

**IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE

v.

MARISSA J. FERNANDES,

Defendant.

)
)
)
)
)
)
)
)
)
)
)

Cr. A. No. 1112010628

Submitted: April 6, 2015

Decided: June 2, 2015

Kelly L. Breen, Esquire
Deputy Attorney General
Delaware Department of Justice
820 N. French Street, 7th Floor
Wilmington, DE 19801
Attorney for the State

Jonathan Layton, Esquire
Layton & Associates, P.A.
1823 W. 16th Street
Wilmington, DE 19806
Attorney for Defendant

**DECISION ON DEFENDANT'S MOTION
TO SUPPRESS AND DECISION AFTER TRIAL**

On December 15, 2011 at approximately 1:00 a.m., Defendant Marissa J. Fernandes (“Fernandes”) was subjected to two traffic stops and subsequently arrested. Fernandes was arrested and charged with Driving Under the Influence of Alcohol (“DUI”), in violation of 21 *Del. C.* § 4177, and Driving a Vehicle with a Suspended/Revoked License (“DWS”), in violation of 21 *Del. C.* § 2756. On November 13, 2013, Fernandes filed a motion to suppress. After the suppression hearing, the Court denied Fernandes’ motion, finding that probable cause existed to support the traffic stop which led to her arrest. On May 19, 2014, Fernandes filed a motion for reargument. On August 6, 2014, the motion was denied, and the matter proceeded to trial.

A bench trial was held on November 26, 2014. The State presented evidence through Corporal Michael Ripple (“Cpl. Riddle”) of the Delaware State Police. Fernandes did not testify or present any evidence. After brief argument, the Court reserved decision and ordered post-trial briefing to focus on probable cause issues as they relate to the initial stop, and whether there were any case-dispositive issues concerning the administration of the Standard Field Sobriety Tests (“SFTs”).¹ This is the Court’s decision on Fernandes’ Motion to Suppress, as well as the Court’s decision after trial.

FACTS

On December 15, 2011, Cpl. Ripple was on patrol, travelling westbound on Kirkwood Highway when he noticed a black vehicle traveling in front of him. Over the span of a mile, Cpl. Ripple observed the vehicle cross the white fog line three times. Each time, the vehicle’s right wheels made contact with the fog line, drifted across it entirely, and remained in the shoulder for two to three seconds. After Fernandes’ vehicle crossed the fog line a third time, Cpl. Ripple activated his emergency lights and initiated a traffic stop in a McDonald’s parking lot.²

Upon approach, Cpl. Ripple made contact with Fernandes. During the brief encounter, Cpl. Ripple noticed a faint odor of alcohol emanating from Fernandes’ vehicle. However, he did not believe Fernandes was incapable of safely operating her vehicle. Cpl. Ripple allowed Fernandes to continue on her way without verifying that she possessed a valid license. Immediately after Fernandes drove away, Cpl. Ripple completed a DELJIS check which revealed that Fernandes’ driving privileges had been suspended/revoked, and that she had a capias out for her arrest. Cpl. Ripple pursued Fernandes in his cruiser to conduct a second traffic stop.

¹ In her post-trial brief, Fernandes concedes reasonable articulable suspicion existed to support the second stop. Therefore, the Opinion will address the administration of the SFTs, and their appropriate weight in the probable cause analysis.

² Cpl. Ripple testified that he did not stop Fernandes with the intent to cite her for unsafe lane change. He indicated he made the stop for safety purposes given the narrow shoulder of the road and resultant proximity of Fernandes’ vehicle to the curb.

Cpl. Ripple caught up to Fernandes approximately three-quarters of a mile down the road and initiated a second traffic stop. At the outset, Cpl. Ripple noticed that Fernandes had glassy eyes, a flushed face, and that she was slurring some of her words. Cpl. Ripple also detected a stronger odor of alcohol coming from Fernandes than when he interacted with her during the first stop. Fernandes admitted to having consumed two to three alcoholic beverages prior to the stop. Cpl. Ripple had Fernandes exit the vehicle and walk to the rear. He noticed that in complying with his directive, she placed her left hand on the back of the vehicle to maintain her balance.

At the rear of the vehicle, Cpl. Ripple conducted various SFTs. According to Cpl. Ripple, the tests were conducted in the shoulder of the road at an area where there was a slight uphill incline. Prior to administering the SFTs, Cpl. Ripple asked Fernandes if she had any physical impairment which might result in the tests giving a “false-positive.”³ Fernandes indicated that she had no such impairment. Cpl. Ripple administered the Horizontal Gaze Nystagmus (“HGN”), Walk-and-Turn (“WAT”), and One-Leg Stand (“OLS”) tests. Fernandes exhibited six out of six possible clues on the HGN; five out of six possible clues on the WAT; and three out of four possible clues during the OLS.

