IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
	)	
	)	
v.	)	ID. No. 1307021876
	)	
CHRISTIAN LACKFORD,	)	
	)	
Defendant.	)	

ORDER

AND NOW, TO WIT, this 29th day of January, 2014, **IT IS HEREBY ORDERED** as follows:

Introduction

Before the Court is Defendant Christian Lackford's ("Defendant") motion, brought by counsel, to suppress all evidence obtained after Defendant was stopped at a sobriety checkpoint. Defendant argues that the stop violated his right against unreasonable seizures. Defendant also argues that police lacked reasonable suspicion to administer Field Sobriety Tests ("FSTs") and probable cause to arrest or subject him to a breath test. The Court held a suppression hearing on January

24, 2013 and reviewed the parties' submissions and documents submitted by the State.[1] For the following reasons, Defendant's motion is **DENIED.**

Findings of Fact

At 12:40 a.m. on July 27, 2013, Defendant was stopped during a sobriety checkpoint by Corporal Mark Conway ("Cpl. Conway") of the Delaware State Police ("DSP") while traveling on U.S. 40, Pulaski Highway in Newark, Delaware.[2] Cpl. Conway introduced himself and informed Defendant that the stop was part of a checkpoint designed to detect intoxicated drivers. While speaking to Defendant, Cpl. Conway observed that Defendant's eyes were glassy and his face was flushed. Cpl. Conway detected a strong odor of alcohol coming from inside the vehicle and viewed a small empty plastic bottle of Jim Beam Whiskey on the floor of the driver's seat. Based on these observations, Cpl. Conway asked Defendant how much he had to drink that evening. Defendant first replied that he had no alcohol, but then admitted to having two beers after work. Cpl. Conway noticed that Defendant's speech was slurred.

Thereafter, Cpl. Conway directed Defendant to pull into the designated testing lane. Cpl. Conway conducted pre-exit FSTs, starting with the alphabet test and the numbers test. Defendant's performance on these tests indicated a

[1] State's Ex. 1.
[2] Cpl. Conway has worked for DSP five years and received DUI detection field training.

probability of impairment. Cpl. Conway then asked Defendant to perform the finger dexterity test. Defendant's performance on this test also indicated a probability of impairment.

Cpl. Conway asked Defendant if he would participate in additional testing and he agreed. Cpl. Conway asked Defendant to exit the vehicle. Defendant stumbled as he exited the vehicle and used the driver side door for support. After exiting, Defendant also leaned his back against the back of the vehicle. Defendant walked about ten feet to the testing area. Cpl. Conway conducted a Horizontal Nystagmus Test ("HGN"),[3] the walk-and-turn test, and the one-leg stand. Defendant's performance on these tests indicated a probability of intoxication. After Defendant completed the tests, Cpl. Conway then conducted a Portable Breath Test ("PBT").[4]

The State submitted a memorandum written by DSP statistician Tammy Hyland which contained research pertaining to the number of DUI related crashes and arrests for specific grid locations in the preceding three years.[5] The memorandum also explained that the grids were included in the list of possible

[3] Cpl. Conway explained the principles behind the HGN test and how certain observations indicate intoxication. He also stated that the HGN test was administered under NHTSA standards, he accounted for false positives, and Defendant performed the test without any risk of strobe effect from the lights.
[4] Defense counsel objected to the admission of the PBT results because no evidence of calibration was provided. The State then stated that it would not address the PBT results.
[5] State's Ex. 1.

checkpoints for 2013 only if they showed three or more alcohol related crashes or nine or more DUI arrests in any of the three years shown. In 2011- 2012, 11 alcohol-related crashes and 27 DUI arrests occurred in the particular grid in which Defendant was stopped, "090-338" (hereinafter, "the Grid").[6]

Lieutenant Michael Wysock ("Lt. Wysock") testified that he serves as the Traffic Lieutenant and as Deputy Troop Commander. Lt. Wysock explained that, based on DSP checkpoint guidelines, he was required to select certain areas based on the statistics provided in the statistician's memorandum and submit a request to Captain Sherri Benson ("Capt. Benson"), Director of the Traffic Operations Section. On July 18, 2013, Lt. Wysock sent a request to Capt. Benson that stated, "I am requesting a sobriety check point for July 26, 20130 (sic) from 2200-0200 hours. The location grid is 084-334, 084-336, 086-334, 0896-338 (sic), covers US 40 fr[om] Wilton to SR 7."[7] Lt. Wysock testified that he did in fact send the request on July 18, 2013, that "0896-338" was a typographical error, and that the area on US 40 from Wilton to Route 7 includes the Grid. On the same day of the request, Capt. Benson signed a memorandum approving a sobriety checkpoint on July 26, 2013 from 2200 to 0200 hours for "84-334, 084-336, 086-334, 086-338, 090-338 (Covers Rt. 40 from Wilton to Rt. 7)".[8] Capt. Benson's approval also

