IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No.: 1210019022**
	)	
MICHAEL KANE,	)	
	)	
Defendant.	)	
	)	

Date Submitted: January 20, 2014
Date Decided: February 12, 2014

Upon Defendant's Motion to Suppress; GRANTED

Jenna Milecki, Deputy Attorney General
Department of Justice, 820 N. French Street, 7th floor, Wilmington, DE 19801
Attorney for the State of Delaware

Louis B. Ferrara, Esquire
Ferrara & Haley, 1716 Wawaset Street, Wilmington, DE 19806
Attorney for Defendant

WELCH, J.

I. Introduction

Before the Court is Michael Kane's ("defendant") Motion to Suppress ("Motion") filed with the Clerk of the Court February 28, 2013 seeking to suppress all evidence, including but not limited to the blood draw of the defendant on the date, time and place in the charging documents, October 6, 2012 in New Castle County. The defendant's Motion alleges multiple violation of his State, Federal and Constitutional rights including, but not limited to, that there was no reasonable articulable suspicion to stop the defendant; no consent to draw his blood, which was allegedly done improperly, and finally that the arresting officer lacked probable cause for the defendant's arrest of all motor vehicle charges.

The Suppression Hearing was held on December 12, 2013. Following that hearing, this Court issued a Briefing Schedule to counsel of record and requested counsel of record to provide case law or statutory authority that applies to the alleged oral consent given by the defendant to the investigating trooper to draw blood, and its direct applicability to the U.S. Supreme Court decision in *McNeely*.[1] Counsel was also requested to provide written closing statements on this issue, as well as the ultimate issue, namely whether there was probable cause to arrest the defendant for an unreasonable speed violation under 21 *Del.C.* §4168(a), as well as the Driving Under the Influence Charge on the date, time and place in the charging documents, 21 *Del.C.* §4177(a).

II. The Facts

(a) The State's Case.

Walter Kaspereen ("Kaspereen") testified at the Suppression Hearing. He is forty-four (44) years old and has resided in Delaware since the year 2000. Kaspereen and was at Honda East Motor Sport ("Honda East") in Bear, Delaware, New Castle County to drop off a friend on

October 26, 2012. Kaspereen was pulling from the Honda East parking lot crossing Route 40 and attempting to make a left turn and was struck by the defendant. Kaspereen was driving a Honda mini-van. The defendant was operating a motor cycle. He testified further there were two lanes and a median and two turning lanes at that location. Prior to being struck, Kaspereen was attempting to turn left when the defendant struck him with his motorcycle. Kaspereen pulled out of Honda East and testified he could not see "anyone coming" and suddenly, the defendant's motorcycle struck his door. Kaspereen was in the middle of the intersection, but never saw the defendant before he was struck by his motorcycle. Kaspereen's motor vehicle airbags deployed when the motorcycle struck him on the vans passenger side door. A diagram was introduced into evidence showing the date, time and location of the accident. The weather conditions according to Kaspereen was that it was a "clear day, no rain" and was apparently "near dusk". When Kaspereen exited the vehicle he saw the defendant on the street. He testified the defendant appeared to look "dazed" and was lying in the roadway.

A State Trooper arrived several seconds later and asked Kaspereen, "Are you okay?" Kaspereen testified that he was locked in his car because of the accident for approximately fifteen (15) minutes. He was subsequently cut out of his vehicle by the police with equipment used at accident scenes by the state police.

On cross-examination Kaspereen testified he was dropping off a friend at the Honda dealership and did not see the defendant's motorcycle before it struck him. It was approximately 6:30 pm when the accident occurred. Kaspereen testified he observed no helmet on the defendant. The State Trooper appeared shortly after the accident at the scene. Kaspereen also testified that he did not hear "any braking" by the defendant. His door was crushed in on the

[1] *See, Missouri v. McNeely, 133 S.Ct. 152, 185 L.Ed 2nd 696, 2013 WL 1628934* (April 17, 2013).

passenger side of his van by the defendant's motorcycle. His van was subsequently deemed "totaled".

On re-direct examination, Kaspereen testified he could see two-to-three football fields down the road and never saw the defendant travelling on his motorcycle toward his motor vehicle.

Trooper Gregory P. Gaffney ("Trooper Gaffney") testified at the Suppression Hearing.

