in the County of New Castle, State of Delaware, did drive a motor vehicle upon a public roadway known as Silverside Road, Wilmington, Delaware and did fail to give full time and attention or maintain a proper lookout while operating the motor vehicle" in violation of 21 *Del.C.* §4176(b).

Defendant filed a Motion to Suppress.[1] Following the receipt of all documentary evidence and sworn testimony, the Court reserved decision. This is the Court's Final Opinion and Order on Defendant's Motion.

I. The Facts.

Lauren Nicole Davis ("Davis") presented testimony at the Suppression Hearing. Davis resides in Wilmington, Delaware and on December 13, 2008 at 10:50 p.m. she was traveling on Marsh Road in New Castle County taking some friends home.[2] Davis was making a left turn at Marsh Road and stopped at a T-intersection in New Castle County to enter the neighborhood in order to drop her friend off. There were three (3) passengers in her motor vehicle. She was waiting for approximately one (1) minute when she suddenly "got hit" and suddenly became a "little bit in shock." Davis was hit in the rear of her motor vehicle which shattered her rear window, and pushed her car forward into the other lane of traffic. Davis

[1] Defendant withdrew as a basis for his Motion to Suppress that the State lacked reasonable suspicion for the stop.
[2] As the Court learned at the Suppression Hearing, Davis was actually on Silverside Road and did not recall the road because she was not familiar with the area.

testified that her car was "totaled". Davis then sat in her motor vehicle with her passengers "for a couple of minutes" and then pushed her motor vehicle to the other side of the road. The other driver in the motor vehicle, the defendant, exited his motor vehicle. Davis observed him leave from the driver's side door. Davis spoke with him briefly and asked him if he was going to call the police. Defendant told her to just call a tow truck and "we can call the police tomorrow."

Davis then instructed her friends in her motor vehicle to call the police after she briefly spoke with her father.

Davis' observations of the defendant, after she observed his face, were that there were no marks and no blood. Davis did not detect an odor of alcohol from defendant's person.

On cross-examination, Davis indicated that she is eighteen (18) years old but was seventeen (17) years of age when the accident occurred on December 13, 2008. Davis was attempting to make a left turn and there were double yellow lines with a shoulder on one side of the road. Davis is a student at Concord High School. Davis moved her motor vehicle onto the shoulder in the opposite direction in order to avoid traffic. The lighting in the area, according to Davis, was one light pole for the entrance way, which was a "T-intersection". No airbags "popped" in Davis' motor vehicle when it was struck and totaled by defendant's motor vehicle. Davis testified the defendant did exit his motor vehicle and ask Davis "Are you okay?"

Delaware State Trooper Joshua S. Walther ("Trooper Walther") arrived and spoke to Davis on December 18, 2008 at the scene of the accident. Trooper Walther also spoke to the defendant. Davis reiterated her testimony that she observed no cuts, bruises and nothing unusual about the defendant.

Trooper Walther presented testimony at the hearing[3]. He is a Delaware State Police Trooper at Troop 1. His duties involve patrol, DUI enforcement, traffic accident, criminal summons and investigating crashes at traffic stops. Trooper Walther was present on the day in question, December 13, 2008 at 10:50 p.m. and was performing the same official duties.

Trooper Walther was called by RECOM to a motor vehicle collision at 22:55 hours (10:55 p.m.) at Silverside Road and Grinnell Road. It took approximately nine (9) minutes to arrive at the scene where he found two (2) motor vehicles with damages at that location, which was in New Castle County.

Trooper Walther identified the defendant in the courtroom. Trooper Walther observed the defendant's SUV in the westbound traffic lane and a smaller Honda owned by Davis in the eastbound traffic lane facing westbound. He made contact with the defendant and Davis. Trooper Walther spoke with Davis first and inquired, "is everybody okay?" and/or "Do you need an ambulance?" Davis responded in the negative.

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[3] State's Exhibits No.: 1 and 2 were received into evidence which is Trooper Joshua Walther's successful completion of the DWI Detection and Standardized Field Sobriety Testing Course on April 19, 2003 (*State's Exhibit No.: 1*). *State's Exhibit No. 2* is Trooper Walther's New Castle County Police Certificate of Proficiency dated October 12, 1999.