As a result of the numerous clues Cpl. Ripple observed during the SFTs, the odor of alcohol on Defendant’s breath, Fernandes’ slurred speech, apparent difficulty with walking, and her admission to drinking two or more alcoholic beverages prior to the stop, Fernandes was taken into custody, and transported to Delaware State Police Troop Six, where she was observed for the requisite period of time before having a breath test administered. Using the Intoxilyzer 5000, Fernandes was determined to have a .177 blood alcohol content rate (“BAC”).

³ This includes any medication, illness, or injury which may impede an individual’s ability to properly perform these tests when sober, thus diminishing such tests’ efficacy as an indicator of alcohol induced impairment.

PARTIES' CONTENTIONS

In her post-trial brief, Fernandes contends that Cpl. Ripple failed to properly administer the SFTs in compliance with NHTSA guidelines. Fernandes reasons that due to Cpl. Ripple's failure to follow NHTSA guidelines, those results should not be considered in the probable cause analysis. Without the SFT results, Fernandes argues that Cpl. Ripple did not have probable cause to arrest her on suspicion of DUI and as a result, the subsequent intoxilyzer results should not be considered in assessing guilt or innocence.⁴

The State argues that Cpl. Ripple's deviation from the NHTSA guidelines is minor, and in no way affected the accuracy or reliability of the SFTs. The State argues that the credibility of SFT results should not be reduced in the totality of the circumstances analysis in determining whether probable cause supported Fernandes' arrest for DUI.

DISCUSSION

I. Defendant's Motion to Suppress

An arrest made after a traffic stop must be supported by probable cause.⁵ In the DUI context, probable cause exists when an officer has trustworthy and factual information, which when viewed under the totality of the circumstances warrants "a reasonable [person] in believing that" the defendant drove a motor vehicle under the influence of alcohol.⁶ Further, probable cause to arrest for DUI "rests upon the observations of the arresting officer, which includes the driver's performance on field sobriety tests."⁷ In assessing a driver's performance on SFTs, the

⁴ Def.'s Post-trial Brief, p. 5.

⁵ *Lefebvre v. State*, 19 A.3d 287, 293 (Del. 2011).

⁶ *State v. Maxwell*, 624 A.2d 926, 930 (Del. 1993); *Lefebvre* at 292 (quoting *Clendaniel v. Voshell*, 562 A.2d 1167, 1170 (Del. 1989) (internal quotations omitted)).

⁷ *State v. Mulholland*, 2013 WL 3131642, at *4 (Del. Com. Pl. Jun. 14, 2013).

Court is free to consider an officer's failure to strictly comply with NHTSA standards as bearing on the evidentiary weight and value assigned to each test's results.⁸

A. Standardized Field Sobriety Tests

Fernandes contends that the HGN should not be considered because Cpl. Ripple began the test with Fernandes' right eye, rather than the NHTSA-mandated left eye. The HGN is "a highly regulated NHTSA test that allows the investigating officer to detect Nystagmus, or involuntary movement (jerking) of the eye. These involuntary movements have been scientifically linked to alcohol intoxication."⁹ Beginning the test with the left eye is for purposes of consistency. Although Cpl. Ripple began the HGN exam with the wrong eye, he correctly took care to position Fernandes at a location where the lights from either vehicle would not interfere with her performance on the HGN. The deviation was minor, and could not have had any effect on the presence of Nystagmus. Cpl. Ripple noticed six out of six possible indicators during the test, which illustrate with a high degree of probability that Fernandes was under the influence of alcohol.

Fernandes continues that the WAT test should not be considered because the test was performed on a slight incline as opposed to the NHTSA-recommended level surface.¹⁰ In administering the WAT, Cpl. Ripple instructed Fernandes to walk along an imaginary line going *with* the slight incline, as opposed to *across* it, so as to diminish any interference the incline may cause. For the WAT test, NHTSA recommends a "reasonably dry, hard, level, and non-slippery surface."¹¹ Although Cpl. Ripple administered the WAT on a slight incline, there is nothing in the record to indicate that the incline affected test results. The WAT may indicate intoxication if

⁸ *State v. Pasawicz*, 2012 WL 1392564, at *4 (Del. Com. Pl. Mar. 16, 2012) (citing transcript of non jury trial of April 14, 2010 in *State v. Lyre*, Cr. A. No 0904004949, at 103- 04 (Del. Com. Pl. Apr. 14, 2010).

