**IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

| | | |
|---|---|---|
| **STATE OF DELAWARE,** | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| | ) | |
| **v.** | ) | **Case No.: 1103018636** |
| | ) | |
| **SHAWN D. MUNDEN,** | ) | |
| | ) | |
| Defendant. | ) | |
| | ) | |

**Date Submitted: March 2, 2012**
**Date Decided: April 2, 2012**

# MEMORANDUM OPINION ON DEFENDANT'S MOTION TO SUPPRESS

**Darryl A. Parsons, Deputy Attorney General,** Office of the Attorney General, 820 N. French Street, 7th floor, Wilmington, DE 19801.
*Attorney for the State of Delaware*

**Edmund Daniel Lyons, Esquire**, Attorney at Law, 1526 Gilpin Avenue, P.O. Box 579, Wilmington, DE 19806.
*Attorney for Defendant*

**WELCH, J.**

## I. Introduction

Pending the Court's decision on Defendant's three (3) Motions; a Motion to Suppress; a First Motion in Limine; and a Second Motion in Limine filed and docketed with the Clerk of the Court by Defendant on or about June 21, 2011. Defendant has been charged by Information filed by the Attorney General with the Clerk of the Court with two (2) Title 21 motor vehicle violations. First, the charging documents allege that defendant failed to stop at a stop sign in violation 21 *Del.C.* §4164(a) on March 21, 2011 on Lindell Boulevard; Count 2 alleges a driving under the influence of alcohol in violation of 21 *Del.C.* §4177(a) on the same date and place in the charging documents.

A hearing was held on defendant's Motions on February 7, 2012. This is the Court's final Order and Opinion.

## II. The Facts

Sergeant Andrew Lloyd ("Officer Lloyd") testified at the Suppression Hearing. He is a Delaware State Police Officer employed at Troop 9 in Odessa since September, 2004. His present duties include uniform patrol and monitoring of traffic and criminal complaints out of Troop 9. On March 21, 2011 he was at Troop 6 charged with the same duties. He is certified in Intoxilyzer and NHTSA DUI detection and Horizontal Gaze Nostagnus and has completed police training on the Intoxilizer 5000.[1]

On March 21, 2011 at 4:42 PM Officer Lloyd was on Milltown Road in New Castle City in a semi-marked patrol vehicle with lights and a siren. The road conditions were "clear, cool and dry". Officer Lloyd was traveling westbound on Milltown Road in New Castle County and observed a silver Dodge Caravan who failed to stop at the stop sign, and then made a "wide turn" eastbound. Officer Lloyd then performed a U-Turn and followed the defendant's motor vehicle

[1] State's Exhibits No. 1, 2, 3 and 4 were moved into evidence without objection.

to Dickinson High School where he activated his emergency lights. Defendant pulled into Dickinson High School.

Officer Lloyd approached defendant's motor vehicle and the defendant identified himself as Shawn D. Munden ("Munden" or the "defendant"). Defendant was seated in the driver's seat and Officer Lloyd spoke with him. Officer Lloyd informed the defendant of the reason for the stop and asked him for his driver's license, registration and insurance card. At that time Officer Lloyd noticed a "strong odor of alcoholic beverages"; that the defendants face was "flushed" and his eyes "glassy". Defendant did, in fact, however produce a valid driver's license, registration and insurance card.

According to Officer Lloyd, the odor of alcohol was emanating two-three feet away from Officer Lloyd. It was described as a "strong odor of alcohol" from the defendant's person. Defendant made an admission that he had consumed one beer while working on his motor vehicle, but later told Officer Lloyd that he had a "couple more beers". Officer Lloyd also noticed two opened Natural iced beers in the driver's front seat and described the defendant's appearance as "blood shot eyes." The defendant's clothes were also "soiled". During conversations with Officer Lloyd, he described the defendant's speech as "slurred at times." The defendant's complexion was "flushed". Officer Lloyd testified the defendant's overall attitude was "cooperative and polite". Defendant exhibited no "unusual actions".

