IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
Plaintiff,	)	
	)	
	)	
v.	)	**Case No.: 1210014598**
	)	
CHARLES DEROSE,	)	
	)	
Defendant.	)	
	)	

Date Submitted: May 26, 2015
Date Decided: June 3, 2015

Upon Defendant's Motion to Suppress: GRANTED

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

Kester I.H. Crosse, Assistant Public Defender
Office of the Public Defender, 900 N. King Street, 2nd floor, Wilmington, DE 19801
Attorney for Defendant

WELCH, J.

I. Introduction

Before the Court is Charles DeRose's (the "defendant") Motion to Suppress (the "Motion") filed with the Clerk of the Court on April 10, 2015 seeking to suppress the results of the blood test drawn on the defendant. At the suppression hearing, the parties agreed that the sole issue to be decided by the Court in the pending Motion to Suppress is whether the defendant gave valid legal consent to the State in order to draw his blood. The Suppression hearing was held on May 19, 2015. While counsel could not file any formal Memoranda of Law, they submitted various copies of reported and unreported decisions to the Court for its review prior to its Final Written Decision and Order.

II. The Facts

First Class Officer Maura Schultz ("Officer Schultz") was duly sworn and testified. She is a police officer for New Castle County and was so employed on the date of the defendant's arrest for violation of 21 *Del.C.* §4177(a) on September 22, 2012. Officer Schultz was called by RECOM regarding a car accident and observed the defendant's motor vehicle in the middle of the roadway located at East Ayre Street and Forest Drive in New Castle County. The time was approximately 2300 hours or 11:00 pm. She arrived at the scene at 10:55 pm, 30 minutes after her call from RECOM. The defendant was being cut out of his motor vehicle by the "jaws of life" and was unconscious when he was placed in the ambulance. The defendant regained consciousness between 11:00 pm and 11:15 pm at Christiana Medical Center at the Trauma Unit when Officer Schultz then spoke to the defendant. Officer Schultz described the defendant's demeanor as "very agreeable." She had conversations with him while he was in a partially elevated position in a bed in a hospital room. The defendant answered all her questions. According to Officer Schultz the defendant was not combative. A copy of the Consent Form

was formally moved into evidence.[1] After the defendant signed the form, a phlebotomist at Christiana Medical Center drew the blood. The form was signed by the defendant at 23:56 hours. According to Officer Schultz, she never told the defendant she would get a warrant if the defendant did not sign the form. The defendant was "very agreeable" and signed the same on September 22, 2012.

On cross-examination, Officer Schultz told the Court that the defendant had a fairly serious facial laceration and was involved in a car accident. She told him "while inside the trauma room I was going to do a blood draw. Officer Schultz conceded nothing in her report indicating the defendant was informed of his right to refuse but she simply told him "I was going to do a blood draw." Officer Schultz agreed defendant had suffered a serious collision and was knocked unconscious as well as the noted serious laceration on the right side of his face.

Officer Schultz was shown Defense's Exhibit No. 3.[2] Officer Schultz was shown defendant's signature, which she conceded was very scratchy.

Next, the defendant took the stand. He is 26 years ago and is employed by Freedom Mortgage and was involved in the accident on September 22, 2012. Defendant had a concussion and a laceration on the side of his face and "does not recall anything from the accident all the way through the next morning" following being admitting to the hospital. Defendant was shown his scribbled signature and testified it "is not my signature." On cross-examination defendant conceded alcohol can cause impairment or memory loss.

III. Standard of Review

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[1] *See State's Exhibit No. 1* - Specimen Acquisition Authorization and *State's Exhibit No. 2*- Discharge transfer instructions.

[2] *Defense Exhibits No. 1 and 3,* by stipulation were moved into evidence. *Defense Exhibit No.* 2 was discharge instructions and *Defense Exhibit No. 1* was the individual consent to test allegedly signed by defendant in a scratchy manner.

On a Motion to Suppress, the State bears the burden[3] of establishing that the challenged search or seizure comported with the rights guaranteed to the defendant by the United States Constitution, the Delaware Constitution, and Delaware statutory law.[4]

IV. The Law

"The Fourth Amendment of the United States Constitution and Delaware Constitution protects against "unreasonable search and seizure." [5] "A warrantless search is deemed unreasonable unless the search falls within a recognized exception."[6] "If a search proceeds without a warrant the State must prove by a preponderance of evidence the search fell within established exception to the warrant required."[7] "A compelled and physical intrusion beneath the skin to obtain a blood sample for use as evidence in a criminal investigation is considered a search."[8]

As this Court has noted, warrantless searches under the Fourth Amendment "are per se and reasonable unless the Fourth Amendment subject to a few established and well delineated exceptions."[9] "One such exception is where a defendant voluntarily consents to a police search and seizure.[10]

(a) *Missouri v. McNeely.*

As the Superior Court also ruled in *State v. Wayne Jones*, the "...[s]uppression of a warrantless blood extraction was recently affirmed by the United States Supreme Court in

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[3] *See State v. Bien-Aime*, Del.Supr., Cr.A. No.: IK92-08-326, Toliver, J. (March 17, 1993)(Mem.Op.).
[4] *See Hunter v. State*, 783 A.2d 558, 560-561 (Del. 2001).
[5] *See United States Constitution Amendment IV, Delaware Constitution Art.1§6.* "A warrantless search is deemed unreasonable unless the search falls within a recognized exception."
[6] *See Katz v. United States*, 389 U.S. 347, 357 (1967); *Schneckloth v. Bustamont*, 412 U.S. 218, 219 (1973).
[7] *See Missouri v. McNeely*, 133 S.Ct. 1552, 1558 (2013).
[8] *See McNeely, 133 S.Ct. 1558.*
[9] *See Cooke v. State*, 977 A.2d 803, 854 (Del. 2009) (quoting *Katz v. United States,* 389 U.S. 347, 357 (1967).
[10] *See Schneckloth v. Bustamont*, 412 U.S. 218, 219 (1973).

