

The issue before the Court is whether the Court should grant Defendant's Motion to Suppress all evidence pertaining to his DUI arrest. Defendant's motion argues that the arresting officer lacked reasonable suspicion to pull Defendant over in the first place, and that the officer also lacked probable cause to arrest Defendant because the officer's field sobriety tests were either improperly administered or adequately passed by Defendant. A suppression hearing was held November 19, 2014. After considering the evidence presented at the suppression hearing, and the arguments of counsel, Defendant's Motion to Suppress is denied.

FACTS AND PROCEDURE

The Defendant was arrested on November 18, 2013 and charged with Driving a Vehicle Under the Influence of Alcohol (21 *Del. C.* § 4177(a)(1)). At the suppression hearing, the State called Officer Robert Cassidy ("Officer Cassidy") of the Delaware State Police as its only witness. Officer Cassidy testified that he has been employed by the Delaware State Police for eight (8) years and prior to that worked for the Wilmington Police for ten (10) years. He is certified in DUI enforcement, DUI detection and field sobriety testing. Officer Cassidy testified that he was patrolling Route 13 in Dover on November 18, 2013, in an unmarked state police vehicle. His attention was drawn to the Defendant's vehicle because the Defendant passed the Officer on his right-hand side at a high rate of speed (higher than the posted limit, estimated by Officer Cassidy to be about 75 miles per hour). Officer Cassidy observed the Defendant nearly rear-ending another vehicle while in the right lane, and then moving onto the shoulder and either skimming the curb or

actually hitting it.

At this point, the Officer pulled the vehicle over. Upon contact with the Defendant, Officer Cassidy noticed the smell of alcohol and the Defendant's bloodshot eyes. Officer Cassidy asked the Defendant for his driver's license, registration, and insurance. The Defendant was unable to provide any of the requested information. At the suppression hearing, Officer Cassidy testified that the Defendant admitted to having two (2) beers. The Officer also observed the Defendant speaking in a very fast and slurred manner. These observations prompted Officer Cassidy to administer three (3) field sobriety tests. Prior to administering the test, Officer Cassidy performed the test himself in order to show the Defendant how to do so.

First the Officer asked the Defendant to count backwards from fifty-two (52) to thirty-four (34). The Defendant instead counted backwards from fifty-one (51) to thirty-four (34), missing the first number. Officer Cassidy then asked the Defendant to perform the walk and turn test, whereby the Defendant had his arms up and was swaying. The third test was the one-leg stand test, which the was unable to keep his foot off the ground for the duration of the test, and kept putting his foot down and hopped around in order to maintain balance. Lastly, Officer Cassidy attempted to administer a PBT, or Portable Breath Test (hereinafter "PBT") which was unsuccessful because it was not functioning properly. The Defendant was then sent back to his car to wait for another officer to bring a replacement test. Officer Cassidy then asked the Defendant about his DUI history and subsequently took him into

custody, prior to the other PBT test arriving.

STANDARD OF REVIEW

When presented with a motion to suppress, Delaware courts have repeatedly stated that the Defendant bears the burden of establishing that the challenged search and seizure violated his rights under the United States Constitution, the Delaware Constitution, or the Delaware Code.¹ The Defendant must demonstrate, by a preponderance of the evidence, that he is entitled to the relief requested.² At a suppression hearing, the trial judge sits as the trier of fact, and determines the credibility of witnesses.³

DISCUSSION

The Defendant alleges that the arresting officer lacked the probable cause and/or reasonable suspicion required to pull the Defendant over due to any motor vehicle violation. The Defendant also alleges that the arresting officer lacked the probable cause and/or reasonable suspicion to believe the Defendant was operating his vehicle while under the influence of alcohol and/or drugs. The Defendant alleges that officer violated the Defendant's Constitutional rights under the 4th and 14th Amendments (based on lack of probable cause to arrest and take into custody), and

¹ See *State v. Dollard*, 788 A.2d 1283, 1286 (Del. Super. Ct. 2001) (citing *State v. Huntley*, 777 A.2d 249 (Del. Super. Ct. 2000)).

