

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KESLER STEVENS,	§	
	§	No. 41, 2015
Defendant-Below,	§	
Appellant,	§	Court Below: Superior Court
	§	of the State of Delaware in and
v.	§	for New Castle County
	§	
STATE OF DELAWARE	§	
	§	C.A. No. N13A-09-008
Plaintiff-Below,	§	
Appellee.	§	

Submitted: September 24, 2015

Decided: November 12, 2015

Before **STRINE**, Chief Justice, **HOLLAND**, and **VAUGHN**, Justices.

Upon appeal from the Superior Court. **AFFIRMED.**

James O. Turner, Jr., Esquire, Office of the Public Defender, Wilmington, Delaware,
for Appellant.

Karen V. Sullivan, Esquire, Deputy Attorney General, Department of Justice,
Wilmington, Delaware, for Appellee.

VAUGHN, Justice:

Defendant-below/Appellant Kesler Stevens (“Stevens”) appeals from a Superior Court Opinion affirming a Court of Common Pleas bench trial verdict which found him guilty of Driving Under the Influence (“DUI”).¹ He raises two claims on appeal. First, Stevens contends that the trial court erred in denying his motion for judgment of acquittal because there was insufficient evidence to convict him of DUI. Second, he contends that Delaware’s DUI law violates the Equal Protection Clause of the United States Constitution because it provides for a harsher punishment than Delaware’s Reckless Driving–Alcohol Related² law even though both laws punish identical conduct. We find no merit to Stevens’ appeal and affirm.

I. FACTS AND PROCEDURAL HISTORY³

On the night of March 17, 2013, Stevens was driving on Pulaski Highway near Scotland Drive in New Castle County. At the same time, Alfred Melchiore was traveling on Scotland Drive with his daughter. As Melchiore approached Pulaski Highway, Stevens’ vehicle collided, head-on, with Melchiore’s vehicle.⁴ After the

¹ 21 Del. C. § 4177(a).

² 21 Del. C. § 4175(b).

³ Unless otherwise noted, the facts and procedural history are taken from the Superior Court’s Opinion affirming the judgment of the Court of Common Pleas. *Stevens v. State*, 110 A.3d 1264, 1265 (Del. 2015).

⁴ Both vehicles sustained heavy front-end damage and were ultimately totaled.

collision, Stevens approached Melchiore and stated: “Your daughter’s crying . . . she’s really upset, try to calm [her] down.”⁵ Melchiore smelled alcohol on his breath.

When Delaware State Trooper Gregory Gaffney arrived at the scene of the accident, Stevens handed Trooper Gaffney his car keys despite not being asked to do so. Trooper Gaffney handed Stevens his keys back and asked for his driver’s license, registration, and proof of insurance. Stevens returned with just his driver’s license and handed his car keys to Trooper Gaffney for a second time. Trooper Gaffney observed that Stevens had: (1) stumbled a few times and seemed unbalanced; (2) the smell of alcohol on his breath; (3) glassy eyes; and (4) slurred and mumbled speech. Trooper Gaffney also “asked him numerous times where he was coming from and all he could do was point to [the highway] and say, ‘There, Pulaski Highway.’”⁶

During his investigation, Trooper Gaffney observed tire marks crossing Pulaski Highway’s grass median as well as a knocked down tree. Pieces of the downed tree were found in Stevens’ bumper and the tire tracks pointed towards the collision. Based on these observations, Trooper Gaffney determined that Stevens had swerved into the median and hit the tree before crashing into Melchiore’s vehicle.

Not sure whether the Delaware State Police or the New Castle County Police would be handling the investigation, Trooper Gaffney did not request that Stevens

⁵ Appellant’s Op. Br. App. at A16.

⁶ Appellant’s Op. Br. App. at A34-35.

perform any field sobriety tests before Stevens, Melchiore, and Melchiore's daughter were transported to the hospital.⁷ Shortly after the ambulance left, Stevens' mother arrived at the accident scene. Trooper Gaffney told her that her son was at the hospital and may have been intoxicated. Stevens' mother then left for the hospital.