⁹ *State v. Anderson*, 2010 WL 4056130, at *2 (Del. Super. Oct. 14, 2010).

¹⁰ Def.'s Post-trial Br., p.6.

¹¹ Def.'s Post-trial Br., p.7.

two or more clues are observed; Cpl. Ripple noticed at least five of eight. The Court notes that in his testimony, Cpl. Ripple indicated that Fernandes *twice* missed a heel-to-toe step, *twice* raised her arm, started too soon, and stepped off of the line. However, NHTSA mandates that each missed clue should be counted once. Cpl. Ripple's testimony indicates that he miscounted the clues to the WAT. Erring on the side of caution, the Court will not consider the results of the WAT in its probable cause analysis.¹²

Fernandes challenges the reliability of the OLS on the same ground as the WAT, based on the slight incline. The Court's reasoning above also applies to the OLS. There is no indication in the record that the slight incline affected the reliability of the test. The OLS test has a total of four clues; Cpl. Ripple noticed three.¹³

Finally, the 2006 NHTSA Manual squarely addresses Fernandes' concerns of officer compliance with its guidelines in the preface:

SFTs will not always be administered under ideal conditions...because such conditions will not always exist. Even when administered under less than ideal conditions, they will generally serve as valid and useful indicators of impairment. Slight variations from the ideal, i.e., the inability to find a perfectly smooth surface at roadside, may have some effect on the evidentiary weight given to the results. However, this does not necessarily make the [tests] invalid.¹⁴

Taken alone or together, the HGN and OLS indicate with a high degree of probability that at the time of the tests, Fernandes was under the influence of alcohol. Moreover, nothing in the record indicates that Cpl. Ripple's deviation from NHTSA standards reduced the reliability

¹² While this discovery invalidates the admissibility of the WAT, a substantial amount of evidence indicating intoxication still remains in the record.

¹³ Fernandes put her foot down after only six seconds of counting. Additionally she was swaying and raised her arms.

¹⁴ National Highway Traffic Safety Administration, *DWI Detection and Standardized Field Sobriety Testing*, Instructor's Manual, Preface (2006).

or accuracy of the HGN and OLS results. Therefore, the Court will consider the HGN and OLS results in its probable cause analysis. The Court strikes the results of the WAT.

B. The Court's Probable Cause Analysis

The Court will consider the following factors, in the totality of the circumstances, to determine whether Cpl. Ripple had probable cause to arrest Fernandes for DUI: (1) glassy eyes ; (2) flushed face; (3) slurred speech; (4) a strong odor of alcohol emanating from her person; (5) Fernandes' admission to consuming two or three alcoholic beverages prior to the stop; (6) apparent difficulty walking; and (7) Fernandes' performance on the HGN and OLS tests.

These factors, when considered within the totality of the circumstances present at the time of arrest amount to probable cause. Moreover, in similar situations, a defendant's behavior alone has weighed heavily in Delaware courts finding probable cause to arrest for DUI.¹⁵ This case is no different. Even if the Court discounted the weight of the SFTs, Cpl. Ripple observed Fernandes' difficulty in maintaining balance, slurred speech, flushed face, and glassy eyes. Further, Fernandes admitted to consuming two to three drinks prior to the stop. At that point in the stop, Cpl. Ripple possessed a high degree of trustworthy, factual information tending to indicate that Fernandes was driving under the influence. The test results, when combined with Cpl. Ripple's observations, would strongly tip the balance in favor of a finding of probable cause to arrest Fernandes. Accordingly, Fernandes' Motion to Suppress is **DENIED**.

¹⁵ See, e.g., *Maxwell*, 624 A.2d at 929 – 31 (evidence of motor vehicle collision, odor of alcohol, admission to drinking, and dazed appearance were sufficient to find probable cause); *Bease v. State*, 884 A.2d 495, 499 – 500 (Del. 2005) (evidence of traffic violation, odor of alcohol, rapid speech, admission to drinking, bloodshot and glassy eyes, and a failed alphabet test constituted probable cause to arrest the driver for DUI).

