IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

Raul Zarco,	:	
	:	
Defendant-Below,	:	
Appellant,	:	
	:	
	:	
v.	:	ID# 1010004773
	:	
State of Delaware,	:	
	:	
Plaintiff Below,	:	
Appellee.	:	

Submitted: January 8, 2014
Decided: May 15, 2014

OPINION

Upon Appeal from the Court of Common Pleas: **AFFIRMED**

John S. Malik, Esquire, 100 East 14th Street, Wilmington, DE; Attorney for the Appellant.

Zachary Rosen, Esquire, Department of Justice, 820 North French Street, Wilmington, DE; Attorney for the Appellee.

JURDEN, J.

I. INTRODUCTION

Before the Court is an appeal filed by Defendant Raul Zarco ("Zarco") from a decision of the Court of Common Pleas following a one-day bench trial on April 17, 2013. For the reasons set forth below, the decision of the Court of Common Pleas is **AFFIRMED**.

II. NATURE OF THE PROCEEDINGS

On October 7, 2010, Zarco was arrested for Driving under the Influence of Alcohol in violation of 21 *Del. C.* § 4177(a), Inattentive Driving in Violation of 21 *Del. C.* § 4176(b), Driving without a Valid License in violation of 21 *Del. C.* § 2701(a), and Failure to Possess Proof of Insurance in violation of 21 *Del. C.* § 2118(p). On March 2, 2011, Zarco pled not guilty to all charges. Before trial, the State entered a *nolle prosequi* on the Failure to Possess Proof of Insurance charge. After a one-day bench trial on April, 17, 2013, Zarco was found guilty of Driving Under the Influence and Driving without a Valid License, and not guilty of Inattentive Driving. Zarco timely filed this appeal. On appeal, Zarco argues that the trial court abused its discretion in admitting the Intoxilyzer test result into evidence and that the evidence adduced at trial was insufficient to support a finding that Zarco was in actual physical control of the vehicle in which the police found him.

III. FACTS

On October 7, 2010, Corporal ("Cpl.") Conway of the Delaware State Police responded to a call that led him to Salem Church Road.[1] Upon responding to Salem Church Road, Cpl. Conway found Zarco in the driver's seat of his vehicle, stopped in the right lane of traffic.[2] Cpl. Conway smelled a "strong odor" of alcohol coming from Zarco.[3] Although Cpl. Conway was unable to speak with Zarco (Zarco did not speak English), Cpl. Conway noticed that Zarco "had all the signs of somebody that had been intoxicated. He had bloodshot eyes, glassy eyes, appeared very tired, fatigued, very lethargic in his movements."[4] Using a visual aid, Cpl. Conway asked Zarco for his license, registration, and valid proof of insurance, and Zarco was unable to produce them. Cpl. Conway saw empty bottles of Miller Genuine Draft in Zarco's vehicle.[5] Cpl. Conway assisted Zarco out of the driver's seat and walked with him over to Cpl. Conway's patrol car. Cpl. Conway noticed on the way to the patrol car that Zarco "was moving very lethargic."[6] Cpl. Conway, using hand gestures, asked Zarco whether he had been sleeping, and Zarco nodded his head in the affirmative.[7] After observing Zarco for

[1] A-17.
[2] A-19-20.
[3] A-23.
[4] A-22-23, 25.
[5] A-25-26.
[6] A-26.
[7] A-26-27. Cpl. Conway used "mannerisms with …[his]hands" to ask Zarco if he had been sleeping.

approximately fifteen minutes, Cpl. Conway administered a preliminary breathalyzer test ("PBT").[8] Cpl. Conway testified that the standard operating procedure for administrating a PBT test is to observe the subject for fifteen minutes.[9] He also testified that the PBT was functioning properly, and the calibration log at Troop 6 indicated the same.[10] Zarco failed the PBT test.[11] At that point, Cpl. Conway arrested Zarco for suspicion of DUI, and transported him to Delaware State Police Troop 6.[12]

At the time of Zarco's arrest, Cpl. Conway had made about 50 DUI arrests.[13] Cpl. Conway is NHTSA certified and went through a six-month training regimen, one week of which was dedicated to DUI enforcement.[14] He is certified to use an Intoxilyzer machine.[15] The Intoxilyzer machine used to measure Zarco's breath alcohol concentration was found to be in proper working order.[16]

Zarco performed the Intoxilyzer test at Delaware State Police Troop 6 at 22:40 hours (10:40 p.m.)[17] Prior to administering the test to Zarco, Cpl. Conway observed him for a continuous 20 minute period, during which Zarco did not eat,

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[8] A-27. Because of the language barrier, Cpl. Conway was unable to perform standard field sobriety tests. A-18.
[9] *Id*. A-28.
[10] A-28-29.
[11] A-30.
[12] A-32.
[13] *Id*.
[14] A-6-7.
[15] A-7.
[16] A- 22.
[17] A-33.

smoke, drink, belch, or regurgitate.[18] He started the 20 minute observation period at 2220 hours (10:20 p.m.) and the Intoxilyzer card was entered into the machine at 2240 hours (10:40 p.m.).[19] Over Zarco's objection, the Intoxilyzer card was admitted into evidence.[20] Zarco's BAC was determined to be .194.[21] The trial court concluded that the documents established an uninterrupted observation period of 20 minutes and found beyond a reasonable doubt that the defendant was Driving While Under the Influence of Alcohol in violation of 21 *Del. C.* § 4177(a).[22]

IV. DISCUSSION

A. Standard of Review

In reviewing an appeal from the Court of Common Pleas, this Court sits as an intermediate appellate court, and its function mirrors that of the Supreme Court.[23] That function is to correct errors of law and to review the factual findings of the trial below to determine if they are sufficiently supported by the record and are the product of an orderly and logical deductive process.[24] If there is sufficient evidence to support the findings of the trial court, this Court must affirm the