Trooper Gaffney is employed by the Delaware State Police at Troop 2 for the past two and a half years. Trooper Gaffney was performing traffic enforcement on the date and time in the charging documents, October 26, 2012.[2] Trooper Gaffney is also certified to administer the Horizontal Gaze Nystagnus and other NHTSA Field Tests. He graduated in 2011 from the standard six month training program with the Police Academy.

On October 26, 2012 Trooper Gaffney testified he was on duty and routine patrol at Route 40 Pulaski Highway in New Castle County prior to the accident in question. His attention was drawn to a motor vehicle accident near Route 40 Westbound which he heard on the radio. He proceeded to the accident scene. Trooper Gaffney testified he "heard the bang from the accident" because he was in the locality eastbound on Pulaski Highway when he responded.

Trooper Gaffney arrived at the accident scene. He observed a motor vehicle van on the highway and the defendant lying on the ground on his side. There were two traffic lanes and a median at the location of the accident. The van was located near the median on the grass eastbound with an occupant behind the steering wheel.

[2] He routinely performs traffic stops and DUI arrests. A copy of his certificate of Delaware State Police training was marked as State's Exhibit No.: 1 and received into evidence indicating he has successfully completed police training for 24 hours of DUI Detection and Standardized Field Sobriety Testing.

Trooper Gaffney spoke with owner of the motorcycle who was lying on the roadway Pulaski Highway Eastbound. He identified the defendant in the courtroom.

Trooper Gaffney testified the defendant appeared to be "out of it." He instructed the defendant to "Stay where you are". Trooper Gaffney then called for an ambulance for medical assistance. He observed the defendant's motorcycle four-to-five feet away and directed traffic away from the accident scene until the ambulance arrived.

Trooper Gaffney testified the defendant had a head injury and a mark on the back of his head. There was also blood on the ground. He observed a "slight" detection of alcohol from the defendant and the testified defendant's eyes appeared "glassy". Trooper Gaffney testified his focus was on traffic control and not the accident control because of traffic conditions.

An ambulance and EMT group arrived at the scene and transported defendant to the Christiana Hospital.

Trooper Gaffney arrived at the hospital. He spoke to the defendant who he described as "very cooperative" and "coherent". At the hospital Trooper Gaffney testified he could now smell a moderate "odor of alcoholic beverage" one foot away from the defendant in the hospital. The defendant was "not handcuffed". A phlebotomist was present and Trooper Gaffney spoke with the defendant. Trooper Gaffney testified the defendant then verbally consented to a phlebotomist draw of his blood.

The blood was drawn by Christiana Hospital Phlebotomist from the defendant's left hand.

As to the blood draw procedures, Trooper Gaffney testified he gave the Phlebotomist a kit from the Delaware State Police prior to the blood draw. Trooper Gaffney observed the Phlebotomist opened the kit; cleaned the area about the defendant's arm; and he subsequently

saw blood drawn into the tube. Trooper Gaffney testified the blood was then placed into an evidence locker at the State Police Troop according to State Police Procedures. Trooper Gaffney testified he observed the blood "going into the tube" and an actual sample drawn from the defendant. Trooper Gaffney testified the defendant at that time told him "I believed I am over the limit" and then "verbally consented" to the blood draw.

On cross-examination Trooper Gaffney testified the odor of alcohol at the scene was a "slight odor" and at the hospital there was a "moderate odor" from the defendant. The defendant's face, according to Trooper Gaffney, on cross-examination was normal, but the defendant's eyes were "glassy" but his clothing description was "normal". Trooper Gaffney reiterated there was blood on the ground at the accident scene near the defendant and blood was also coming from defendant's head.

Trooper Gaffney testified the blood draw was at 21:09 hours or approximately 9:09 – 9:10 PM. The accident happened at 18:00 or 6:00 PM which was three (3) hours later, not one hour as set forth in his oral testimony on direct examination. Trooper Gaffney testified on cross-examination that he never saw the motorcycle in motion or actually being driven by the defendant. Trooper Gaffney testified he is also not an accident reconstructionist. Trooper Gaffney first saw the defendant lying on the ground with his knees up and bleeding from his head, and lacerations on his head and that "it appeared defendant had a head injury."