[6] *Id.*
[7] *Id.*
[8] *Id.*

contained the total number of alcohol related crashes and arrests from the previous three years for all of the grids that she listed.[9]

The checkpoint was conducted from 2200 to 0200 hours in four lanes, two on each side of Route 40. There were arrow boards set up about a half-mile from the checkpoint, marked police cars, lights, and cones. All vehicles were stopped, unless Lt. Wysock determined that traffic was congested. In addition, officers were required to introduce themselves and explain the purpose for the stop upon approach. When the checkpoint was completed, Lt. Wyscok compiled the summary in accordance with DSP sobriety checkpoint guidelines.

Discussion

I. The Sobriety Checkpoint Substantially Complied with DSP Guidelines.

A stop at a sobriety checkpoint is a "seizure" subject to the reasonableness requirements of the Fourth Amendment to the U.S. Constitution.[10] Determining whether such a stop is reasonable requires a balance between the "State's interest in preventing drunk driving, the extent to which the system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who

[9] Capt. Benson's approval has a typewritten date of July 16, 2013, but a handwritten date of "7/18/13" next to her signature.
[10] *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 450 (1990).

are briefly stopped".[11] The U.S. Supreme Court and Delaware courts require checkpoints to be performed in a manner that protects against unfettered police officer discretion.[12]

DSP policy guidelines "describe the objective criteria used for choosing the location of the checkpoint, the manner of notifying officials and the procedures for actually conducting the roadblock."[13] In *Bradley v. State*, the Delaware Supreme Court upheld this Court's finding that a checkpoint stop was constitutional because the record showed that the police had "carefully complied with substantially all of the [Office of Highway Safety] procedures in setting up and operating their checkpoint" and that the police "were careful to comply with OHS guidelines that limit an officer's discretion."[14] The Court also stated that, "the minor deficiencies in compliance […] did not affect [the defendant's] constitutional rights.[15]

The police substantially complied with DSP guidelines in the formation of the checkpoint.[16] The crux of defense counsel's argument was that the checkpoint was not established in compliance with the guidelines because the Grid was not

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[11] *Id.* at 455.
[12] *Id.* at 496 (discussing *Martinez-Fuerte*, 428 U.S. 543,558 (1976)); *Bradley*, 2004 WL 1964980, at *1, 858 A.2d 960 (Del. 2004)(TABLE); *State v. Cook*, 2013 WL 1092130, at *2 (Del. Super. Feb. 13, 2013); *State v. Butler*, 2011 WL 2552546, at *2 (Del. Super. Apr. 11, 2011)(citing *State v. Stroman*, 1984 WL 547841 (Del. Super. May 18, 1984).
[13] *State v. Terry*, 2013 WL 3833085, at *3 (Del. Super. Jul. 18, 2013).
[14] *Bradley*, 2004 WL 1964980 at *1.
[15] *Id.*
[16] State Ex. 1, DSP Sobriety Checkpoint Guidelines.

expressly contained in Lt. Wysock's request. However, the Court finds Lt. Wysock's testimony to be credible that he reviewed the statistical data in selecting the location and that the Grid was intended to be included since he requested the area which "covers US 40 fr[om] Wilton to SR 7."[17] This finding is supported by Capt. Benson's memorandum approving the area covering US 40 from Wilton to Route 7 and listing the Grid among the grids in that area. In addition, statistical data from the preceding three years evidenced the Grid's problem with drunk driving. Therefore, the Court finds that the checkpoint was formed in substantial compliance with the guidelines.

The checkpoint was also operated in substantial compliance with DSP guidelines. There were marked cars, safety devices and arrow signs in place to alert drivers of the checkpoint. Each vehicle was stopped unless Lt. Wysock determined that traffic was congested. Upon approaching Defendant's vehicle, Cpl. Conway gave the appropriate introduction. He did not question Defendant until after he smelled the odor of alcohol and observed Defendant's flushed face, glassy eyes and the empty bottle. In sum, the checkpoint was formed and conducted in substantial compliance of DSP guidelines and not subject to the unfettered discretion of police officers.

[17] State Ex. 1.