Officer Lloyd requested the defendant exit the motor vehicle which he described as "slow and uneventful".[2]

The defendant was then requested to perform field coordination sobriety tests. He informed Officer Lloyd that he had no physical disabilities. Defendant was requested to cite the alphabet. After proper instructions to recite F-D the defendant agreed and cooperated voluntarily. The test was completed at the entrance of Dickinson High School on Milltown

Road. It was at that time dusk. On the Alphabet Test, the defendant cited F-P slow, but performed the test correctly. On the Counting Test, 79-68 which defendant was also instructed by Officer Lloyd, the defendant cited 79-68 and also "slow", but performed the test correctly.

The defendant was next requested to perform the NHTSA Walk and Turn Test and to walk an imaginary line. During the instructional phase, the defendant couldn't keep his balance and started early. Defendant also missed heel to toe, stepped off the line and took 10 steps back while instructed to only take 9. Of the potential eight clues, Officer Lloyd testified that the defendant exhibited four clues, which Officer Lloyd indicated resulted in a 68% probability that defendant's BAC was .1 or greater under NHTSA standards and guidelines.

Next, defendant was requested by Officer Lloyd to perform the One Legged Stand Test. The defendant was properly given instructions under NHTSA guidelines. The defendant completed that test without incident. Next, Officer Lloyd noted he did not request the defendant to perform the Horizontal Gaze Nystagnus Test because of his past practices in conducting DUI stops.

Officer Lloyd testified the defendant was stopped at 5:30 PM. He was handcuffed and placed in the police car approximately 5:42 PM.

On cross-examination the defendant's turn at the intersection in Middletown was described by Officer Lloyd as a "wide turn." Officer Lloyd also testified the defendant's speech was "slurred at times" and his exit out of his motor vehicle was "slow, but uneventful".

Officer Lloyd indicated during cross-examination that his patrol car was equipped with a mobile video recorder on the dashboard but he did not activate it at the time because he simply forgot to turn it on. On cross-examination, Officer Lloyd indicated he either did not turn it on or the memory was full and he needed the Troop Commander to "reprogram it". Officer Lloyd further testified he didn't think to turn it on at the time of the traffic stop. He believes it was

---

[2] Officer Lloyd testified he had 500 prior DUI arrests and/or investigations.

simply an "oversight". Officer Lloyd testified the video, if activated, would have picked up whether defendant's speech was "slurred" and would have indicated whether the defendant actually touched heel-to-toe on steps 1-9.

According to Officer Lloyd, the defendant missed the heel-to-toe greater than ½ inch. Officer Lloyd testified that is his normal standard and the defendant stepped off the line during the walk-and-turn on steps 4, 5 and 6 and back steps 9-1. Officer Lloyd conceded if the video was on, it would have filmed this field coordination test.

Officer Lloyd indicated that the Alphabet and Counting Test results were "okay" and during the Walk and Turn Test, the defendant exhibited four (4) clues and that the One-Legged Stand was a "pass".

Officer Lloyd testified the defendant was also "polite and cooperative." At Troop 6, after he was taken back to the Troop, Officer Lloyd testified the defendant had "no problems" walking from the Police court to the Intoxilizer room. Officer Lloyd also testified that he did not use the Intoxilizer MVR video when he took the defendant back to the Troop to administer the Intoxilizer 5000. According to Officer Lloyd using the video is an administrative burden because copies must be made to defendant's attorney, the State, the Police, as well as the Attorney General. Officer Lloyd testified that there are mechanical requirements such as turning on and off the video machine, presetting the device, and inserting the DVD and as indicated, as well as making sufficient copies for all interested parties he described, are too cumbersome.

## III. <u>Standard of Review</u>

"A defendant moving to suppress evidence bears the burden of establishing that a search or seizure violated his rights under the U.S. Constitution, the Delaware Constitution, or the Delaware Code."[3]

---

[3] *See Rakas v. Illinois*, 439 U.S. 128, 130 N.199 S.Ct. 421, 58 L.Ed.2d 387 (1978); *State v. Dollard*, 788 A.2d 1283, 1286 (Del. Supr. 2001; *State v. Bien-Aime*, 1993 WL 138719 at *3 (Del. Supr. March 17, 1993).

