

STATE OF DELAWARE,)
)
 v.)
)
 BERNARD ELLERBE,) Case No. 1306016966
)
 Defendant.)
)
)
)

Decided: January 27, 2014

Defendant Bernard Ellerbe was arrested on June 18, 2013 and charged with the offenses of (i) aggravated possession, (ii) drug dealing, (iii) conspiracy second, and (iv) possession of drug paraphernalia. Mr. Ellerbe was the passenger of a Lincoln Continental (the “Continental”). Keyon M. Hoyer was driving the Continental. The State charged Mr. Hoyer with the same offenses as Mr. Ellerbe. In addition, the State charged Mr. Hoyer with disregarding a stop sign in violation of 21 *Del. C.* § 4164(a). On

September 6, 2013, Mr. Ellerbe's counsel filed a motion to suppress (the "Motion") that challenged the validity of the traffic stop and subsequent search of the Continental and Mr. Ellerbe's person. The State responded to the Motion. On November 15, 2013, the Court held an evidentiary hearing (the "Hearing") on the Motion. The Court heard some argument and testimony but had to continue the hearing until December 20, 2013 due to some confusion among the parties as to the breadth of the Motion.

On December 18, 2013, Mr. Ellerbe's counsel filed a supplemental paper with the Court in support of the Motion. The State filed an additional paper in opposition to the Motion on December 19, 2013. On December 20, 2013, the Court reconvened the hearing, heard additional testimony and argument and, at the end of the hearing, reserved decision on the Motion.

After a review of the record, the applicable authorities, and the legal arguments and factual presentation made at the Hearing, the Court **DENIES** the Motion.

BACKGROUND

General and Procedural Background

Through the Motion, Mr. Ellerbe challenges the stop of the Continental, the subsequent search of the vehicle and his person, and Mr. Ellerbe's arrest. Mr. Ellerbe contends the traffic stop of the vehicle was improper as probable cause did not exist for stopping the Continental for disregarding the stop sign. Relying upon 21 Del. C. § 4101(a)(3), Mr. Ellerbe contends that the stop sign was on private property, Mr. Hoye was not in violation of 21 Del. C. § 4164(a) and, under *McDonald v. State*, 947 A.2d 1073 (Del. 2006), there can be no probable cause for an arrest for disregarding a stop sign when that stop sign is located on nonresidential, commercial property. Mr. Ellerbe also

contends that even if probable cause existed for the traffic stop there was not sufficient suspicion to justify an extension of the stop and subsequent search of the Continental and Mr. Ellerbe.¹ The Motion contends that the evidence obtained during the stop should be suppressed and the case dismissed because of this failure.

On November 15, 2013, the Court began a hearing on the Motion. At the Hearing, the State called one witness – Officer Nicholas Heitzmann of the New Castle County Police Department. Officer Heitzmann is one of the arresting officers (the other being Officer Richard Blackston of the New Castle County Police Department) and the affiant for Mr. Ellerbe’s arrest warrant. In addition to Officer Heitzmann’s testimony, the State produced DelDOT records concerning the traffic plans of Beaverbrook Plaza (the “Beaverbrook Plaza Plans”).²

Officer Heitzmann testified that he was notified by an undercover officer that the Continental failed to stop at the stop sign located at the exit of Beaverbrook Plaza onto Saienni Boulevard. Officer Heitzmann confirmed that the location was in New Castle County, Delaware. Officer Heitzmann went on to testify that the emergency equipment of the patrol car was activated prior to the intersection of Saienni Boulevard and Karen Court. Officer Heitzmann stated the Continental did not immediately stop but, rather, continued on at a slow speed through the intersection of Saienni Boulevard and Quindome Drive before finally stopping at the next intersection of Saienni Boulevard and Dillon Street.

¹ See *Caldwell v. State*, 780 A.2d 1037, 1046 (Del. 2001)(scope of the vehicle stop and any further police investigation must be reasonable under the circumstances).

² The State submitted the Beaverbrook Plaza Plans under Rules 803(6) and 902 of the Delaware Rules of Evidence through an “ordinary course of business” affidavit of Mike Cote, custodian of records for DelDOT. Mr. Ellerbe did not object to the introduction of the Beaverbrook Plaza Plans. As such, the Court admitted the plans for purposes of the hearing on the Motion without making any additional determination as to whether the Beaverbrook Plaza Plans were admissible under the applicable Delaware Rules of Evidence.

