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

STATE OF DELAWARE,)	
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)	
v.)	Criminal Action No.
)	1108017931
MELISSA A. DIORIO)	
Defendant,)	
)	

MEMORANDUM OPINION AND ORDER

To: Zachary Rosen, Esquire
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Date Submitted: October 28, 2013 Date Decided: November 18, 2013

FRACZKOWSKI, J.

FACTS AND PROCEDURAL HISTORY

Defendant, Melissa A. DiOrio, was charged with five offenses under the Motor Vehicle Code when operating a vehicle in New Castle County, Delaware, on August 20, 2011: driving under the influence of alcohol, 21 Del. C. § 4177(a)(1); speeding, 21 Del. C. § 4169(b); following a vehicle too closely, 21 Del. C. § 4123(a); making an improper lane change, 21 Del. C. §4122(1); and turning without proper signal, 21 Del. C. §4155(a). Defendant filed a motion to suppress evidence seized in a blood draw. After a hearing, the State did not contest suppression of the results of a blood draw. The State and Defendant then stipulated that the

record of the suppression hearing would be a trial of the issues before the Court. The parties submitted written arguments, and this is the Court's decision in the matter.

On August 20, 2011, at approximately 9:00 pm, Delaware State Trooper Yeldell (hereinafter "Yeldell") was driving northbound on Shipley Road in a marked police car when he observed the Defendant, Melissa DiOrio (hereinafter "DiOrio"), allegedly speeding in the opposite direction. Yeldell performed a U-turn and began driving behind Ms. DiOrio. During the time he was following Ms. DiOrio, Yeldell observed the following traffic violations: speeding, following too closely, improper lane change, and failure to use a turn signal when changing lanes.² After Yeldell activated his lights, Ms. DiOrio pulled over and parked her vehicle in the middle of a parking lot. Upon making contact with Ms. DiOrio, Yeldell noted a strong smell of alcohol emanating from her breath, and observed her bloodshot eyes.³ Yeldell asked Ms. DiOrio for her license, registration, and insurance card. Prior to providing only her driver's license, Ms. DiOrio paused, stared at Yeldell for a period of time, and stated that she was not speeding.⁴ Yeldell asked Ms. DiOrio if she had been drinking, to which she initially replied no, then stated later that she had consumed a vodka and lemonade "earlier" that day.⁵ Yeldell requested that Ms. DiOrio recite the alphabet from E to P. Ms. DiOrio responded with "E E F G H L M O." According to Yeldell, Ms. DiOrio did not complete the finger dexterity test. Next, Yeldell asked Ms. DiOrio to exit her vehicle. Upon exiting, Ms. DiOrio placed her left hand upon the door of the vehicle, and kept it there as she walked to the rear of the vehicle.⁷

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¹ Tr. at 4.

² Tr. at 4-5.

³ Tr at 8

⁴ Id

⁵ Tr. at 9.

⁶ Tr. at 10.

⁷ Tr. at 12.

Trooper Yeldell testified that during his interaction with Ms. Yeldell, she was insulting and combative, and used profanity.⁸

Trooper Yeldell administered three NHTSA tests. The first was the Horizontal Gaze Nystagmus test (hereinafter "HGN"). According to Yeldell's testimony, Ms. DiOrio exhibited four of the six clues for that test. Next, Ms. DiOrio performed the walk and turn test, during which she did not kiss her heel to her toe during each step, but she did maintain a two- to three-inch gap with each step. Yeldell testified that Ms. DiOrio did step off the line for steps one through three, but had no additional problems with the test. Ms. DiOrio exhibited four out of eight clues for that test. Finally, Yeldell administered the one-leg stand test. Ms. DiOrio placed her foot down after the count of three, and exhibited four out of four clues. Yeldell testified that DiOrio did maintain her balance and kept her arms to her side while he instructed her on each test. Side while he instructed her on each test.

Following the administration of these tests, Yeldell asked Ms. DiOrio to undergo a portable breathalyzer test (hereinafter "PBT"), which she failed. As a result, Yeldell took Ms. DiOrio to Troop 1 for further testing. At the station, Ms. DiOrio refused the intoxilyzer test and Yeldell called a phlebotomist to perform a blood draw on Ms. DiOrio. As the phlebotomist prepared to perform the test, Ms. DiOrio became combative and verbally abusive. As a result, three troopers held her down to prevent harm to the phlebotomist.

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⁸ Tr. at 9.

⁹ Tr. at 14.