Once the New Castle County Police arrived, it was determined that the State Police should continue the investigation. Trooper Gaffney headed to the hospital where he learned that Stevens had left after refusing any treatment for a shoulder injury. Trooper Gaffney then called Stevens and asked him to return to the hospital. During the call, Stevens told Trooper Gaffney that he was walking on a road but was unable to provide its name. After being asked to return, Stevens told Trooper Gaffney that his mother was driving him home. Stevens never returned to the hospital and stopped answering Trooper Gaffney's phone calls. Unable to establish contact with Stevens, Trooper Gaffney traveled to Stevens' house. He knocked on the door and rang the doorbell repeatedly, but there was no answer. Ultimately, Stevens was charged with DUI as well as several other offenses.⁸

On February 25, 2014, a bench trial was held in the Court of Common Pleas. Melchiore and Trooper Gaffney testified for the State. At the conclusion of the

⁷ At the hospital, Melchiore observed Stevens doing "wheelie[s]" in a wheelchair before Stevens left without being treated.

⁸ The other offenses are not at issue on appeal.

State's case, Stevens moved for judgment of acquittal as to the DUI charge. The trial court reserved judgment on the motion. Stevens then testified. At the conclusion of Stevens' case, the trial court denied Stevens' motion and found him guilty of DUI. In its ruling, the court stated that the "totality of the circumstances" and all reasonable inferences showed that the State proved, beyond a reasonable doubt, that Stevens was driving under the influence of alcohol. Stevens renewed his motion for judgment of acquittal, which the trial court denied on March 17, 2014.

On April 14, 2014, Stevens appealed the trial court's decision to the Superior Court. He raised two claims on appeal: (1) the evidence was insufficient to support a conviction for DUI and (2) an error in the Information regarding the date of the offense exposed him to double jeopardy. The Superior Court dismissed the double jeopardy claim because Stevens failed to preserve it during trial. As to the insufficient evidence claim, the Superior Court found no error in the trial court's factual findings and the judgment was affirmed. This appeal followed.

II. ANALYSIS

A. Based on the Evidence Presented at Trial, a Rational Trier of Fact Could Find, Beyond a Reasonable Doubt, that Stevens was Guilty of DUI.

"When a defendant argues that the evidence is insufficient to support the verdict, the relevant inquiry is whether, considering the evidence in the light most

favorable to the State, including all reasonable inferences to be drawn therefrom, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”⁹ We do not distinguish between direct and circumstantial evidence.¹⁰ Factual findings will not be overturned unless they are “clearly wrong.”¹¹ Our review of the fact finder’s factual conclusions is deferential because the fact finder is “responsible for determining witness credibility, resolving conflicts in testimony and for drawing any inferences from the proven facts.”¹² Any claim that the trial court erred in formulating or applying the law is reviewed *de novo*.¹³

In order for a defendant to be found guilty of DUI, the State must prove, beyond a reasonable doubt, that the defendant was (1) driving a vehicle (2) while impaired by alcohol.¹⁴ It is not necessary to prove that the defendant was “drunk.”¹⁵ The State is only required to produce enough evidence to allow a reasonable trier of fact to conclude that the defendant’s “ability to drive safely was impaired by alcohol.”¹⁶ Investigative tests, such as a chemical or sobriety test, are “not necessary

⁹ *Church v. State*, 2010 WL 5342963, at *1 (Del. Dec. 22, 2010) (citing *Dixon v. State*, 567 A.2d 854, 857 (Del. 1989)).

¹⁰ *Id.* (citing *Skinner v. State*, 575 A.2d 1108, 1121 (Del. 1990)).

¹¹ *Anderson v. State*, 21 A.3d 52, 57 (Del. 2011) (quotation omitted).

¹² *Church*, 2010 WL 5342963, at *1 (quoting *Chao v. State*, 604 A.2d 1351, 1363 (Del. 1992)).

¹³ *Anderson*, 21 A.3d at 57.

¹⁴ See 21 Del. C. § 4177(a); *Lewis v. State*, 626 A.2d 1350, 1355 (Del. 1993).

¹⁵ *Lewis*, 626 A.2d at 1355.

