IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
	)	
v.	)	**Case No.: 1306022086**
	)	
	)	
JAMES R. KARCHA,	)	
	)	
Defendant.	)	
	)	

Date Submitted: January 28, 2015
Date Decided: February 5, 2015

Upon Defendant's Motion to Suppress: **DENIED**

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WELCH, J.

I. Introduction

Before the Court is James R. Karcha's ("defendant") Motion to Suppress ("the Motion"). The Court held a hearing on November 6, 2014 regarding the Motion to Suppress with regards to both reasonable articulable suspicion ("RAS") to initiate investigation in into DUI, as well as probable cause to arrest the defendant for a violation of 21 *Del.C.* §4177(a) and a multitude of other traffic offenses. Defendant requests in his Motion to "...[e]xclude all evidence of wrong doing," or in the alternative, "the results of the HGN, the results of the VGN, the results of the WAT, the results of the OLS, the results of the PBT," as well as the results of the Intoxilizer 5000E and breathalyzer tests.

The Court issued a briefing schedule on Defendant's Motion to Suppress on November 7, 2014. The briefing schedule is now completed and the matter is ripe for a decision.

II. The Facts

Master Corporal Christopher M. Jones ("Corporal Jones") testified at the suppression hearing. Corporal Jones is with the Newark Police Department for the past twelve (12) years and works in the Patrol Division. On June 25, 2013 he responded to a RECOM call as he is involved in the Traffic Enforcement Unit. He has completed DUI Training and a 2000 recertification at NHTSA and in 2003 completed NHTSA training courses.[1]

Corporal Jones was on patrol on East Delaware Avenue in Newark, Delaware, New Castle County at 1:42 am on the date, time, and place in the charging documents.[2]

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[1] *State's Exhibits No.: 1, 2, and 3* were introduced into evidence without objection.

[2] Defendant was charged with one count of Driving a Motor Vehicle Under the Influence of Alcohol in violation of 21 *Del.C.* §4177(a) on June 25, 2013 on a public roadway known as Kel's Avenue, Newark, Delaware, as well as one count of Drug Paraphenalia in violation of 16 *Del.C. §4077(1)(a)*; one count of no proof of insurance in violation of 21 *Del.C.* §2118(p); and improper lane change allegedly in violation of 21 *Del.C.* §4122 and finally disregarding a stop sign on the same date, time and place in the charging documents allegedly in violation of 21 *Del.C.* §4164(a).

Corporal Jones observed on June 25, 2013 the defendant make a "wide turn onto Chapel Street" in New Castle County and was "weaving side to side". Corporal Jones then observed the defendant "roll through a stop sign" and make a right turn onto East Park Avenue. Corporal Jones observed the defendant for approximately two minutes. Corporal Jones identified the defendant in the Courtroom.

Corporal Jones then performed a traffic stop. He was approximately two and a half feet away from the defendant at the stop and smelled a "strong odor of alcohol". When inquiries were made, the defendant told Corporal Jones he had consumed approximately "three to four beers". Defendant's eyes were also "blood shot" and "glassy" and his "speech was slow and deliberate".

Corporal Jones observed the defendant's "flushed face" and observed the defendant exit the motor vehicle approximately five feet away. Corporal Jones testified the defendant was "slow and deliberate" in his exit from his motor vehicle. Corporal Jones testified he has made over 600-700 DUI arrests.

Corporal Jones decided to investigate further and testified that the defendant was very "cooperative". He first administered the Horizontal Gaze Nystagmus ("HGN") Test and testified as to the appropriate foundation under the NHTSA Guidelines.[3]

Corporal Jones observed four (4) clues when he administered the HGN Test including, but not limited to lack of smooth pursuit in the left and right eye. He testified there was approximately a 77% probability that defendant's BAC was .10 or more based on his performance.