Yeldell testified that if he is on a roadway, he will utilize a fog line, however he did not note in his documentation that he used a line for Ms. DiOrio's test, and therefore assumed that he had Ms. DiOrio walk along an imaginary line (Tr. at 36).

¹¹ Tr. at 16.

¹² Tr. at 17.

¹³ Tr. at 33-34.

¹⁴ Tr. at 17.

On June 6, 2013, the Court held a suppression hearing, as Ms. DiOrio challenged the results of the blood draw performed on August 20, 2011. On July 5, 2013, the State advised the Court that it no longer contested the suppression of the blood test results. Accordingly, this case involves only a question of impairment.

Trial was scheduled for August 29, 2013. In lieu of further testimony, the Defense and State stipulated that the record of the suppression hearing would constitute the record of the trial. Defendant tacitly admitted that the record showed no defense to the four charges other than the driving under the influence charge.

Decision was reserved and the parties submitted arguments on the following two issues:

- 1. Whether or not the results of the Horizontal Gaze Nystagmus should be admitted as part of the trial record.
- 2. Whether or not the State proved beyond a reasonable doubt that Ms. DiOrio was driving under the influence of alcohol.

Ms. DiOrio, through her attorney, Thomas Foley filed a letter addressing the above issues on September 30, 2013. DiOrio argues that although the HGN test is deemed admissible in the courts for the purpose of establishing the existence of probable cause, it is not automatic that the test be "admitted as substantive evidence that the driver was under the influence." Ms. DiOrio also argued that the State could not prove beyond a reasonable doubt that Ms. DiOrio was driving under the influence, as her driving was not impaired at the time Yeldell pulled her over, and the State failed to prove that her results on the field test were influenced by the consumption of alcohol, rather than her coordination, balance, and fitness.

The State responded on October 28, 2013, arguing that Trooper Yeldell possesses the necessary qualifications to testify regarding the administration of the HGN test, and its ultimate

¹⁵ Defendant's letter of Sept. 30, 2013 (quoting *State v. Ruthardt*, 680 A.2d 349. 355 (Del. Super. 1996)).

results. The State also argues that it has proven beyond a reasonable doubt that the Defendant was driving under the influence, as the State proved that Defendant's ability to drive safely was impaired by alcohol.

DISCUSSION AND FINDINGS

a. Admissibility of the Horizontal Gaze Nystagmus Test

Under the principles set forth in State v. Ruthardt, before a court may admit evidence of an HGN test, it must first hear testimony from an expert on the testing method and underlying principles of the test. 16 In Delaware, a "police officer with specialized training in HGN will suffice" as the expert. 17 However, the specialized training must consist of more than "three days (or twenty-four hours) of general DUI training," and must enable the testifying officer to discuss "the correlation between alcohol ingestion and gaze nystagmus, how other possible causes might be masked, what margin of error has been shown in statistical surveys and the cause of observed symptoms of nystagmus." Ultimately, however, the results of the HGN test may not be used for the purpose of "conclusively establish[ing] that a defendant's blood alcohol content equaled or exceeded a specific concentration."¹⁹

During the suppression hearing, Yeldell testified that he received 40 hours of general DUI training at the police academy, and then took an eight-hour refresher course in 2010. In his later testimony, Yeldell explained how he administered the test in accordance with NHTSA

¹⁶ 680 A.2d 349, 362 (Del. Super. 1996) ¹⁷ *Id*.

¹⁹ Zimmerman v. State, 693 A.2d 311, 315 (Del. 1997) (quoting Ruthardt, 680 A.2d at 351).

guidelines, stated which clues he looked for and ultimately observed during his investigation of Ms. DiOrio, and also explained how he ruled out one other cause of nystagmus.²⁰

Although Yeldell testified about receiving 40 hours of training on DUI detection and some supplemental training, there was nothing in the record to show what part of this time was focused specifically or particularly on the HGN test. Nothing was shown on training as to the theories behind and proper implementation of the test. The testimony on the issue of the HGN test was a recital of phrases from a text. It did not demonstrate any understanding of the reasons why the test can be found reliable.