## IV. The Law

Under *State v. Maxwell*, 624, 926, 929-930, Del. Supr., (1993) probable cause has been defined as follows:

> …A police officer has probable cause to believe defendant has violated 21 *Del.C.* §4177… 'when the officer possesses' information which 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).

*See, also Delaware v. Prouse*, 440 U.S. 663 (1979); *Coleman v. State*, Del. Supr., 562 A.2d 1171, 1174 (1989). As indicated in *Spinks v. State*, Del. Supr., 571 A.2d 788 (1990):

> "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).

"While driving under the influence," in relevant part, as set forth on 21 *Del.C.* §4177(c)(5) has been defined by the Superior Court in *Bennefield v. State*, 2006 WL 258306 (Del. Supr.) as follows:

> [A] According to the Supreme Court, <u>the evidence proffered '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.' It is unnecessary that the defendant be 'drunk' or 'intoxicated' to be found guilty of driving while under the influence. 'Nor is it</u>

> required that impaired ability to drive be demonstrated by particular acts of unsafe driving.' 'What is required is that the person's ability to drive safely was impaired by alcohol.' Finally, an accused may be convicted under this statute based on admissible evidence '*other than the results of a chemical test* of a person's blood, breath or urine to determine the concentration or presence of alcohol or drugs.' *See Lewis v. State*, 626 A.2d 1350 at 1355. (Emphasis supplied).

With regards to the reasonable articulable suspicion, …"[Id] it is well settled that reasonable articulable suspicion is required to seize an individual and it must be based upon specific and articulable facts and cannot be based on a mere hunch."[4] Under the reasonable articulable suspicion test, a police officer "must point to specific and articulable facts when which, taken together with rational inferences from those facts reasonable warranting the intrusion."[5]

In *State v. Brohawn*, 2001 WL 1629086, at *3 (Del.Super., March 6, 2001) the Court rejected defendant's contention that the officer who conducted the traffic stop did not have reasonable suspicion because the officer who actually witnessed the traffic violation radioed ahead and another officer and the second Officer was the one who conducted the traffic stop. Such is the case pending here as RECOM contacted Officer Ivey and informed Officer Lloyd of an alleged pending drug transaction.

## V. Discussion

With regard to defendant's Motion in Limine to exclude Officer Lloyd's observations of the NHTSA Field Tests in this case because car MVR his video was not activated, the State's argument in the filings with the Court is on point and dispositive: (See Motion in Limine for failure to turn on motor vehicle recording ("MVR") in this proceeding.)

In its Answer, the State agrees that the Delaware State Police has … an "in-car camera policy" (the "policy") which, *inter alia*, provides "MDR Equipment has been demonstrated to be

[4] *See Terry v. Ohio*, 392 U.S. 1 (1968); *Jones v. State*, 745 A.2d 856 (Del. 1999).

of value in the prosecution of traffic and criminal violations, evaluation of employee performance, and as [a] training tool." The same was attached as Exhibit "A" to the State's Response to Defendant's Second Motion in Limine to Bar Field Tests and Evidence of Breath Testing. The policy sets forth as follows:

> The MVR will provide accurate documentation of events, actions, conditions and statements during the arrests and other instances corroborating reports. While evidence may be captured on the recordings, the use of video and audio recording equipment by members primarily assigned to general police activities is not intended as a device to document all evidentiary material relevant to Court proceedings. Any evidence is a byproduct of the primary purpose for installation of said equipment.

The State also points out that section C-1-a also provides as follows:

> The following incident[s] shall be recorded.
> (a) all traffic stops, pedestrian stops, and requests for consent to search a motor vehicle, and use of drug detection canines.

The Court must conclude after careful consideration of defendant's Motion in Limine as well as the State's Response that no legal basis exist to bar Sergeant Andrew Lloyd ("Officer Lloyd") from testifying about his direct, personal observations of the events of the traffic stop of defendant on March 21, 2011 which could have been recorded by the in-car video. In short, Officer Lloyd can testify as to his personal observations of the stop in question and defendant's performance on all NHTSA and non-NHTSA field test results. No bad faith exists in the record because Officer Lloyd did not turn the MVR on. In the testimony Officer Lloyd testified he simply forgot to turn on the recording equipment. It also must be noted that while defendant argues this Court should apply a *DeBerry/Lolly* analysis, the defendant cites no case law or citation that an independent legal duty exists to the defendant in the instant case to operate the MVR equipment. Officer Lloyd has first-hand knowledge of the events and under the Delaware Rules of Evidence is a competent witness. *See* DRE 602. Defendant also has the opportunity to

---

[5] *See Coleman v. State*, 562 A.2d 1171, 1174 (Del. 1989) (quoting *Terry*, 392 U.S. at 21.

cross-examine Officer Lloyd with respect to the policy and present any additional evidence as well as fully cross-examine Officer Lloyd of all events of the traffic stop.