II. Cpl. Conway's Further Detention of Defendant for FSTs was supported by Reasonable Suspicion.

"In order to detain someone to administer field sobriety tests, an officer need only possess a reasonable articulable suspicion [of DUI]."[18] Reasonable articulable suspicion exists when an "officer [] points to specific facts, which viewed in their entirety, accompanied by rational inferences, support the suspicion that the person sought to be detained was in the process of violating the law."[19] In *State v. Butler,* this Court held that Cpl. Conway had reasonable articulable suspicion to further detain a defendant for questioning during a sobriety checkpoint based on the strong odor of alcohol coming from the car and the defendant's glassy eyes and pale face. In *Perrera v. State,* the Supreme Court concluded that that a defendant's bloodshot, glassy eyes, odor of alcohol, admission of alcohol consumption, and plainly visible beers cans in her vehicle gave the officer reasonable and articulable suspicion to detain her at the scene to administer FSTs.[20] Similar to the series of observations that supported a finding of reasonable suspicion in *Perrera*, Cpl. Conway's observations after his initial contact with Defendant supports a finding that he had reasonable articulable suspicion of DUI. Cpl. Conway's reasonable suspicion to administer FST's is based on Defendant's bloodshot, glassy eyes, flushed face and slurred speech, as well as the strong odor of alcohol, his admission of consuming

[18] *State v. Kang*, 2001 WL 1729126, at *8 (Del. Super. 2001).
[19] *Cummings v. State*, 765 A.2d 945, 948 (Del. 2001).
[20] *Perrera*, 2004 WL 1535815, at *1, 852 A.2d 908 (Del. 2004)(TABLE).

two beers that same night, and Cpl. Conway's observation of the empty small bottle of Jim Beam Whiskey on the floor of the driver's seat.

III. Excluding the PBT results, Cpl. Conway had Probable Cause to administer the Intoxilyzer Test and Arrest Defendant for DUI.

Probable cause is required for the administration of chemical testing and to arrest for DUI.[21] Probable cause requires a showing, by a totality of the circumstances, of a probability that criminal activity is occurring or has occurred."[22] In *Miller v. State*, the Supreme Court affirmed this Court's denial of a motion to suppress, holding that the officer has sufficient probable cause to conduct tests and subsequently arrest the defendant.[23] After responding to the scene of an accident, to which the defendant was at-fault, an officer detected a strong alcoholic odor on the defendant's breath and her glassy, watery eyes.[24] Additionally, the defendant admitted to consuming two beers approximately two hours earlier.[25] She passed pre-exit sobriety tests, but failed the HGN and PBT tests.[26] The defendant argued that the Officer lacked probable cause to arrest her or to administer a chemical test.[27]

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[21] *See Lefebvre v. State*, 19 A.3d 287, 292 (Del. 2011);*Bease v. State*, 884 A.2d 495, 497 (Del. 2005).
[22] *Id.*
[23] *Miller v. State*, 4 A.3d 371, 375 (2010).
[24] *Id.* at 372.
[25] *Id.*
[26] *Id.* at 373.
[27] *Id.*

The Court concluded that, even with the exclusion of the PBT and HGN test results for lack of proper foundation, the defendant's "alcoholic odor from two or three feet away, glassy watery eyes, failed walk-and-turn and one-legged standing tests, and the defendant's admission of having consumed two beers about two hours before sufficiently supported probable cause that the defendant drove under the influence of alcohol."[28] Apart from the type of stop at issue in *Miller*, the facts in this case are similar in that, even with the exclusion of the PBT results, the facts, viewed in totality of the circumstances, suggest that there was a fair probability that Defendant committed a DUI. In addition to the facts discussed above that support Cpl. Conway's reasonable suspicion to conduct FSTs, Defendant's performance on all the three pre-exit FSTs, the walk and turn, one-leg stand, and HGN tests each indicated a probability of intoxication. Cpl. Conway also observed Defendant stumble and use the driver side door to hold himself up upon exiting the vehicle and lean against the vehicle for support. Given these facts, Conway had sufficient probable cause to arrest Defendant for DUI.

[28] *Id.* at 375; *See also, Bease*, 884 A.2d at 499-500 (holding that evidence of a traffic violation, odor of alcohol, rapid speech, admission of drinking, bloodshot and glassy eyes and a failed alphabet test constituted probable cause ; *State v. Maxwell*, 624 A.2d 926, 930-31 (Del. 1993) (holding that an accident, alcoholic odor, admitted alcohol consumption, and the defendant's dazed appearance constituted probable cause).

Conclusion

For the foregoing reasons, Defendant's motion to suppress is **DENIED.**

IT IS SO ORDERED.

/s/ Calvin L. Scott
Judge Calvin L. Scott, Jr.