At this point, the evidentiary aspect of the hearing stopped. Next, the parties made arguments regarding the validity of the stop. Mr. Ellerbe argued that the stop was per se impermissible as Mr. Hoye had not violated 21 *Del. C.* § 4164(a) and therefore no probable cause existed for the initial traffic stop. The State countered with its argument in opposition, relying upon 21 *Del. C.* §§ 4101(a)(3) and 4164(a) as well as the Beaverbrook Plaza Plans that showed that the stop sign at the Beaverbrook Plaza exit onto Saienni Road was located there after a review by and approval of DelDOT. At this point, the Court took the issue under advisement and continued the hearing until December 20, 2013.

At the December 20, 2013 hearing, the State called Officer Blackston, Officer Heitzmann and Corporal Erik Meese of the Wilmington Police Department. Officer Blackston was the other arresting officer on June 18, 2013. Corporal Meese is a member of the K-9 unit of the WPD who, with his K-9 partner Rex, conducted an open air sniff of the Continental. After hearing his testimony, the Court finds Officer Heitzmann, Officer Blackston and Corporal Meese to be credible witnesses.

Facts Developed in Connection with the Motion

In addition to the facts surrounding the initial stop stated above, the State developed additional facts regarding the arrest at the December 20, 2013 hearing. Before stopping the Continental, Officer Heitzmann noticed that – after the emergency lights were activated -- the driver of the Continental moved about the interior of the vehicle in a way that seemed like the driver was trying to conceal something. Upon approaching the vehicle, and after asking for identification and vehicle registration, Officer Blackston

noted that the driver, Mr. Hoyer, appeared extremely nervous in that the veins in his neck were throbbing and his hands were visibly shaking.

According to Officers Blackston and Heitzmann, Mr. Hoyer and Mr. Ellerbe gave evasive and conflicting answers about who was the registered owner of the Continental. Eventually, Mr. Hoyer advised the officers that the vehicle was owned by Alonso Roberts. Officer Heitzmann testified that Mr. Ellerbe continued to speak on his cell phone despite requests to stop. Officer Heitzmann and Officer Blackston both testified that such behavior was suspicious. Officer Heitzmann, on cross-examination, also testified that Mr. Ellerbe's refusal to stop talking on the cell phone was alarming as the officers were unsure if Mr. Ellerbe was calling persons to come to the scene of the stop. Both Officer Heitzmann and Officer Blackston testified that Mr. Ellerbe had a large, mysterious bulge in his pocket. Officer Blackston stated the bulge was consistent with a weapon. At this point, the officers asked Mr. Hoyer and Mr. Ellerbe if there were any weapons in the Continental. On cross-examination, Officer Heitzmann stated that this was a normal question directed for purposes of officer safety.

After making these observations, Officers Heitzmann and Blackston extended the stop and called for Corporal Meese and Rex. Officer Heitzmann testified that Corporal Meese was called in order to have Rex conduct an open air sniff of the Continental. Corporal Meese testified that he arrived at the scene within 15 minutes after receiving the call from Officer Heitzmann. Upon seeing Corporal Meese and Rex, Officer Heitzmann said that Mr. Ellerbe emitted an audible sigh. Corporal Meese asked that the Continental's engine be turned off in order to ensure Rex's safety. Corporal Meese and Rex went around the Continental twice. Corporal Meese stated that Rex gave a positive

indication for the presence of controlled substances. During one pass, Rex tried to get into the Continental through an open window and began barking and biting at the interior upholstery of the vehicle. Officers Heitzmann's and Blackston's subsequent search of the Continental uncovered \$3,700 in United State currency and 837 bags of heroin. Officers Heitzmann and Blackston then arrested Mr. Hoye and Mr. Ellerbe.