Trooper Walther next spoke to the defendant at the scene on December 13, 2008. He provided testimony that the defendant was "slurring his words" and that the defendant "smelled of an odor of alcoholic beverage from his person". Trooper Walther testified he performed approximately 100 DUI arrests. When he further spoke with the defendant he noticed the odor of alcoholic beverage was now "a strong odor of alcoholic beverages" coming from defendant's person.

The defendant told him "I misjudged" my motor vehicle while driving and struck Davis. The defendant told Trooper Walther he believed Davis was going to turn left, but misjudged the timing of Davis' turn and struck the right side of her motor vehicle. The defendant first told him that he was coming from work, but further clarified when questioned that he was coming from a Christmas party at work. The defendant then told the Trooper that he had a "little bit of alcoholic beverages at the party."

Trooper Walther presented testimony that the defendant's eyes were "glassy" and "blood-shot". On redirect, he testified his AAIR report, however, simply referred to the defendant's eyes as "glassy". According to his AAIR report, defendant's face was "flushed". The defendant's attitude was marked as "cooperative" on the AAIR Report. The defendant produced his driver's license and registration and insurance card with no difficulty.

Next, Trooper Walther had the defendant perform some NHTSA approved field coordination tests. A proper foundation was established under *Zimmerman v.*

State, 693 A.2d 311 (1977) Del. Supr. (*See footnote)* for the Horizontal Gaize Nystagnus Test. As a result of performing those tests, the defendant exhibited six clues. According to Trooper Walther, the statistical reliability as to 77% of reliability as to the defendant with a .10 BAC is 4 out of 6 clues. Trooper Walther testified he observed all six clues on the defendant.

The defendant was then administered by Trooper Walther the Walk-and-Turn Test. The defendant passed. According to Trooper Walther the defendant passed because he had exhibited "less than 2 clues". Next the defendant did the One-Legged Stand Test which Trooper Walther testified the defendant exhibited 0 clues and passed.

The defendant was then given the Portable Breath Test ("PBT"), which this Court finds was administered properly and a proper foundation was properly established in the Suppression hearing by the State. The Court finds based upon the further colloquy by the defendant's counsel and the prosecutions *prima* facie proffer that the PBT was established as working administered properly and according to the operating instructions. The PBT was serviced at Troop 1 and was new PBT then given to Trooper Walther eleven (11) months ago. There was no new temperature gauge on the new model as new models have eliminated that feature. The PBT was taken out of the heated Trooper's motor vehicle and administered promptly to the defendant. The PBT was tested and all zeros were present on the calibration record

as working properly. According to Trooper Walther, the defendant failed the Portable Breath Test.[4]

On cross-examination Trooper Walther testified that RECOM called him and the actual location of the instant accident was Grinnell and Silverside Road, a T-intersection. Trooper Walther previous law enforcement experience was seven (7) years with the County and four (4) years as a State Trooper. He reiterated his testimony that the defendant told him he "misjudged going around Davis' motor vehicle" because the defendant thought Davis' motor vehicle was turning more quickly. The defendant told Trooper Walther he therefore struck her motor vehicle on the right side and Trooper Walther testified it was a "big hit". The damage to defendant's SUV vehicle was "heavy front-end damage." The defendant was out of the car when Trooper Walther arrived.

On cross-examination, Trooper Walther testified that the defendant was "slurring his words;" had "glassy eyes;" there was a "strong odor of alcohol beverages;" no balance difficulties, and that the defendant produced his driver's license and insurance card without difficulty. According to Trooper Walther, defendant did not appear to be mentally impaired when he spoke with him. The defendant was not given the Mental Acuity, Alphabet and Counting Test. According to Officer Walther, defendant answered questions with "appropriate responses".

[4] While the PBT results, if a proper foundation is present, may not be used for trial as proof beyond a reasonable doubt, 11 *Del.C.* §301, it may be given appropriate weight at a suppression hearing. *See e.g. State v. Ogden Blake,* Cr.A. No.: 0806028750, Del. CCP, Bradley, J. (Sept. 14, 2009). Hence the PBT may be a factor under the totality of circumstances to determine if probable cause exists.

