

defendant for driving his vehicle under the influence. On July 29, 2014, the Court held a hearing on the motion and reserved decision. The State's sole witness at the hearing was the arresting officer. The State also introduced the Motor Vehicle Recording ("MVR") of the defendant's traffic stop and arrest. After careful consideration of the evidence and applicable law, the Court denies the defendant's motion to suppress.

FACTS

On or about January 7, 2014, a police officer from the Harrington Police Department was on patrol in the area of Route 13 in the city of Harrington, located in Kent County, Delaware. At approximately 8:30 P.M, while stationary in his vehicle, the officer, using his radar, clocked the defendant traveling northbound on Route 13 at a speed of 56 miles per hour in a posted 35 mile per hour zone. The officer activated his emergency equipment and pulled out behind the defendant's vehicle to conduct a traffic stop. The defendant immediately responded to the officer's signal and pulled into a nearby parking lot. The officer testified that it was a windy, cold night and that there was ice in areas of the parking lot where puddles had frozen over.

The officer identified the defendant as the driver of the vehicle at the hearing. The officer testified that the defendant was smoking a cigarette when the officer first approached the vehicle. The officer asked the defendant to put out the cigarette and the defendant complied. Upon his initial contact with the defendant, the officer observed that the defendant had glassy eyes and dilated pupils. In response to the officer's questioning, the defendant informed the officer that he was returning home from an Alcoholics Anonymous meeting. The officer asked for the defendant's license and registration and returned to his police vehicle. When the officer returned to the defendant's driver-side window, he detected a moderate odor of alcohol on the defendant's breath. The officer also testified that the defendant's speech was slow and deliberate

and that the defendant turned his face away from the officer when responding to the officer's questions.

At this point, the officer asked the defendant if he was under the influence of alcohol or had taken any prescription drugs. The defendant informed the officer that he was on prescription medication; however, the type and purpose of the medication taken by the defendant was never established. The officer proceeded to have the defendant perform the alphabet test and the counting test. The defendant performed both tests well.

Next, the officer asked the defendant to step out of his vehicle to perform field sobriety tests. At some point prior to the defendant exiting his vehicle, a State Trooper arrived on the scene, out of his own volition, for purposes of officer safety. The defendant exited his vehicle without issue. The defendant informed the officer that he did not have any injuries that would impair his ability to perform the field tests. The officer administered the walk-and-turn test. The defendant did not count his steps out-loud, as instructed by the officer, until the officer reminded him to do so. After the officer's reminder, the defendant complied with the counting instruction for the remainder of the test. The defendant swayed throughout the duration of the test and used his arms for balance as he walked.¹

The officer then administered the one-leg stand test. The defendant began by standing on his right foot and elevating his left foot. The defendant swayed as he counted to three, put his left foot down and informed the officer that he was unable to perform the test. The officer asked the defendant to make a second attempt at the test. The defendant complied, this time standing on his left foot and elevating his right foot. The defendant was able to count to thirty without

¹ The officer also testified at the hearing that the defendant did not perform the turn as instructed, by making three small steps, but instead stopped and pivoted. The MVR showed the defendant making, what the Court considers, a sufficient attempt at three small steps when he turned.

issue. At thirty, the defendant lost his balance, raised his arms and used the tailgate of his vehicle for support.

Next, the officer returned to his police vehicle to retrieve the portable breath test (“PBT”) device while the trooper remained with the defendant. At this time, the defendant informed the trooper that he had consumed two or three alcoholic beverages prior to attending an Alcoholics Anonymous meeting, approximately three hours earlier. The officer returned and administered the portable breath test (“PBT”) to the defendant. At the hearing, the officer established that standard operating procedures were followed in administering the PBT and that the PBT was functioning properly. The defendant failed the PBT.² At this point, the officer placed the defendant under arrest for DUI.

DISCUSSION

On a motion to suppress, the burden of proof is on the State to establish by a preponderance of the evidence that there was probable cause to arrest the defendant. *State v. Smith*, 2014 WL 1047076, at *5 (Del. Super. Feb. 28, 2014).

The defendant first argues that the officer lacked reasonable suspicion to detain him for purposes of a DUI investigation. An officer must have reasonable suspicion of criminal activity before he is justified in conducting a stop. *State v. Lewis*, 2013 WL 2297031, at *2 (Del. Super. May 20, 2013). “For an officer to conduct an investigation beyond that required in order to complete the purpose of the [traffic] stop, the occupants must consent or the officer must have

² The officer also administered the horizontal gaze nystagmus test (“HGN”) and the finger dexterity test to the defendant; however, the Court is not considering either test for the purposes of the defendant’s motion to suppress. Both the State and counsel for the defendant stipulated to the inadmissibility of the defendant’s performance on the HGN in this case. As to the finger dexterity test, the officer did not record the defendant’s performance of this test in his police report and could not recall at the hearing how the defendant performed on the test.