ANALYSIS

Mr. Ellerbe contends that the evidence relating to his arrest should be suppressed because the State cannot demonstrate that this "seizure" was reasonable under the Fourth Amendment of the United States Constitution and Article I, Section 6 of the Delaware Constitution. Specifically, in this case, Mr. Ellerbe argues that the State did not prove that the stop of the Continental was based on probable cause and, even if the initial stop were proper, sufficient suspicion did not exist to justify an extension of the traffic stop until Corporal Meese arrived for the open air sniff. The State argues that the initial stop was supported by reasonably articulable suspicion and probable cause. In addition, the State contends that the facts testified to at the hearings demonstrated sufficient suspicion existed to extend the traffic stop until Corporal Meese arrived.

Under the Fourth Amendment, a traffic stop is reasonable if it is supported by reasonable suspicion or probable cause to believe that a traffic violation has occurred.³ The case law in Delaware is clear that while probable cause will serve as the basis for a traffic stop, only a reasonable articulable suspicion of criminal activity is required.⁴ In

³ See *State v. Richards*, 2010 WL 2802905 (Del. Super. July 13, 2010).

⁴ *State v. Caldwell*, 780 A.2d 1037, 1046 (Del. 2001) (Traffic stop must be justified at its inception by reasonable suspicion of criminal activity); *State v. Blank*, 2001 WL 755932, at *1 (Del. Super. June 26, 2001); see also *Howard v. Voshell*, 621 A.2d 804, 806 (Del. Super. 1992) ("While Delaware does not require that an officer have probable cause to stop and detain a motorist, the officer must still have at least a 'reasonable and articulable suspicion.'"); 11 *Del. C.* § 1902 ("[A] peace officer may stop any person

this case, Officers Blackston and Heitzmann had reasonable articulable suspicion, and probable cause, to believe that Mr. Hoye committed a traffic violation -- failing to come to a complete stop as the Continental exited Beaverbrook Plaza. These officers had been notified that the Continental had “rolled through without making a complete stop” at the stop sign by an undercover officer who observed the violation.

Mr. Ellerbe contends that the stop was not supported by probable cause because Mr. Hoye cannot be charged under 21 *Del. C.* § 4164(a). Mr. Ellerbe points out that Beaverbrook Plaza is a private nonresidential commercial property and the roadway exiting Beaverbrook Plaza is also private. Furthermore, Mr. Ellerbe relies upon 21 *Del. C.* § 4101(a)(3) which provides that 21 *Del. C.* § 4164 does not “apply upon any nonresidential, commercial property.” As such, Mr. Ellerbe concludes that no probable cause can exist when the alleged traffic violation occurs on private property.⁵

The State counters by contending that the provisions of Title 21 are specifically applicable in this instance. The State also relies upon 21 *Del. C.* § 4101(a)(3). The State says that this subsection provides that 21 *Del. C.* § 4164 applies upon highways and “elsewhere” throughout the State, and that “elsewhere” is defined to mean “only those areas regulated by traffic-control devices which have been reviewed and approved as acceptable for the areas by the Delaware Department of Transportation.”⁶

Upon initial review, 21 *Del. C.* § 4101(a)(3) seems internally inconsistent when applied to the facts here. Beaverbrook Plaza is a nonresidential, commercial property and thus 21 *Del. C.* § 4164(a) does not seem to apply. However, the evidence is clear that the

abroad...who the officer has reasonable grounds to suspect is committing, has committed or is about to commit a crime, and may demand the person’s name, address, business abroad and destination.”).

⁵ See, e.g., *McDonald v. State*, 947A.2d 1073 (Del. 2006).

⁶ 21 *Del. C.* § 4101(a)(3).

stop sign at the Beaverbrook Plaza exit onto Saienni Boulevard is regulated by a traffic-control device that was reviewed and approved by DelDOT.