¹⁶ *Id.*

to prove the impairment required by the statute.”¹⁷ The requisite level of impairment may be established through circumstantial evidence.¹⁸ Determining whether a person is intoxicated “is within the realm of common knowledge.”¹⁹

Stevens’ first claim is unavailing. There was sufficient evidence from which a rational trier of fact could find Stevens guilty of DUI beyond a reasonable doubt. Stevens abruptly turned on Pulaski Highway, drove through a median, hit a tree, and then collided, head-on, with another motor vehicle, which resulted in extensive damage to both vehicles. He could not explain where he was coming from when asked by Trooper Gaffney. Both Trooper Gaffney and Melchiore noticed the odor of alcohol on Stevens’ breath. Further, Trooper Gaffney noticed that Stevens was (1) stumbling, (2) slurring his words, and (3) had glassy eyes. Stevens also handed his car keys to Trooper Gaffney twice, despite never being asked to do so. These actions and characteristics have long been associated with someone who is under the influence.²⁰ The totality of these circumstances allowed the trial court, acting as the fact finder, to reasonably infer that Stevens was under the influence. Thus, Stevens’ first claim has no merit.

¹⁷ *Church v. State*, 2010 WL 5342963, at *2 (Del. Dec. 22, 2010).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *See id.* at *1-2; *Lefebvre v. State*, 19 A.3d 287, 290-95 (Del. 2011) (discussing indicia in the context of probable cause); *Bease v. State*, 884 A.2d 495, 499-500 (Del. 2005) (discussing indicia in the context of probable cause).

B. The DUI statute does not violate the equal protection clause.

“Claims of error implicating basic constitutional rights of a defendant have been accorded review by this Court notwithstanding their nonassertion at trial.”²¹ “[W]here substantial rights are jeopardized and the fairness of the trial imperiled, this court will apply a plain error standard of review.”²² “The doctrine of plain error is limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice.”²³

Despite Stevens’ failure to preserve this issue below, we will address it in the interest of justice. It is axiomatic that a law that results in a harsher punishment than another for an identical act “violates the right of equal protection.”²⁴ But DUI and Reckless Driving–Alcohol Related (“RDAR”) do not punish the same conduct. Each of the two statutes requires an element that the other does not. An element of RDAR is driving a vehicle in wilful or wanton disregard for the safety of persons or property, an element not required for DUI. DUI requires proof that the defendant was under

²¹ *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

²² *Stansbury v. State*, 591 A.2d 188, 191 (Del. 1991).

²³ *Wainwright*, 504 A.2d at 1100.

²⁴ *Hughes v. State*, 653 A.2d 241, 251 (Del. 1994).

the influence of alcohol or drugs as described in 21 *Del. C.* § 4177(a)(1-6), an element not required for RDAR.²⁵ Accordingly, Stevens' second claim lacks merit.

Moreover, because each statute contains an element that the other does not, one cannot be a lesser included offense of the other.²⁶ A lesser included offense is one which is established by proof of the same or less than all the facts of a charged offense.²⁷ We are aware that a number of trial court opinions have referred to RDAR as a lesser included offense of DUI.²⁸ We also realize that our own decision in *Michael v. State* may have contributed to the confusion by referring to RDAR as a lesser included offense of DUI.²⁹ But we emphasize here that for the reasons just stated, RDAR is not a lesser included offense of DUI. The provisions of 21 *Del. C.* § 4175(b) which give rise to the concept of RDAR are penalty provisions which apply when a person who is charged with DUI is permitted to plead guilty to Reckless Driving.³⁰ There is no offense of RDAR separate from Reckless Driving.

²⁵ *Lewis v. State*, 626 A.2d 1350, 1355 (Del. 1993); *see also* 21 *Del. C.* §§ 4177(a)91), (c)(11).

²⁶ *Johnson v. State*, 5 A.3d 617, 620 (Del. 2010) (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)) (“The *Blockburger* rule states that two distinct statutory provisions that condemn the same conduct constitute separate offenses when ‘each provision requires proof of an additional fact, which the other does not.’”); *see also* 11 *Del. C.* § 206 (codifying the *Blockburger* rule).

²⁷ 11 *Del. C.* § 206(b).

²⁸ *See Wilkerson v. State*, 1998 WL 472755, at *1 (Del. Super. Ct. June 17, 1998); *State v. Smallwood*, 2012 WL 5869624, at *8 (Del. Com. Pl. Nov. 9, 2012); *State v. Early*, 2011 WL 6946970, at *5 (Del. Com. Pl. Dec. 22, 2011); *State v. Stonesfier*, 2000 WL 33662346, at *3 n.5 (Del. Com. Pl. June 8, 2000).

²⁹ *Michael v. State*, 529 A.2d 752, 756 (Del. 1987).