² *Id.* (citing *State v. Bien-Aime and Smalls*, 1993 WL 138719, at *3 (Del. Super. Ct. 1993)).

³ *Turner v. State*, 957 A.2d 565, 570-71 (Del. 2008).

the Defendant's rights under Article I, Section VI of the Delaware Constitution.⁴

Traffic Stop

The Court will first determine whether the warrantless stop of Defendant's vehicle was constitutionally proper. Under the Fourth Amendment of the United States Constitution and Article I, Section Six of the Delaware Constitution, a traffic stop is a seizure of the vehicle and its occupant.⁵ The stop must be justified, at its inception, by reasonable suspicion of criminal activity, and the scope of the stop must be reasonably related to the stop's initial purpose.⁶ Reasonable suspicion is defined as the "officer's ability to 'point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion.'"⁷ "As a general matter, the decision to stop an automobile is reasonable when the police have probable cause to believe that a traffic violation has occurred."⁸

The facts of this case support a finding that a traffic violation occurred, and, therefore, the officers had probable cause to stop the vehicle. A review of the camera

⁴ An individual's right to be free from unreasonable searches and seizures is secured by the parallel mandates of the Fourth Amendment of the United States Constitution and Article 1, Section 6 of the Delaware Constitution. *See Jones v. State*, 745 A.2d 856, 860 (Del. 1999).

⁵ *Caldwell v. State*, 780 A.2d 1037, 1046 (Del. 2001).

⁶ *Id.* at 1045-46.

⁷ *Coleman v. State*, 562 A.2d 1171, 1174 (Del. 1989) (quoting *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)).

⁸ *McDonald v. State*, 947 A.2d 1073, 1077 (Del. 2008) (quoting *Whren v. United States*, 517 U.S. 806, 810, 116 S.Ct. 1769, 135 L.Ed.2d. 89 (1996)).

dash revealed that, while traveling on Route 13, the Defendant was speeding and nearly collided with other vehicles on the road. The footage also showed the Defendant swerving onto the shoulder in order to maintain his fast rate of speed while maneuvering around a vehicle. As such, the Defendant's argument that Officer Cassidy lacked a reasonable articulable suspicion that the Defendant was committing a crime is without merit.

The Defense further argues that Officer Cassidy lacked probable cause or a reasonable articulable suspicion to believe that Defendant was operating the vehicle while under the influence of alcohol. However, Officer Cassidy testified that once he pulled the Defendant over and made initial contact with him, he could smell the strong scent of alcohol, and that the Defendant stated he had consumed two (2) beers. Based on the Defendant's statement, appearance of bloodshot eyes, and the scent of alcohol, the Officer's stop was justified.

Field Tests

The Defense argued that Officer Cassidy incorrectly administered the counting test because he did not ask the Defendant whether or not he had a disability that would affect his test performance, prior to his attempt to complete it. The Defense also argued that the Defendant did not fail the walk and turn test, he just performed it incorrectly because his arms were raised, parallel to the road, as opposed to down by the Defendant's side. Lastly, the Defense argued during the suppression hearing that Officer Cassidy did not perform the field sobriety tests pursuant to the National Highway Traffic Safety Administration ("NHTSA") protocol, because the Officer

should have asked the Defendant if he had any disabilities that would inhibit the performance of any test, and also that the pre-exit tests should have been conducted while the Defendant was still inside his vehicle. The Defense also took issue with the field tests not being recorded, and asserted that Officer Cassidy could have moved his patrol car so that the scene would have been visible to the camera.