Missouri v. McNeely.[11] The Supreme Court held that "…[i]n drunken driving investigations, the natural disposition of alcohol in the blood stream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant."[12]

The Court has set forth in the *Jones* decision and concluded that an exigency in drunk driving "…[m]ust be determined case-by-case based upon the totality of circumstances."[13] Also set forth in the Superior Court's decision in *Jones*, "…[r]outine DBWI investigation when no factors other than natural dissipation of blood alcohol suggested that there was an emergency, and thus, a non-consensual warrantless [blood draw] test violated [*McNeely's* right] to be free from unreasonable searches of his person.[14]

"Consent may be expressed or implied, but this waiver of Fourth Amendment rights needs to be knowing and intelligent."[15]

"To determine whether consent was given voluntarily, Courts examine the 'totality of circumstances' surrounding the consent, including (1) defendant's knowledge of the Constitutional right to refuse consent; (2) defendant's age, intelligence, education, and language abilities; (3) the degree to which the individual cooperates with police; and (4) the length of detention and nature of the questioning, including the use of physical punishment or other coercive police behavior."[16]

V. Opinion and Order

Applying these four (4) factors to the instant case, there is no record that was presented at the Suppression Hearing that the defendant was advised of the knowledge of the constitutional

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[11] *Id. 2013 WL 1628934.*
[12] *Id. at 1, 14.*
[13] *Id. at 3.*
[14] *Id.*
[15] *See Cooke* 977 A.2d at 855 (citing *Schneckloth v. Bustamont*, 412 U.S. at 241).
[16] *See Cooke 977 A.2d at 855 (Schneckloth v. Bustamont*, 412 U.S. at 226).

right to refuse consent. Even the officer indicated he was not advised of the same; his signature bears no resemblance to his name. While the defendant had suitable age, intelligence, education and language ability, he was placed in an ambulance at the scene unconscious and recently revived in the trauma room at Christiana Medical Center when Officer Schultz interviewed him. He testified he has absolutely no recollection of the conversation with the officer until the day after he was admitted. The defendant does not recall signing the consent form, or even speaking with the officer. There was a strong laceration on the right side of his face. He was unconscious until he woke up temporarily at the Christiana Trauma Room. While the defendant appeared to be cooperative with the police, he was recently dazed and unconscious. Officer Schultz never spoke to him at the accident scene prior to when he was cut out of his motor vehicle and transported by ambulance to the Trauma Unit of Christiana Medical Center.

Finally, with regards to the length of detention and nature of questioning, including the use of physical punishment, or other coercive police behavior, the Court did not find any such conduct in this suppression record. However, based upon the totality of circumstances and the quality of the signature of the defendant and based upon a review of the four (4) factors, the Court finds by a preponderance of evidence that the defendant did not validly consent to the blood draw by the phlebotomist at the Christiana Medical Center. The Court grants the Motion to Suppress. The Officer never applied for a search warrant and relied on a recently unconscious defendant to sign a consent form, which the defendant does not recall ever signing.

In a recent decision by this Court, *State of Delaware v. Michael Kane, ID No.:* 1210019022 Op., Welch, J. (Feb 12, 2014)., this Court reached the same conclusion. In *Kane*, the defendant was lying on the roadway following a motorcycle having struck a car. Defendant sustained a head injury and was lying on the ground when the police arrived. He was taken to

the hospital; lost "a lot" of blood causing a "trauma alert" and coded twice but was still subjected to a blood draw by a phlebotomist. The Court determined Kane's blood was not drawn by consent. The State Officer did not set forth in the suppression record why a reasonable effort could not have been made to obtain a search warrant.[17]

Likewise, in the instant case, as in *Kane*, no field tests, HGN, one legged stand, walk and turn, PBT or mental acuity tests were given to the defendant because of his unconscious state at the actual scene. Nevertheless, no warrant was ever applied by this law enforcement officer. Courts have ruled that a defendant who received a severe blow to this head in a motor vehicle accident and had no recollection of the police officers request to draw blood be completed was not capable of consenting to the blood draw.[18]

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 3rd day of June, 2015.

John K. Welch, Judge

/jb
cc: Ms. Diane Healy, CCP Criminal Case Manager

[17] *See State v. Brian Dempsey, ID No.: 121201170, Del. Super., Carpenter, J. (August 30, 2013).*
[18] *See McVaughn v. State*, WL 1117722 at *2 (Del.Supr) citing *Cooke v. State*, 977 A.2d 803, 854 (Del. 2009).