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[3] *See, Zimmerman v. State of Delaware*, Del. Supr. *footnote 15*

Next, Corporal Jones performed the Walk and Turn Test. He testified he demonstrated the test and testified as to the appropriate foundation under NHTSA for the Walk and Turn Test. Corporal Jones testified that with two or more clues there was a 68% probability that the defendant's BAC was .10 or more. As to the performance of the test, Corporal Jones testified that defendant used his hands for balance on steps 9-1 in return. Defendant missed heel-to-toe on Steps 4, 7, 8 and 9 on the first step. On Steps 4 and 5 the defendant stepped off the line, and also did a "steep miss-turn" instead of a pivot turn and missed heel-to-toe on step 2. Corporal Jones testified that defendant failed the Walk and Turn Test. With the failure of both the HGN and the Walk and Turn tests, Corporal Jones certified there was an 80% probability the defendant's BAC is greater than .10 or more.

Next, Corporal Jones administered the One Legged Stand NHTSA Test. He observed two more clues. The test was demonstrated and NHTSA instructions were given to the defendant and according to Corporal Jones the defendant had a .65% probability that his BAC was .10 or greater.

Finally, Corporal Jones administered the Portable Breath Test ("PBT"). He testified that the PBT was calibrated and working properly and observed the defendant for fifteen minutes before the PBT. He administered the test at 0141 hours on the date, time, and place in the charging documents, and defendant blew in the PBT. When asked, Corporal Jones testified that the defendant failed the test.

On cross-examination, defendant's counsel walked Corporal Jones through the performance of each and every one of the NHTSA tests which were administered to the defendant. The defendant contends in his Opening Memoranda that within seventy seconds of smoking a cigarette and within 22 seconds of approaching defendant's window, Corporal Jones

stated to the defendant "you look like you had some trouble keeping your car between the lines." "Have you had something to drink?" At that point defendant admitted to consuming three drinks and was asked to step out of the car.

Corporal Jones contends in his legal filings that when instructing defendant how to do the 9 step Walk and Turn Test he failed to instruct the defendant to pivot on the ball of his left foot to complete the turn. In addition, Corporal Jones contends while instructing the defendant how to do the One Legged Stand Test Corporal Jones failed to tell the defendant to look at his raised foot while performing the test.

Counsel also argued that the defendant's speech did not appear to be "slurred" and defendant "did not appear to be unsteady on his feet".

In his legal filings, defendant also argues that Corporal Jones administered a PBT just 10 minutes and 58 seconds after clearing defendant's mouth.

Also, in defendant's legal filing the defendant argued the HGN cannot be done in less than 96 seconds and that a common mistake when performing the Walk and Turn NHTSA Test the defendant must be instructed and demonstrate a pivot turn. The defendant must also be told to look at the raised foot while performing the One Legged Stand and Corporal Jones failed to instruct the defendant on this issue.

Upon cross-examination Corporal Jones testified "blood shot, glassy eyes" can appear after 12:00 AM. He conceded the defendant's speech was "slow and deliberate".

On cross-examination, Corporal Jones also testified that the left foot appeared to be on the line during the Walk and Turn Test, and conceded it was not fully explained that defendant must pivot on the ball of his feet in the NHTSA instruction phase.[4]

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[4] In defendant's filings he also argued that the defendant did not appear to be "unsteady on his feet," his speech did not appear to be "slurred", and Corporal Jones could not remember all the clues in the Walk and Turn NHTSA tests.