While the Court recognizes that there may be deficiencies in the way Officer Cassidy performed the field tests, the Court does not find that the deficiency of asking a Defendant to perform the tests outside the vehicle as opposed to inside the vehicle are enough to disqualify the results from a probable cause determination. Further, although the Defense raises the issue of the Officer's failure to ask Defendant if he had any disabilities that would preclude him from successfully completing the test, the Defense is not asserting that the Defendant actually had any disability, nor any reason to improperly perform. The Superior Court has previously stated, "no Court in this jurisdiction ha[s] concluded that a failure to strictly comply with NHTSA invalidates the test."⁹ The Court's role is to take note of the deficiencies in the administration of the sobriety test when giving weight and value to the tests performed.¹⁰ Here, the Court does not find that any deficiency in the testing of the Defendant is enough to disqualify the tests entirely.

⁹ *State v. Lanouette*, 2012 WL 4857820, at *8 (Del. Com. Aug. 27, 2012) *citing* Transcript of Nonjury Trial of April 14, 2010 in *State v. Iyer*, Case No. 0904004949, at 103–04 (Del. Comm. Pl. April 14, 2010) (decision reversed on other grounds in *State v. Iyer*, 2011 WL 976480 (Del.Super. Feb. 23, 2011)).

¹⁰ *Id.*

As the Delaware Supreme Court articulated in *Lefebvre v. State*, probable cause to arrest a motorist for a DUI offense exists when an officer can “‘present facts which suggest, when those facts are viewed under the totality of the circumstances, that there is a fair probability’ that the defendant has committed a DUI offense.”¹¹ Whether probable cause exists to arrest a driver for a DUI offense is “generally decided by the arresting officer’s observations, which frequently include the quality of the driver’s performance on field sobriety tests.”¹² In making this determination, this court is free to accept the arresting officer’s sworn testimony as true, and resolve any inconsistencies in the evidence in the officer’s favor.¹³

While field sobriety tests must be administered in strict compliance with standardized procedures, probable cause to arrest does not necessarily have to be based, in whole or in part, upon a suspect’s poor performance on one or more of these tests.¹⁴ The totality of the facts and circumstances underlying the suspect’s arrest can support a finding of probable cause even where no field sobriety tests were

¹¹ *Lefebvre v. State*, 19 A.2d 287, 292 (Del. 2011) (quoting *State v. Maxwell*, 624 A.2d 929, 930 (Del. 1993)).

¹² *Id.* at 293.

¹³ *See Dunlap v. State*, 812 A.2d 899, at *2 (Del. Dec. 13, 2000) (unpublished table decision) (stating that the trial judge, sitting as the trier of fact at a suppression hearing, “is the sole judge of the credibility of witnesses and is responsible for resolving any conflicts in the testimony”).

¹⁴ *See Lefebvre*, 19 A.2d at 293 (concluding that probable cause to arrest Lefebvre for a DUI offense existed before police administered any field sobriety test); *Perrera v. State*, 2004 WL 1535815, at *1 (Del. June 25, 2004) (unpublished table decision).

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administered or where, as here, a defendant's performance of said tests was not recorded. Even if the Court were to set aside the results of Defendant's field tests, there is ample evidence to support a finding that there was probable cause to arrest Defendant for a DUI offense. Officer Cassidy's testimony during the suppression hearing showed that, before conducting any field sobriety test, he observed Defendant to have bloodshot eyes, slurred speech, and that Defendant had an odor of alcohol emanating from his breath. The Court believes the facts and the circumstances, when viewed together, are sufficient to establish probable cause to arrest Defendant for driving under the influence.

Lastly, the Defense asserts that the Intoxilyzer results should be suppressed as well, however the Court has no record of any Intoxilyzer test results, nor was any such test discussed at the suppression hearing. For this reason, the Court will not rule on this matter.

CONCLUSION

Because probable cause existed to arrest the Defendant for a DUI offense, his Motion to Suppress is hereby **DENIED**.

IT IS SO ORDERED.

Honorable William L. Witham, Jr.
Resident Judge

WLW/dmh