Trooper Gaffney testified the defendant was "moaning" and needed immediate medical treatment. He testified he does not know when or what time the accident "actually occurred". Trooper Gaffney testified he drew blood three (3) hours after the accident and was unaware if defendant was treated with any alcohol for abrasions or otherwise or his face or body prior to the blood draw.

Trooper Gaffney testified further on direct the defendant was in the treatment room when he arrived at the hospital. According to Trooper Gaffney "a lot of hospital personnel" were in the room. He also recalls an IV tube in the defendant and reiterated the defendant told him he had been drinking and quoted him as stating "I was probably over the limit." Trooper Gaffney was unsure if the defendant was medicated for his broken pelvis at the time he was administered the blood draw or whether he was receiving any painkillers or antibiotic treatment while he was in the room prior to the blood draw. Trooper Gaffney testified he believed the defendant verbally consented to the blood draw.

(b) The Defendant's Case.

Michael Kane ("defendant") presented testimony as the defendant's case-in-chief. Defendant has been employed as a Wilmington Fire Fighter for the past twenty-four years. He is a lieutenant and is 48 years old. He recalls October 26, 2012 when he was driving down the road and a vehicle pulled in front of his motorcycle. Defendant testified he "couldn't stop" and doesn't recall the events after the collision.

Defendant also testified that he does remember the van pulled in front of him and his motorcycle struck it when it stopped after it pulled out of Honda East. The defendant further testified he was not wearing a helmet on the date and time he was driving his motorcycle, and defendant testified he "turned the motorcycle on its side" before striking or coming near the Kaspereen's motor vehicle. There were no other motor vehicles in the roadway and he testified he "put his bike down". Defendant recalls being in "a lot of pain" and that his legs "hurt." He was then taken to the hospital by EMT personnel. Defendant testified he was in the hospital for four (4) weeks and rehab for four (4) months. He testified he was "off work" for an extended period of time or approximately nine (9) months. Defendant testified that he does not recall

speaking to the officer or all other events in the hospital. He testified he had seven (7) screws and a plate put in his pelvis following the accident. He testified his heart coded twice, and actually stopped during the medical procedures at the hospital. Defendant testified he had bleeding in the pelvic area and that he was in "substantial pain."

Defendant also testified that he was losing a lot of blood which caused a "trauma alert". Defendant testified he actually coded twice, which means his heart stopped. He testified he does not have "any recollection" of speaking to the police officer or at the hospital, or at the scene because of the amount of pain. Defendant also does not recall receiving the blood transfusions and testified he was drinking "several beers" on the date, time and place before the accident. Defendant testified he has been driving the motorcycle for approximately five (5) years and was travelling, he believed, approximately 40-55 miles per hour prior to the accident.

Defendant testified he does not remember "being handcuffed" as well as many of the events in the hospital. He does not remember the blood actually being drawn by he phlebotomist. He testified he had "some beer" prior to the accident on cross-examination and ate a late lunch at 3:30 pm on October 25, 2012.

III. Standard of Review

On a Motion to Suppress, the State bears the burden of establishing that the challenged search or seizure comported with the rights guaranteed to the defendant by the United States Constitution, the Delaware Constitution and Delaware Statutory law.[3] The burden of proof on a Motion to Suppress is proof by a preponderance of the evidence.[4]

[3] *See Hunter v. State*, 783 A.2d 558, 560-561 (Del. 2001).

IV. The Law.

An individual's right to be free from unreasonable government search and seizures is secured by the Fourth Amendment of the United States Constitution. This right applies to the States through the Due Process Clause of the Fourteenth Amendment.[5]

As to reasonable suspicion, the Delaware Supreme Court has held that "[i]n certain circumstances… law enforcement officers may stop or detain an individual for investigatory purposes… if the officer has reasonable articulable suspicion to believe the individual could be detained is committing, has committed or is about to commit a crime."[6] "The Court will defer 'to the experience and training of law enforcement officers' in determining whether there was reasonable articulable suspicion to justify detention."[7] "Law enforcement officers must demonstrate reasonable articulable suspicion by pointing to "specific and articulable facts, taken together with rational inferences from those facts, reasonably warrant the intrusion."[8] "The Court must examine the totality of circumstances surrounding the situation as viewed through the 'eyes of a reasonable trained police officer in the same manner or similar circumstances, combining the objective facts with such an officer's subjective interpretation to those facts' and determine reasonable articulable suspicion."[9]

As to probable cause, the case law is clear in that a police officer "has probable cause to believe a person was driving, operating or in visible control of the vehicle in violation of §4177 of Title 21 and may draw blood for that purpose." *See 21* Del. C. §2740.