III. The Law

"On a Motion to Suppress, the State bears the burden of establishing that the challenged search or seizure comported with the rights guaranteed Mr. Anderson 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." *State of Delaware v. Daquon Anderson,* 2001 Del.Super., WL 1729141 as to the case law on probable cause, case law provides as follows:

> "Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably 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." *Brinegar v. United States*, 338 U.S. at 175-76, 69 S.Ct. at 1310-11 (emphasis added) (quoting *Carroll v. United States,* 267 U.S. 132, 162, 45 S.Ct. 280, 288, 69 L.Ed. 543 (1925)). [FN3]

In *State v. Maxwell,* Del. Supr., 624, 926, 929-30 (1993), the Supreme Court defined "probable cause" as follows:

> [A] police officer has probable cause to believe a defendant has violated 21 Del. C. § 4177. . . 'when the officer possesses' information which would 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).[5]

[5] *See, also Delaware v. Prouse,* 440 U.S. 663 (1979); *Coleman v. State,* Del. Supr., 562 A.2d 1171, 1174 (1989). *(Emphasis Supplied).*

As provided in *Spinks v. State,* Del. Supr., 571 A.2d 788 (1990), probable cause was further defined by the Delaware Supreme Court as follows:

> Under Delaware law, a police officer is authorized to make a warrantless arrest and search when he has probable cause to believe that a crime or a violation of the Motor Vehicle Code has been committed. 21 Del. C. § 701; *Garner v. State,* Del. Supr., 314 A.2d 908, 910 (1973). 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). *(Emphasis Supplied).*

In *State v. Robert S. Edwards*, 2002 Del. C.P. LEXIS 28, Clark, Judge (May 31, 2002) this Court applied the following standard to similar facts as follows:

> A police officer may detain an individual for investigatory purposes for a limited scope, but only if the detention is supported by a reasonable and articulable suspicion of criminal activity. *Jones v. State, 745 A.2d 856 (Del. 1999),* (citing *Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868,* (1968)). A determination of reasonable and articulable suspicion must be evaluated by the totality of the circumstances as viewed through the eyes of a reasonable, trained police officer under the same or similar circumstances, combining objective facts with the officer's subjective interpretation of them. Id. The Delaware Supreme Court defines reasonable and articulable suspicion as an officer's ability to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. *Id.* In the absence of reasonable and articulable suspicion of wrongdoing, detention is not authorized. *(Emphasis supplied).*

* * *

In *State of Delaware v. John C. Dinan,* 1998 Del. C.P. LEXIS 31, (Welch, J. Oct. 15, 1998), this Court applied a "similar standard" for a motor vehicle stop by a police officer:

As stated in *State v. Arterbridge, 1995 Del. Super. LEXIS 587, 1995 W.L. 790965* (December 7, 1995), the law with regard to "reasonable articulable suspicion" provides as follows:

The Fourth Amendment in Article 1, Sec. 6 of the Delaware Constitution protecting individual's right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; Del. Const. Art. I §6. Accordingly, a police officer must justify any "seizure" of a citizen. The level of justification required varies with the magnitude of the intrusion to the citizen. See, *U.S. v. Hernandez, 854 F.2d 295, 297 (8th Cir. 1988).* Not every contact between a citizen and a police officer, however, involves a "seizure" of a personal under the Fourth Amendment. See, *Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868, n16 (1968);* see also, *Thompson v. State, Ark. Supr., 303 Ark. 407, 797 S.W.2d 450, 451 (1990).* . . .

There are three categories of police-citizen encounters. See, *Hernandez, 854 F.2d 295 at 297.* First, the least intrusive encounter occurs when a police officer simply approaches an individual and asks him or her to answer questions. This type of police-citizen confrontation does not constitute a seizure. *Robertson v. State, Del. Supr., 596 A.2d 1345, 1351 (1991)* (citing *Florida v. Bostick, 501 U.S. 429, 434, 115 L. Ed. 2d 389, 111 S. Ct. 2382 (1991); Hernandez, 854 F.2d 295 at 297.* Second, a limited intrusion occurs [like the facts of this case] when a police officer restrains an individual for a short period of time. This *Terry* stop encounter constitutes a seizure and requires that the officer have an "articulable suspicion" that the person has committed or is about to commit a crime. *Hernandez, 854 F.2d at 297.* Third, the most intrusive encounter occurs when a police officer actually arrests a person for a commission of a crime. Only "probable cause" justifies a full scale arrest. Id. n2. (emphasis supplied)