II. Driving Under the Influence of Alcohol

Under 21 *Del. C.* § 4177, “[n]o person shall drive a vehicle [w]hen the person is under the influence of alcohol.”¹⁶ The Court looks to the totality of the circumstances when determining whether the State has proven beyond a reasonable doubt that an individual was driving under the influence.¹⁷ The State must prove that the defendant was in control of, or driving a vehicle while also under the influence of alcohol.¹⁸ “The evidence 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.”¹⁹ In a case where an intoxilyzer reading is admitted into evidence, the reading “must be predicated on an adequate evidentiary foundation that includes evidence that there was an uninterrupted twenty minute observation of the defendant prior to testing.”²⁰ A BAC reading over 0.08% is conclusive on the issue of intoxication.²¹

After initially stopping Fernandes for crossing the fog line three times, Cpl. Ripple initiated a second stop immediately after discovering she was driving with a suspended/revoked license. Upon approach, Cpl. Ripple detected a strong odor of alcohol on Fernandes’ breath, and noticed her glassy eyes and flushed face. Further, after having Fernandes exit her car, Cpl. Ripple observed Fernandes’ difficulty maintaining balance and slurred speech. Fernandes also admitted that she consumed two or three alcoholic beverages prior to the stop. Cpl. Ripple administered three SFTs, on which Fernandes’ performance was poor.

¹⁶ See 21 *Del. C.* § 4177(a)(1).

¹⁷ *State v. Smallwood*, 2012 WL 5869624 (Del. Com. Pl. Nov. 9, 2012).

¹⁸ *Lewis v. State*, 626 A.2d 1350, 1355 (Del. 1993).

¹⁹ *State v. Mealy*, 2010 WL 175623 (Del. Com. Pl. Jan. 20, 2010) (quoting *Lewis*, at 1355); See 21 *Del. C.* § 4177(c)(11).

²⁰ *Webb-Buckingham v. State*, 2009 WL 147020, at *3 (Del. Super. Jan. 22, 2009) (quoting *Clawson v. State*, 867 A.2d 187, 192 (Del. 2005) (internal quotations omitted)).

²¹ See 21 *Del. C.* § 4177 (a)(5).

Fernandes was taken back to the State Police barracks, where she was observed for the requisite period of time before submitting to a breath test. The intoxilyzer indicated that Fernandes had a BAC of .177%, well above the legal limit of .08%. Accordingly, based upon Cpl. Ripple's observations, Fernandes' performance on the SFTs, her admission to consuming two or three alcoholic beverages prior to the stop, and the intoxilyzer results, the State has proven beyond a reasonable doubt that Fernandes was driving under the influence of alcohol. Therefore, the Court finds Fernandes **GUILTY**.

III. Driving a Vehicle with a Suspended/Revoked License

A person who drives any motor vehicle on the highways of this State during a period of suspension or revocation violates 21 *Del. C.* § 2756(a).²² Cpl. Ripple testified that after he pulled Fernandes over the first time, he learned from a DELJIS check that her license was suspended or revoked. Cpl. Ripple pulled Fernandes over a second time based on this new information. Additionally, at trial, the State entered an official notice of Fernandes' license revocation and certified driving abstract into evidence. The driving abstract indicates that Fernandes' license was suspended for twelve months effective March 27, 2011. At the time of the subject stop, December 15, 2011, Fernandes' license was still suspended, and nothing on the record indicates that her driving privileges were reinstated. Therefore, the State has proven beyond a reasonable doubt that Fernandes drove her vehicle with a suspended or revoked license. Accordingly, the Court finds Fernandes **GUILTY**.

²² See 21 *Del. C.* § 2756(a).

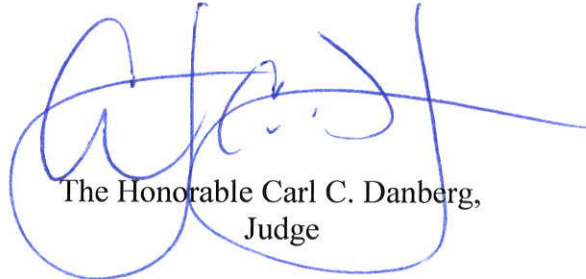
ORDER

After consideration of the testimony, evidence, and arguments presented, Defendant Marissa J. Fernandes' Motion to Suppress the results of the Standardized Field Sobriety Tests is **GRANTED** as to the Walk-and-Turn test and **DENIED** as to the Horizontal Gaze Nystagmus test and One-Legged-Stand test.

On the charge of Driving Under the Influence of Alcohol in violation of 21 *Del. C.* § 4177(a)(1), the Court finds Defendant Marissa J. Fernandes **GUILTY**.

On the charge of Driving a Vehicle with a Suspended/Revoked License, the Court finds Defendant Marissa J. Fernandes **GUILTY**.

IT IS SO ORDERED this 2nd day of June, 2015.


The Honorable Carl C. Danberg,
Judge

cc: Diane Healy, Judicial Case Management Supervisor