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[4] *See State v. Bien-Aime*, Del.Supr. Cr.A. No.: IK92-08-326, Toliver, J. (March 17, 1993)(Mem.Op.)(*citations omitted).*
[5] *See Mapp v. Ohio*, 367 U.S. 643, 655 (1961).
[6] *See Woody v. State*, 765 A.2d 1257, 1262 (Del. 2000).
[7] *Id.*
[8] *Id.* at 1262-64 (*citation omitted).*
[9] *Id. (citations omitted).*

"Probable cause arrests for a DUI offense exists when an officer possesses 'information which would warrant a reasonable man in believing [such] a crime has been committed.'" *See State v. Lefebvre*, 19 A.3d 287, 292 (Del. 2011); *Bease v. State*, 884 A.2d 495, 497-98 (Del. 2005); 21 *Del. C.* §2740.

Police are required to present facts that suggest "by the totality of circumstances, that there is a 'fair probability' that defendant has committed a DUI Offense." *Lefebvre*, 19 A.3d at 292 (citing *Clendanial v. Voshell*, 562 A.2d 1167, 1170 (Del. 1989).

V. The Blood Draw of Defendant's Blood.

(a) *Missouri v. McNeely*.

As the Superior Court also ruled in *State v. Wayne Jones*, the "…[s]uppression of a warrantless blood extraction was recently affirmed by the United States Supreme Court in *Missouri v. McNeely*.[10] The Supreme Court held that "…[i]n drunken driving investigations, the natural disposition of alcohol in the blood stream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant."[11]

The Court has set forth in the *Jones* decision and concluded that an exigency in drunk driving "…[m]ust be determined case-by-case based upon the totality of circumstances."[12] Also set forth in the Superior Court's decision in *Jones*, "…[r]outine DBWI investigation when no factors other than natural dissipation of blood alcohol suggested that there was an emergency, and thus, a non-consensual warrantless [blood draw] test violated [*McNeely's* right] to be free from unreasonable searches of his person.[13]

(b) The Parties Contentions.

[10] *Id. 2013 WL 1628934*.
[11] *Id. at 1, 14.*
[12] *Id. at 3.*
[13] *Id.*

In the instant case, counsel for the State and defense have submitted memoranda of law on the issue as to whether the defendant's blood draw was voluntarily consented and therefore no such warrant was needed under *McNeely*. As both parties agree in their filings, "'''[w]here consent is given, the State has the burden of proving, by a preponderance of the evidence, that the defendant's consent was valid."[14]

To be valid, a consent search "must be 'voluntarily given' and not the result of duress or coercion must be under recent case law, express or implied."[15] The issue of consent is factual and considered under the totality of circumstances rest.[16]

"Factors to be considered in making this [voluntary consent] determination include: 1) knowledge of the constitutional right to refuse consent; 2) age, intelligence, education and language ability; 3) the degree to which the individual cooperates with the police; and 4) the length of detention and nature of the questioning, including the use of physical punishment or other course of police behavior, however, no one factor is dispositive."[17] "…[T]he influence of intoxication or mental agitation does not automatically render consent involuntary."[18]

Applying these factors in the instant case, the Court must find through the totality of circumstances that no voluntary consent was given by the defendant in this case in order to allow the blood draw to be admitted as evidence at trial. It appeared through the testimony that defendant had a head injury; had severe significant physical injuries to his pelvis which required seven (7) screws; his heart stopped twice; he was under what appeared to the Court to be pain medication and was in "substantial pain" at the hospital. The defendant testified he doesn't even recall any of the events or facts testified to at the hospital due to his medical condition at the

[14] *Scott v. State*, 672 A.2d 550, 552 (Del. 1996).
[15] *See Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973).
[16] *See Missouri v. McNeely*, 133 S.Ct. 152 (2013).
[17] *See Cooke v. State*, 977 A.2d 803, 856 (Del. 2009).