As stated in *Arterbridge*, "stopping an automobile falls under the second category and therefore requires that the officer have a reasonable articulable suspicion to do so." *Delaware v. Prouse, 440 U.S. 648, 59 L. Ed. 2d 660, 99 S. Ct. 1391 (1979).* Initially in this matter the Court, as it did in *Arterbridge*, must determine whether the police officer had a reasonable articulable suspicion to stop the defendant's vehicle on March 24, 1998. There was clearly a "seizure" because under the facts of this case, Officer Huber restricted the liberty by a show of authority by turning on his overhead lights, siren and beeping his horn when following the defendant. *Terry, 392 U.S. at 20 n.16.* This police contact "conveyed to a reasonable person that he or she is not free to

leave." *United States v. Mendenhall, 446 U.S. 544, 545, 64 L. Ed. 2d 497, 100 S. Ct. 1870 (1980); Florida v. Royer, 460 U.S. 491, 502, 75 L. Ed. 2d 229, 103 S. Ct. 1319 (1983).* The Court must make this decision objectively by viewing the "totality of circumstances surrounding the incident at that time." *Mendenhall, 446 U.S. 544 at 545.*

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As stated in *State v. Harmon*, 2001 Del. Super., LEXIS 338, Bradley, J., August 22, 2001, the following standard applies:

> ...The quantum of evidence required for reasonable articulable suspicion is less than that of probable cause. *Downs v. State, Del. Supr., 570 A.2d 1142, 1145 (1990).* The former requires that an objective standard be met: "would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief that the action taken was appropriate?" *Terry v. Ohio, 392 U.S. 1, 21, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968)* (internal quotations omitted). If Harmon had not actually violated any statutes, this reasonable suspicion standard would be the appropriate one to have used. However, Harmon was charged with violating *21 Del. C.* §4114(a), and this violation provided the officer with probable cause to make the stop. *See, State v. Walker, 1991 Del. Super. LEXIS 104,* Del. Super., Cr. A. No. IK90-08-0001, Steele, J. (Mar. 18, 1991) (Order) (holding that changing lanes without a signaling is a violation of *21 Del. C. §4155* which created probable cause for the officer to stop the vehicle.); and *State v. Huss, 1993 Del. Super. LEXIS 481,* *6-7, Del. Super., Cr. A. No. N93-04-0294AC, 0295AC, Gebelein, J. (Oct. 8, 1993) (stating, "clearly then, if probable cause exists to arrest, this provides more than the reasonable suspicion necessary to stop the vehicle."). *See also, Eskridge v. Voshell, Del. Supr., 593 A.2d 589 (1991)* (ORDER); *Austin v. Division of Motor Vehicles, 1992 Del. Super. LEXIS 10,* Del. Super., C.A. No. 91A-08-2, Goldstein, J. (Jan. 9, 1992) (Op. and Order); *State v. Lahman, 1995 Del. Super. LEXIS 611,* Del. Super., Cr. I.D. No. 9410011118, Cooch, J. (Jan. 31, 1995) (Mem. Op.); *State v. Brickfield,* 1997 Del. C.P. LEXIS 6, Del. CCP, Case No. 9609017975, Stokes, J. (May 8, 1997); *Webb v. State, 1998 Del. LEXIS 107,* Del. Supr., No. 332, 1997, Berger, J. (Mar. 26, 1998) (ORDER).