When questioned by defense counsel whether the HGN reliability factor of 77% is affected when a defendant passes two other NHTSA approved field coordination tests, Trooper Walther indicated he was not aware of any scientific information or data which he could opine as charging the 77% reliability factor, given these results. The defendant passed the Heel-to-Toe Test and One Legged Stand test, but failed the PBT. According to Trooper Walther, since December 13, 2008, he has had 50 DUI arrests.

II. The Law.

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

> …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, 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 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).

"On a Motion to Suppress, the State bears the burden of establishing that the challenged search or seizure comported with the rights guaranteed [the defendant] by

the United States Constitution, the Delaware Constitution, or Delaware statutory law. The burden of proof on a motion to suppress is proof by a preponderance of the evidence." See *Hunter v. State*, 8783 A.2d 558, Del.Supr., No. 279, 2000, Steele, J. (Aug. 22, 2001)(Mem. Op. at 5-6). *State v. Bien-Aime*, Del.Super. Lexis 132, Cr. A. No. 1K92-08-326, Toliver, J. (March 17, 1993)(Mem.Op.) (citations omitted).

III. Final Opinion and Order.

It is clear from the evidence presented at the Suppression Hearing above that probable cause exists for the defendant's arrest for both traffic counts, Driving Under the Influence, in violation of 21 *Del.C.* §4177, as well as Inattentive Driving, in violation of 21 *Del.C.* §4176(b). The evidence indicated in the trial record that defendant was in a substantial, 'big impact' accident where he totaled Davis' Honda at 10:50 p.m; the defendant made an admission of consuming alcoholic beverages while at work; his eyes were "glassy"; his face was "flushed"; he was "slurring his words"; after further review the "odor of alcoholic beverage" from the defendant was "a strong odor", the accident can be attributed solely to the defendant and not Davis; the defendant failed the Horizontal Gaize Nystagnus Test with all six (6) clues; and, the defendant failed the Portable Breath Test. Although the defendant was cooperative with Trooper Walther during his investigation and passed two other NHTSA approved tests, the overwhelming evidence in the record based upon the totality of circumstances was that probable cause clearly existed to arrest the defendant for both traffic offenses, 21 *Del.C.* §4177 as well as 21 *Del.C.* §4176(b).

The Court must note that while the issue of probable cause for the two traffic offenses is pending before this Court, this Court had made a finding of proof beyond a reasonable doubt, 11 *Del.C.* §301 without an Intoxilizer 9000 or blood drawn phlebotomist report for cases with similar facts and circumstances. *See, Bennefield v. State*, 2006 WL 258306 (Del. Super., (2006); *State v. Blood*, 2009 WL 2859047 (Del.Com.Pl.); *State v. Singleton*, 2008 WL 5160110 (Del.Com.Pl.); *State v. Celestine Dorsey-Dixon*, Cr.A. No.: 0805033864, Del. CCP, July 27, 2009 (Welch, J.); *State v. Brian Singleton*, 2008 WL 5160110 (Del.Com.Pl.). The only facts different in the instant case is that while overwhelming evidence in the record and exists in this case for probable cause, unlike these four (4) cases, defendant passed two (2) NHTSA approved field coordination tests. Other than these distinguishing factors, probable cause clearly exists in the suppression record for both charged traffic counts in this case.

Before concluding, Judge Jurden crystallized in her ruling in *Bennefield* in citing Supreme Court precedent "[I]t is unnecessary that the defendant be 'drunk' or intoxicated' to be found guilty of driving under the influence. 'Nor is it required that impaired ability to drive be demonstrated by particular acts of unsafe driving'." [In this case, a rear end accident which totaled Davis' motor vehicle] "what is required is person's ability to drive safely was impaired by alcohol." (Emphasis supplied).

In this case, the State has made these predicated findings as proof beyond a reasonable doubt. 11 *Del.C.* §301.

This matter shall be set for trial at the earliest convenience of the Court and the parties.

IT IS SO ORDERED this 15th day of October, 2009.

John K. Welch
Judge

/jb

cc: Ms. Juanette West, Scheduling Manager
CCP, Criminal Division