independent facts sufficient to justify this additional intrusion.” *Id.* at *3. An officer is justified in administering field tests on a defendant where the totality of the officer’s observations give rise to a reasonable and articulable suspicion that the defendant is driving under the influence. *Id.* “[T]he commission of a traffic offense combined with an odor of alcohol, standing alone, do not constitute probable cause to arrest for a DUI offense. Nonetheless, those two facts may give rise to a reasonable suspicion of DUI and justify a request that the driver perform some field sobriety tests.” *Lefebvre v. State*, 19 A.3d 287, 295 (Del. 2011); *see Lewis*, 2013 WL 2297031, at *3 (holding that an officer had a reasonable and articulable suspicion to justify a DUI investigation of a defendant, stopped for a traffic violation, based upon the officer’s observation that the defendant “1) had glassy bloodshot eyes; 2) spoke in a slurred manner; 3) placed a cough drop in his mouth in an apparent attempt to mask the alcohol on his breath; and 4) could not produce identification when asked to do so.”).

In the present case, the arresting officer testified that upon stopping the defendant for a traffic violation, he observed that the defendant had glassy eyes and dilated pupils. The officer described the defendant’s speech as slow and deliberate and the defendant refused to face the officer when responding to questioning in a possible attempt to hide an odor of alcohol on his breath. The defendant was smoking a cigarette when the officer first approached the defendant’s vehicle, in what was also a possible attempt to mask an odor of alcohol on his breath. After the defendant put out his cigarette, the officer was able to detect a moderate odor of alcohol. The Court concludes that based on these observations, taken as a whole, the officer had a reasonable and articulable suspicion to believe that the defendant was driving under the influence and to detain the defendant to administer field sobriety tests.

The defendant also contends that the officer lacked the requisite probable cause to arrest him for DUI. “Probable cause to arrest for a DUI offense exists when an officer possesses

‘information which would warrant a reasonable man in believing that [such] a crime ha[s] been committed.’” *Lefebvre*, 19 A.3d at 292 (alteration in original) (quoting *Clendaniel v. Voshell*, 562 A.2d 1167, 1170 (Del. 1989)). To establish probable cause:

police must ‘present facts which suggest, when those facts are viewed under the totality of the circumstances, that there is a fair probability’ that the defendant has committed a DUI offense. That hypothetically innocent explanations may exist for facts learned during an investigation does not preclude a finding of probable cause. What is required is that the arresting police officer possess a ‘quantum of trustworthy factual information’ sufficient to warrant a man of reasonable caution in believing a DUI offense has been committed.

Lefebvre, 19 A.3d at 292-93 (Del. 2011) (quoting *State v. Maxwell*, 624 A.2d 926, 930-31 (Del. 1993)).

In *Bease v. State*, the Delaware Supreme Court concluded that probable cause was established, prior to the defendant’s performance of any field tests, where the defendant “spoke in a rapid manner to [the arresting officer], smelled of alcohol, admitted that he consumed alcoholic beverages the night before, had bloodshot and glassy eyes, and had just committed a traffic violation by making an improper lane change in an abrupt manner.” *Bease v. State*, 884 A.2d 495, 499-500 (Del. 2005). In *Miller v. State*, the Delaware Supreme Court held that there was probable cause to arrest a defendant for DUI where the evidence established “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. . . .” *Miller v. State*, 4 A.3d 371, 374-75 (Del. 2010).

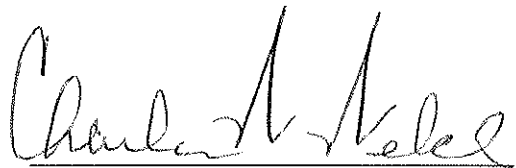
In this case, the arresting officer testified that upon exiting the vehicle, the defendant performed the walk-and-turn test, one-leg stand test and the PBT. Based on the officer’s testimony and the MVR, the Court assigns little weight to the defendant’s performance on either the walk-and-turn test or the one-leg stand test. Considering the defendant’s marginally acceptable performance on both tests given the weather conditions and ice in the parking lot, the

Court finds that neither test sufficiently showed evidence of the defendant's impairment in this case. However, even excluding consideration of the walk-and-turn and one-leg stand tests, the Court concludes that the officer had probable cause to believe that the defendant was driving under the influence in light of the other evidence presented. The record reflects that the defendant (1) was driving more than 20 miles per hour over the speed limit; (2) had glassy eyes and dilated pupils; (3) spoke slowly and deliberately in response to the officer's questioning; (4) had a moderate odor of alcohol on his breath; (5) admitted to consuming two to three beers three hours earlier; (6) and failed the PBT. As a result, the Court concludes that under the totality of the circumstances, probable cause existed to arrest the defendant for driving under the influence.

CONCLUSION

Based on the foregoing analysis, the Court finds that under the totality of the circumstances, the officer had a reasonable and articulable suspicion to detain the defendant to investigate and probable cause to arrest the defendant for DUI. Therefore, the defendant's motion to suppress is DENIED.

IT IS SO ORDERED this 10th day of SEPTEMBER, 2014.


CHARLES W. WELCH
JUDGE