* * *

In *State v. Bloomingdale*, 2000 C.P. LEXIS 63, Smalls, C.J., (July 7, 2000), the Court of Common Pleas also similarly defined the standard for this limited seizure as reasonable articulable suspicion;

> The Supreme Court when examining the issue of reasonable articulable suspicion in *Jones v. State, Del. Supr., 745 A.2d 856 (1999)* stated that the determination of reasonable suspicion must be evaluated in the context of the totality of the circumstances as viewed from the eyes of a reasonable, trained police officer in the same or similar circumstances, combining objective facts with an officer's subjective interpretation of those facts. The Court went on to hold that the determination in Delaware of whether an officer has reasonable articulable suspicion to detain an individual may rest not only on the Fourth Amendment of the U.S. Constitution, but also on Delaware Constitutional provisions. In reaching this decision, the Court pointed to *Arizona v. Altieri, 191 Ariz. 1 951 P.2d 866 (1977)* and concluded that a person's (particularly an anonymous caller's) subjective belief that another person is suspicious without more fails to raise a reasonable and articulable suspicion of criminal activity. (emphasis supplied).

IV. Opinion and Order

The Court has carefully scrutinized the Corporal Jones' testimony on direct, cross and redirect. First, the Court finds reasonable articulable suspicion for the traffic stop. At the very least, the defendant committed a statutory traffic violation when he ran the stop sign. 21 *Del.C.* §4164(a). Second, the Court finds that there was some limited impeachment of Corporal Jones on the NHTSA Tests administered to the defendant on the date, time and place of the charging documents. Ultimately, however, the Court must determine with this impeachment whether there was probable cause to arrest the defendant on all the Informations filed with the Clerk of the Court by the Attorney General. Counsel in their respective filings, argued the DUI Charge and have not addressed the other traffic charges in their subjective filings. As to the balance of the traffic charges, unless defendant produces an insurance card, the Court finds probable cause for all those remaining Title 21 traffic charges. As to the DUI Charge, as set forth above again,

ultimately the Court must determine whether there is a "fair probability that defendant committed the offense of DUI" as set forth in 21 *Del.C.* §4177(a). The State argues in its Answering Brief at Page 10, "...[A]s the Chief Judge of this Court had previously stated '...no Court in this jurisdiction has concluded that a failure to strictly comply with NHTSA Guidelines invalidates the test.'" Instead, "the Court is to consider the deficiencies when giving the weight and value to the test performed."[6]

As defendant has argued in his filings, Corporal Jones administered the HGN in 62 seconds, demonstrated the correct way to pivot on the Walk and Turn and admittedly may have failed to instruct the defendant to keep his eyes focused on the One Legged Stand. These are deficiencies that do not rise to the disqualification of these NHTSA tests performed on the defendant on the date, time and place in the Charging documents. In essence, the tests were formally moved and received into evidence without *voi dire*. However, the Court finds given these deficiencies, said deficiencies go to the weight of the evidence to be considered by the Court and compliance with the NHTSA Guidelines. The Court finds the tests overall were credible and has received the NHTSA Test results into the Suppression Record. These diminimus deficiencies do not affect the overall credibility of the NHTSA tests except the HGN which has been excluded by this Court.

Based upon the totality of the circumstances, considering the officer's training both the direct cross and redirect of the Corporal's testimony, the Court finds sufficient probable cause for the arrest of the DUI, 21 *Del.C.* §4177(a). In the record, the defendant ran a stop sign. The defendant had a "strong odor of alcohol." He conceded he had consumed "three to four beers". His eyes were "blood shot and glassy". The limited impeachment of Corporal Jones administering of the NHTSA Tests at the scene, the Court concludes, at the very least, he failed

[6] *See State v. Pasawicz*, 2012 WL 1392564 at *5 (quoting *State v. Iyer*, 2011 WL 976480 (Del.Super.Ct. 2011)).

the PBT, Walk and Turn and One legged stand NHTSA tests. Even excluding the HGN NHTSA Tests, the Court finds probable cause to arrest the defendant for a violation of 21 *Del.C.* §4177(a).

This matter shall be set for trial with notice to counsel of record at the earliest convenience of the Court.

IT IS SO ORDERED this 5th day of February, 2015.

John K. Welch, Judge

/jb

cc: Ms. Diane Healey, CCP Case Manager