hospital. At the scene he was lying in the roadway bleeding from the head with only a "slight odor" of alcohol from a distance of approximately one foot. In addition, at sidebar, the State presented argument at trial to introduce a signed voluntary consent form from the hospital which was never introduced into evidence by the Attorney General. To the contrary, the investigating officer in this case testified the defendant was coherent and verbally submitted to a blood draw. While this may be credible, Trooper Gaffney also testified that at the scene the defendant was "moaning," lying on his side on the ground at the accident scene; and there was blood coming from his head and blood on the ground. Trooper Gaffney felt it necessary to call an ambulance to transport the defendant with EMT to the hospital. He administered no NHTSA Field standardized tests; no mental acuity tests, and observed only a "slight odor of alcohol" coming from the defendant. No PBT was administered to the defendant at the accident scene.

The Court finds after a careful examination of the testimony at the suppression hearing by a preponderance of the evidence that the defendant did not voluntarily consent to the blood draw in this case.

In a recent decision dated August 30, 2013[19] the Court determined even when the defendant told the arresting officer "I don't care" if a phlebotomist drew blood that it was deemed not consensual by the Superior Court. "There was no consent form executed and while, a reasonable inference, there was no specific indication given to [defendant] that the results of the blood test would be used in the case against him."[20] In that Superior Court decision the Court Judge indicated the officer acted in a professional courteous manner towards the defendant. There was no force or trickery used to obtain the blood draw. It was, however, deemed not voluntarily given under *McNeely* and other case precedent cited in Court's Opinion.

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[18] *See U.S v. Leland*, 376 F.Supp, 1993, 1992 (D.Del. 1974).
[19] *See State v. Brian Dempsey*, ID No.: 121201170, Del. Super., Carpenter, J. (August 30, 2013).

In fact, the Superior Court ruled the Court could not find that the defendant had freely and intelligently in an unequivocal manner waived a constitutional right.[21]

Under the facts of the instant case, given the testimony of the defendant and the totality of circumstances, the Court cannot find the consent for blood draw without a warrant was voluntarily given. The State has not set forth in the suppression record why a reasonable effort could not have been made to obtain a search warrant under *McNeely* or that exigent circumstances existed.

In *State v. Lowry*[22] this Judge ruled "there was no consent form signed by the defendant drafted by the Police Agency…the warrantless intrusion of blood draw, the defendant was not reasonable and should be excluded." As noted above, the Delaware Supreme Court also addressed a similar issue as the Superior Court's decision in *State v. Dempsey*.[23] Many factors are dispositive in this instant Court's decision in this case in that the defendant was not freely, intelligently waiving constitutional rights and appeared to be incoherent at the time in the hospital when the blood draw was allegedly taken. No consent form was signed and not introduced into evidence by the State.

While the Court finds there was reasonable articulable suspicion to stop the defendant, there is a very limited suppression record under the facts of the instant case. There was a motor vehicle accident and either slight or moderate odor of alcohol beverages from the defendant at the scene of the accident. There was no NHTSA Field Tests given, no mental acuity tests given to the defendant, no alphabet or counting, no Horizontal Gaze Nystagnus, "one legged stand", walk and turn or other mental acuity tests. No PBT was administered. Other than the accident

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[20] *Opinion at 3*.
[21] *See Opinion at 4.*
[22] *See State v. Lowry, Cr.A. No.: 120901186* at 10 (Del.Com.Pls., Nov. 7, 2003.
[23] *See State v. Dempsey*, ID No.: 1212011170, Ltr.Op., Carpenter, J. at 4 (August 30, 2013).

itself, the officer testified he did not see the defendant actually driving the motor vehicle. There is very limited evidence on the issue of probable cause applying the case law set forth above. The Court therefore grants Defendant's Motion to Suppress. The Court grants the Motion to Suppress as to 21 *Del.C.* §4168(a). The Court heard testimony at trial from Trooper Gaffney and the civilian witness who offered no substantial testimony on the driving or his speed at the time of the accident.

This matter shall be rescheduled for trial with notice to counsel of record.

IT IS SO ORDERED this 12th day of February, 2014.

/s/ John K. Welch
John K. Welch, Judge

/jb

cc: Diane Healey, CCP Case Manager