This is not the first time this Court has addressed this situation. In *State v. Brown*, C.A. No. 1001013876, 2010 WL 2878246 (Del. Super. July 22, 2010), the defendant in a motion to suppress made the same argument forwarded by Mr. Ellerbe. After a hearing, the Court denied the motion to suppress, holding that 21 Del. C. 4101(a)(3) clearly reflects an intent that motor vehicle operators must honor stop signs whether they are travelling on a public roadway or a private roadway.⁷ The Court also held that the defendant's reliance on the argument that he did not commit a traffic violation was misplaced because even if the Court found that no traffic violation was committed, the motor vehicle stop and resulting seizure would not be *per se* invalid if the stop were supported by reasonable articulable suspicion.⁸

This Court agrees with the reasoning articulated in *Brown*. Title 21 evidences an intent that motor vehicle operators must stop at DelDOT regulated stop signs.⁹ And, while the State may not succeed on proving beyond a reasonable doubt that Mr. Hoye violated 21 Del. C. § 4164(a), the State clearly demonstrated in this case that reasonable articulable suspicion existed and that the driver of the Continental violated that statute or other provisions of Title 21. Therefore, the Court holds that Officers Blackston and Heitzmann did not violate the Fourth Amendment when they stopped the Continental.

⁷ *Brown*, 2010 WL 2878246, at *1 n. 16.

⁸ *Id.*(citing to *State v. Brohawn*, 2001 WL 1629086, at *3 (Del. Super. Mar. 6, 2001) (“Even assuming that the Defendant might ultimately prevail in defending against the traffic violation, the law does not require an officer to possess proof beyond a reasonable doubt before stopping a vehicle for a traffic offense.”)).

⁹ This intent is demonstrated elsewhere in Title 21. *See, e.g.*, 21 Del. C. § 4165 (even where no stop sign, driver should stop and yield right of way before emerging from alleys, driveways, private roads or buildings onto public highway).

Under Delaware law, the State must demonstrate that the scope of the vehicle stop and any further police investigation must be reasonable under the particular circumstances present in the case.¹⁰ The traffic stop and inquiry must be reasonably related in scope to the justification for their initiation.¹¹ Moreover, the duration and execution of a traffic stop is necessarily limited by the initial purpose of the stop.¹² Whether terminated by the issuance of citation or not, the vehicle must be released unless the driver voluntarily consents to further questioning or the officer uncovers facts that independently warrant additional investigation.¹³ Whether a given detention is unreasonably attenuated from the initial purpose of the traffic stop necessarily involves a fact-intensive inquiry in each case.¹⁴

The Court holds that the State has demonstrated that the extension of the traffic stop of Mr. Hoyer and Mr. Ellerbe was reasonable under the facts present in this case. The testimony at the hearing demonstrated that the Continental drove at a slower than normal speed once Officer Blackston activated the patrol cars emergency equipment. Additionally, the Continental took longer than normal to stop, going through a number of intersections before finally pulling over (approximately 350 feet according to Officer Blackston). Officer Heitzmann stated that the driver appeared to be moving about strangely in the vehicle as if to hide something. Upon contacting Mr. Hoyer and Mr. Ellerbe, the officers noticed that Mr. Hoyer seemed unusually nervous with shaking hands and abnormally pulsating neck veins.

¹⁰ See *Caldwell v. State*, 780 A.2d 1037, 1046 (Del. 2001).

¹¹ See *id.* at 1047-48.

¹² See *id.*

¹³ See *id.*

¹⁴ See *id.*

Mr. Hoyer and Mr. Ellerbe were evasive when asked about who was the registered owner of the Continental. Mr. Ellerbe continued to talk on his cell phone despite being asked to put it down. Officer Heitzmann also noticed a bulge in Mr. Ellerbe's pocket that resembled a bulge that might have been made by a gun. After making these observations, Officers Blackston and Heitzmann called Corporal Meese. Corporal Meese arrived within fifteen minutes with Rex. Corporal Meese and Rex then did an open air sniff during which Rex gave a positive indication for the presence of controlled substances.

Based on all these facts, the Court finds that the scope of the vehicle stop and further police investigation was reasonable under the particular circumstances present in this case. Here, Officers Heitzmann and Blackston and Corporal Meese uncovered facts that independently warranted additional investigation, Corporal Meese arrived promptly, and, after the open air sniff, conducted a search that led to the subsequent arrest. Accordingly, the Court holds that the State did not violate Mr. Ellerbe's Fourth Amendment rights during the traffic stop and subsequent investigation on June 18, 2013.

CONCLUSION

For the reasons stated in this opinion, the Court **DENIES** the Motion.

The Clerk of the Court shall set this matter for trial.

IT IS SO ORDERED.

/s/ *Eric M. Davis*

Eric M. Davis
Judge