The State also sets forth the precedent that Delaware Courts have held that a violation of police policy does not by itself require suppression of evidence or bar a police officer from testifying as to his personal observation.[6] The State points out that in *Folks*, the Court refused to address defendant's claims that his statement should have been suppressed because they were obtained in violation of school and/or police policy.[7] The Court in *Folks*, as the State points out reason "[t]he policy violation does not implicate constitutional concerns and cannot be said to be prejudicial to substantial rights."[8]

Defendant does not allege constitutionally protected rights were violated by not operating the MVR video in this instant and/or that the video records do not exists because they were lost or misplaced by the State. Nor does defendant assert that any prejudice has occurred. Defendant simply argues, *inter alia*, that the Court should apply *DeBerry/Lolly* analysis and the State is therefore obligated to record all communications within intoxicated drivers through MVR recordation. However, defendant does not present any statutory ruling nor any rule or regulation.[9]

The State correctly points out that there is no legal duty to record the field tests these MVR videos. The Court finds they are an enforcement tool which the State may use in the preparation of its criminal case subject to cross-examination to prove a charge beyond a reasonable doubt. 11 *Del.C.* §301. Hence if no duty exists, no breach has occurred and Officer Lloyd has made himself available at trial to be fully cross-examined and testified. Hence, the Court shall not apply a *DeBerry/Lolly* analysis.

---

[6] *See Folks v. State*, 648 A.2d 424 (1994 WL 330011, at 2)(Del. Super. 1994).
[7] *Id.* at 3.
[8] *Id.*

Defendant's Motion in Limine to Bar Field Tests and Evidence of Breath Tests based upon the in-car camera policy was not followed or that Officer Lloyd forgot to turn on the MDR equipment is therefore DENIED.

With regard to Defendant's application to bar the Intoxilyzer video or Intoxilyzer Breath Test because the Intoxilyzer video room was not working, the same analysis set forth above applies as the defendant is owed no duty to turn on the Intoxilyzer "MVR" at the Troop. However, since the proceedings at the instant moment considered simply a Motion to Suppress, and there has been no introduction of a breathalyzer Intoxilyzer 5000 Test, the Court shall address that issue should the need arise when the evidence is actually presented to the Court.

**Defendant's Second Motion in Limine to Exclude Expert Interpretation of Field Tests Under NHTSA.**

The State points out that defendant's "lone argument" is that the field tests should be re-admissible without the gloss of the National Highway Safety Administration Performance Standards.[10]

The State points out that defendant admits the same Motion was denied by Judge Smalls in another DUI prosecution, *State v. Myer*, Case No.: 06013877. The only additional evidence defendant asserts should be considered by the Court is an expert from the National Highway Safety Traffic Administration (NHSTA) DUI Detection and Standard for Field Sobriety Testing Instructor Manual dated February 6th in discussing the One Legged Stand Test under the "Column Instructor Notes" that manual provides, *inter alia*, "SFSTs or tools to assist you in seeing visible signs of impairment and not a pass/fail test". In the instant matter Corporal Lloyd, the arresting officer testified that defendant completed the tests.

---

[9] *See, State v. John Wicks*, 2007 WL2318652 (Del.Com.Pl., Welch, J.) Which the Court has already addressed this issue on a similar issue as to whether the MVR was misaligned and otherwise not available at trial.
[10] *See Motion at 1*.