Measuring the record in this case against the guidelines delineated in Ruthardt and Zimmerman leads to the conclusion that the witness was not qualified to give expert opinions and thus the results of the HGN test in this case are inadmissible. ²¹

b. Proof Beyond a Reasonable Doubt that Ms. DiOrio was Driving Under the Influence of Alcohol

Under 21 Del. C. § 4177(a)(1), "[n]o person shall drive a vehicle [w]hen the person is under the influence of alcohol." In considering whether the State has proven beyond a reasonable doubt that an individual was driving under the influence, the Court must look at the totality of the circumstances. 22 The State must prove that the defendant was in control or driving

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²⁰ Yeldell testified that the motions involved in riding on a Ferris wheel or a merry-go-round may cause nystagmus, but he ruled out those options as causes of Ms. DiOrio's nystagmus, as "She said that she was coming from home and never noted that she was at any carnival or any such place" (Tr. at 14).

²¹ In Zimmerman, the testifying officer provided the following testimony as the foundation for the admission of the HGN test: explanation in general terms of the test administration and specific detail about the clues looked for and the total number of clues observed. The Court noted that he did not testify as to whether the "test was performed in accordance with NHTSA standards... the correlation between alcohol ingestion and gaze nystagmus, how other observed symptoms of ntystagmus." The Court noted that testimony of the above is necessary in order to lay a proper foundation for the admission of the HGN test (FN 15). possible causes might be masked, what margin of error has been shown in statistical surveys and the cause of

² State v. Smallwood, 2012 WL 5869624 (Com. Pl. Nov. 9, 2012).

a vehicle at or around the time he or she was charged, and also that while in control or driving, the individual was under the influence of alcohol. ²³ "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."

The defense argues that Ms. DiOrio's driving was not impaired, as there is little evidence that Ms. DiOrio was driving in a reckless manner, especially because Yeldell observed only minor traffic violations during the time he was following her. Although Ms. DiOrio admitted that she had consumed a vodka and lemonade earlier in the day, the defense argues that such admission is not enough to prove that Ms. DiOrio was impaired at the time of her arrest. Finally, the defense states that the field test results are inconclusive as to Ms. DiOrio's impairment, as external factors, including an individual's coordination and balance, may affect the outcome of the tests.

The State counters that Ms. DiOrio's driving, when combined with her behavior directed toward Yeldell, her failed sobriety tests, her admission to drinking earlier that day, and her balance, all show that Ms. DiOrio was unable to exercise the judgment and due care of a reasonable person in a similar circumstance. The State argues that it did prove beyond a reasonable doubt that Ms. DiOrio was driving under the influence of alcohol.

This Court will consider the facts as outlined by the defense and the State in addition to the facts contained in the testimony and briefs in order to fully consider the totality of the

²³ *Lewis v. State*, 626 A.2d 1350, 1355 (Del. 1993).

²⁴ State v. Mealy, 2010 WL 175623 (Com. Pl. Jan. 20, 2010) (quoting Lewis v. State, 626 A.2d 1350, 1355 (Del. 1993)); see 21 Del. C. § 4177(c)(5) (stating, "While under the influence' shall mean that the person is, because of alcohol or drugs or a combination of both, less able than the person would ordinarily have been, either mentally or physically, to exercise clear judgment, sufficient physical control, or due care in the driving of a vehicle").

circumstances present in this action. As determined above, this Court will not consider the results of the HGN test in its analysis.

Trooper Yeldell testified that he pulled Ms. DiOrio over for speeding, following too closely, improper lane change, and failure to use a turn signal when changing lanes. Upon further inquiry, Yeldell stated that during the time he was following Ms. DiOrio in his vehicle, she did not speed, she maintained lane integrity, and other than the improper lane change, did not display any other signs of a failure to properly control her vehicle.²⁵ This testimony appears to show that the speeding offense was based on an estimate made when the vehicles were approaching from opposite directions. Yeldell noted that after he activated his emergency lights, Ms. DiOrio parked her car off of the busy road with a small shoulder and in a larger parking lot. Upon making contact, Yeldell noticed her bloodshot eyes and an odor of alcohol on her breath. Trooper Yeldell testified that he asked Ms. DiOrio if she had been drinking, which she initially denied, but then later admitted; Ms. DiOrio stated that she had consumed a vodka and lemonade "earlier." Yeldell did not ask Ms. DiOrio to clarify what she meant by "earlier." When Yeldell asked Ms. DiOrio for her license, registration, and insurance card, she paused for a moment, then handed him only her license. Trooper Yeldell testified that throughout his interaction with Ms. DiOrio she was combative and used profanity. Yeldell testified that Ms. DiOrio denied speeding, and stated that she was traveling to her boyfriend's house up the street from their current position.²⁶ Finally, Trooper Yeldell testified to Ms. DiOrio's results on the field sobriety tests he asked her to complete.