[18] *Id*.
[19] A-33, 38.
[20] A-43.
[21] *Id*.
[22] A-51-54.
[23] *See e.g., Baker v. Connell*, 488 A.2d 1303, 1309 (Del. 1985); *State v. Richards*, 1998 WL 723960, at * 1 (Del. Super. May 28, 1998).
[24] *Guest v. State*, 2009 WL 2854670, at * 1 (Del. Super. Sept. 4, 2009).

decision, unless the findings are clearly erroneous.[25] The decision to admit evidence is within the sound discretion of the trial judge and will not be reversed absent a clear abuse of that discretion.[26] "An abuse of discretion occurs when the trial judge 'has exceeded the bounds of reason in view of the circumstances or so ignored recognized rules of law or practice so as to produce injustice.'"[27]

B. The Trial Court Did Not Abuse Its Discretion or Commit Legal Error By Admitting The Results of the Intoxilyzer Test

Zarco contends that the trial court abused its discretion in admitting the Intoxilyzer test result into evidence because the State failed to establish by a preponderance of the evidence that the police followed standard operating procedures for the administration of the Intoxilyzer test. Specifically, Zarco argues that because the Intoxilyzer clock registers only hours and minutes, and not seconds as well, the State failed to prove an uninterrupted observation period of at least twenty minutes as required by *Clawson v. State*.[28]

In *Clawson*, the Delaware Supreme Court adopted a bright line rule that:

> in order for the result of the Intoxilyzer test to be admitted, the State must lay an adequate evidentiary foundation showing that there was an uninterrupted twenty minute observation of the defendant prior to testing.[29]

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[25] *Ochoa v. State*, 2009 WL 2365651, at * 2 (Del. Super. July 31, 2009).
[26] *Stickel v. State*, 975 A.2d 780, 782 (Del. 2009) (citing *Moorhead v. State*, 638 A.2d 52, 56 (Del. 1994).
[27] *Stickel v. State*, 975 A.2d at 782 (quoting *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994)).
[28] 867 A.2d 187 (Del. 2005).
[29] *Id*. at 192.

According to the Supreme Court, the testing commences when the officer inserts the card into the Intoxilyzer machine.[30] In *Clawson*, the investigating officer began his observation of the defendant at 11:32 p.m.[31] The officer inserted the intoxilizer card into the machine and completed three internal calibration tests of the machine at 11:51 p.m.[32] Thus, the Intoxilyzer card was inserted 19 minutes after the observation began.[33] The defendant in *Clawson* objected to the admission of the Intoxilyzer test result, arguing that the State had established only a 19 minute observation period, but the trial court admitted it. The Supreme Court reversed, finding that the State failed to establish the requisite uninterrupted twenty minute observation prior to testing and therefore the trial court abused its discretion by admitting the test result.

In this case, Cpl. Conway began his observation of Zarco at 10:20 p.m. Cpl. Conway inserted the Intoxilyzer card into the machine at 10:40 p.m. Cpl. Conway testified that he observed Zarco, uninterrupted, for 20 minutes.

Zarco argues that because the evidence in the record showed an observation period of exactly 20 minutes, and not 21 minutes, the *Clawson* standard has not been satisfied by the State. *Clawson* requires the State to lay an adequate evidentiary foundation showing that there was an uninterrupted twenty minute

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[30] *Id*.
[31] *Id*. at 189-190.
[32] *Id*. at 190.
[33] *Id*.

observation of the defendant prior to testing.[34] *Clawson* does not require the State to prove an uninterrupted period of 21 minutes. The trial court found that because the evidence showed that the card was inserted 20 minutes after the observation period began, the State met its burden.[35] The trial court did not abuse its discretion or commit legal error by so finding.

C. The Trial Court's Determination That Zarco Was In Physical Control Of The Vehicle is Sufficiently Supported by the Evidence

Zarco contends that his convictions should be vacated because the evidence produced at trial was insufficient to support a finding that he was in actual physical control of the vehicle in which he was found. According to Zarco, the State failed to establish whether his vehicle was running, whether the key was in the ignition, whether he had a key to the vehicle in his possession, and finally, whether the vehicle was operational.

Under 21 *Del. C.* 4177(c)(3), "'Drive' shall include operating, or having actual physical control of a vehicle." According to the Delaware Supreme Court, "[i]nsofar as 'physical control' refers to something other than 'driving' or 'operating,'… physical control is meant to cover situations where an inebriated person is found in a parked vehicle under circumstances where the car, without too

[34] *Clawson*, 867 A.2d at 192.
[35] A-43.

much difficulty, might again be started and become a source of danger to the operator, to others, or to property."[36]

The evidence showed that Zarco was in the driver's seat of a vehicle that contained *no other occupants*.[37] That vehicle was stopped *in the roadway*. Zarco's vehicle was not stopped on the side of the road, on the shoulder, or in a parking lot. There are sufficient facts in the record for the trial court to have found that Zarco operated the vehicle and stopped in the roadway, while he was under the influence of alcohol. There are also sufficient facts in the record for the trial judge to conclude that Zarco could have started the vehicle again and become a source of danger to himself, others, or property.

V. CONCLUSION

Based on the foregoing, the factual findings of the trial court are supported by sufficient evidence and are free from legal error. The judgment of conviction and sentence imposed by the Court of Common Pleas are therefore **AFFIRMED**.

IT IS SO ORDERED.

JURDEN, J.

[36] *Bodner v. State*, 752 A.2d 1169, 1173 (Del. 2000) (citing *State v. Starfield*, 481 N.W.2d 834, 837 (Minn. 1992).
[37] Record at 10-12.