The State also points out at page 3 and 4 of its Answering Memorandum in Opposition to the Motion in Limine that NHTSA makes specific reference to standardized "clues" and allows a police officer to draw inference that a suspect may be impaired from his/her performance. Again, the State correctly points out in their Answering Response to Defendant's Second Motion in Limine that Defendant's citation to *State v. Brown* for the "over-reaching premise" that a police officer may not use "value added descriptive language" has not been adopted by any Delaware Court.

In *Brown*, the Court of Common Pleas for Sussex County decided that three non-NHTSA field sobriety tests; namely the Alphabet, Counting and Finger Test where not scientifically reliable within the scope of *Daubert v. Merrill Pharms, Inc.*[11] However, Judge Carpenter in *Minestero* also ruled that these non-NHTSA field mental acuity tests were not scientific test subject to pass/fail analysis. *Daubert* already concluded that these three field sobriety tests do not contact scientific evidence as a matter of law. The Court of Common Pleas in Sussex County ruling was as follows:

> Therefore, the State must refrain from using "value-added descriptive language' or any 'scientific, technical or specialized information learned from law enforcement or traffic safety instruction' in connection with evidence obtained from defendant's performance of the 'alphabet' 'counting', and 'finger-count' tests. The State may, however, present the testimony of witness(es) consisting of "helpful firsthand observations" of defendant's performance of these three tests.

The State correctly points out that …"the Delaware Superior Court has previously held that, when a proper foundation has been established, and when properly administered and scored by a qualified officer, 'the [Horizontal Gaze Nystagnus] Test is a reasonable scientific indicator of alcohol impairment and is therefore admissible."[12] In *Zimmerman*, the Court ruled that … "[p]rior to the admission of HGN evidence, the State must provide [a] proper foundation…by

[11] *See Daubert*, 509 U.S. 571 (1993).

presenting testimony from an expert with specialized knowledge and training in HGN testing and its underlying principles…a Delaware Police Officer with specialized training in HGN will suffice." [13]

In the instant case, before the Court, Officer Lloyd of the Delaware State Police, through the Attorney General introduced a certificate of successful completion in Police training for NHTSA-DUI Detection and Horizontal Gaze Nystagnus Certification in the record. The Court also received a proper foundation as the State points out on his testimony and NHTSA performance of applicable scoring standards. The Court must also note that Officer Lloyd did not administer an HGN test in this case. Defendant completed the One-Legged Stand Test.

Finally, the State points out in its instructional phase of the Walk and Turn Test there are certain clues which are set forth on page 7 of the State's Answering Response to the Motion in Limine. The State also points out that Officer Lloyd, in accordance with his professional training, instructed the defendant how to perform the Walk and Turn Test and the defendant demonstrated four clues; 1) he was unable to maintain his balance during the instructional phase; 2) defendant missed heel-to-toe on five separate occasions; 3) defendant stepped off the line five times; and 4) defendant took ten steps on his return instead of the nine as instructed by Officer Lloyd.

For all these reasons the Court DENIES Defendant's Second Motion in Limine to Exclude Expert Interpretation of the Field Tests under the Standards of the National Highway Safety Transportation Safety Administration Test.

With respect to Defendant's Motion to Suppress for Lack of Reasonable Articulable Suspicion or lack of Probable Cause, the Court finds for the reasons set forth above, the State has met its burden by a preponderance of evidence. As to reasonably articulable suspicion, the

---

[12] *See Zimmerman*, 693 A.2d 311 (Del.Super. 1997)
[13] *See Zimmerman* at 314.

defendant failed to stop at a stop sign in violation of 21 *Del.C.* §4164(a). As to probable cause, for a violation of 21 *Del.C.* §4177(a), the record indicates a motor vehicle violation, (Stop sign), "flushed face", "glassy eyes", a strong odor of alcohol two-three feet from defendant's person, an admission of consuming several beers before the stop, two open beer cans in the driver's front seat, "blood shot eyes", speech "slurred at times"; and a failed NHTSA Walk and Turn test with a 68% probability that defendants BAC was .10 or greater with four (4) clues. Under the totality of circumstances, these factors in the instant record constitute probable cause for a violation of 21 *Del.C.* §4177(a).

## VI. Opinion and Order

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 2nd day of April, 2012.

_____
John K. Welch, Judge

/jb
cc: Ms. Diane Health, CCP Case Manager