First, Yeldell testified that Ms. DiOrio could not properly recite the alphabet between the letters of E and P. Second, Ms. DiOrio did not complete the walk and turn test as asked, but

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²⁵ Tr. at 25-26.

²⁶ Tr. at 8-9.

instead maintained a gap of approximately 2-3 inches between her heel and her toes throughout the test. Finally, Ms. DiOrio failed to maintain her balance for the one-leg stand test, as she "swayed the entire time, raised her arms and hopped and her foot was down at three." Upon further questioning, Trooper Yeldell stated that the results of these tests can be affected by an individual's level of education, coordination, balance, and other physical attributes. Yeldell confirmed that Ms. DiOrio was able to maintain her balance and kept her arms at her sides during the instructional phases of the tests.²⁸

In *State v. Smallwood*, the Court found that evidence such as the defendant's inability to walk in a straight line, a strong odor of alcohol coming from the defendant's person, and the defendant's failure to speak clearly do not in and of themselves support a finding of driving under the influence.²⁹ The Court noted that it needed more evidence, such as the "defendant supporting himself by holding onto a motor vehicle or other objects in order to stand while speaking," multiple sobriety tests, and possible a blood draw to determine guilt for driving under the influence.³⁰

In similar fashion, this Court cannot conclusively determine that Ms. DiOrio's abrasive behavior, the odor of alcohol on her breath, and her failed sobriety tests support a finding of driving under the influence. Ms. DiOrio, rather than sway while walking, was able to maintain her balance during the instructions for each of the sobriety tests, and did not rely solely on her vehicle as support as she walked to the rear of her vehicle.

In *State v. Mealy*, the Court found that evidence of a strong smell of alcohol in the defendant's car, slurred speech, bloodshot eyes, flushed face, admission of drinking earlier,

²⁷ Tr. at 17.

²⁸ Tr. at 34.

²⁹ Smallwood, 2012 WL 5869624, at *8.

³⁰ *Id*.

failure to initially produce his license, loss of balance, use of a vehicle to steady himself, and failing scores for three sobriety tests³¹ sufficed as enough direct and circumstantial evidence to overcome the State's burden of proving the defendant guilty of driving under the influence beyond a reasonable doubt.³²

On first glance it appears that Ms. DiOrio exhibited similar signs of intoxication as the defendant in *Mealy*. However in *Mealy*, the arresting officer discovered the defendant slumped over the steering wheel of his car with his seatbelt tangled about his person. The defendant admitting to ingesting approximately three to four drinks earlier that evening, and continually lost his balance during questioning from the officer, so much so that the officer did not administer the one-leg stand test out of concern for the defendant's safety. Here, however, Ms. DiOrio was pulled over for allegedly speeding and due to a minor traffic violation; she was coherent when Yeldell first encountered her; she was able to maintain her balance throughout the tests performed; and she admitted to drinking only one drink earlier that day. Based on the factors relied upon by this Court in Mealy, Ms. DiOrio was not displaying the signs of intoxication present in the *Mealy* case.

While the State's evidence in this case may have quantity it does not have the quality which would dictate a finding of impairment while driving beyond a reasonable doubt. In sum, the evidence was not convincing on the core issue before the Court.

After an evaluation of all the facts and circumstances in their entirety, this Court has determined that Ms. DiOrio was driving the vehicle at or about the time of her arrest, but that she did not exhibit signs of severely impaired driving, nor did she exhibit signs of physical impairment attributable to the consumption of alcohol that would prevent her from properly

³¹ The three NHSTA approved tests are the HGN test, walk and turn test, and counting test.

³² *Mealy*, 2010 WL 175623, at *1.

maintaining the control over a motor vehicle. This Court therefore concludes that the State has not proven beyond a reasonable doubt that Ms. DiOrio operated a vehicle while under the influence of alcohol in violation of 21 *Del. C.* § 4177.

CONCLUSION

For the foregoing reasons, the Court finds that Defendant DiOrio is **NOT GUILTY** of driving under the influence of alcohol in violation of 21 *Del. C.* § 4177(a)(1); and is **GUILTY** of the offenses in violation of sections 21 *Del. C.* § 4169(b), § 4123(a), § 4122(1), and 4155(a). The clerk will set the open matters down for sentencing.

IT IS SO ORDERED.

Alfred Fraczkowski, Associate Judge³³

³³ Sitting by appointment pursuant to Del. Const. Art. IV, § 38 and 29 Del. C. § 5610.