³⁰ The pertinent language of 21 *Del. C.* § 4175(b) was introduced in House Bill Number 526, which was titled “An Act to Amend Chapters 3, 7, 21, 23, 27, 31, 41, 42 and 43, Title 21 of the Delaware

III. CONCLUSION

For all of the preceding reasons, the judgment of the Superior Court is **AFFIRMED.**

Code Relating to the Penalty Provisions of the Motor Vehicle Code.” *See* Del. H.B. 526, 133d Gen. Assem., 65 Del. Laws ch. 503 (1986).

117 A.3d 562
Supreme Court of Delaware.

State of Delaware, Plaintiff–Below, Appellant,
v.
Andy Laboy, Defendant–Below, Appellee.

No. 169, 2014
Submitted: June 10, 2015
Decided: June 15, 2015

Synopsis

Background: Defendant was convicted on guilty plea in the Superior Court, New Castle County, of driving under influence (DUI), third offense, and was sentenced as first offender. State appealed.

Holdings: The Supreme Court, Strine, C.J., held that:

^[1] trial court lacked statutory discretion to treat instant DUI, third offense, as first offense for sentencing purposes;

^[2] State did not have to prove beyond reasonable doubt that prior Maryland conviction for driving while intoxicated (DWI), under influence of drugs or alcohol, was substantially similar to Delaware DUI law; and

^[3] reversal of illegal first offender sentence and remand for resentencing did not implicate prohibition against double jeopardy.

Reversed and remanded.

West Headnotes (4)

^[1] **Automobiles**
◉ Repeat offenders

Prior Maryland conviction for driving while intoxicated (DWI), which defendant admitted, was conviction under similar statute to Delaware’s driving under influence (DUI)

statute, and thus, trial court lacked statutory discretion to treat instant DUI, defendant’s third offense, as first offense. 21 Del. Code § 4177(d)(3), (e).

Cases that cite this headnote

^[2] **Automobiles**
◉ Repeat offenders

On charge for driving under influence (DUI), third offense, State did not have to prove beyond reasonable doubt that prior Maryland conviction for driving while intoxicated (DWI), under influence of drugs or alcohol, was substantially similar to Delaware DUI law; rather, all that was required was for State to prove that he suffered prior conviction under statute that was similar to Delaware’s DUI statute. 21 Del. Code § 4177B(e)(1).

Cases that cite this headnote

^[3] **Double Jeopardy**
◉ Effect of Arresting, Vacating, or Reversing Judgment or Sentence, or of Granting New Trial
Double Jeopardy
◉ Modification or Correction of Sentence; Cure of Illegal Sentence

Reversal of illegal first offender sentence for driving under influence (DUI), third offense, and remand for resentencing, did not implicate prohibition against double jeopardy. U.S. Const. Amend. 5.

Cases that cite this headnote

^[4] **Criminal Law**
◉ Nature or grade of offense and extent of penalty

The State has an absolute right to appeal any sentence on the grounds that it is unauthorized by, or contrary to, any statute or court rule, in which case the decision or result of the State's appeal shall affect the rights of the accused. 10 Del. Code § 9902(f).

Cases that cite this headnote

Court Below: Superior Court of the State of Delaware, in and for New Castle County.
Upon appeal from the Superior Court. **REVERSED AND REMANDED.**

Attorneys and Law Firms

Karen V. Sullivan, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, for Appellant.

David J.J. Facciolo, Esquire, Minster & Facciolo, LLC, Wilmington, Delaware, for Appellee.

Before STRINE, Chief Justice; HOLLAND and VALIHURA, Justices.

*563 STRINE, Chief Justice:

I. INTRODUCTION

Andy Laboy was arrested in July 2012 and indicted on charges of driving under the influence. He pled guilty, admitting in his plea colloquy with the Superior Court and his plea agreement that he was eligible to be sentenced as a third-time offender under 21 *Del. C.* § 4177 (the "DUI statute") because he had been convicted of two previous DUIs. The Superior Court nevertheless sentenced Laboy as a first-time offender. The State now appeals, arguing that the Superior Court erred in disregarding his first two DUI offenses.

We agree. The Superior Court did not have discretion to ignore Laboy's previous DUI convictions under the DUI statute. The statutory framework established by the General Assembly sets out the minimum penalties a judge must impose on third-time offenders like Laboy. It was

thus error for the Superior Court to impose a sentence that fell below these requirements. We therefore reverse and remand so that Laboy can be sentenced in accordance with the DUI statute as a third-time offender.

II. BACKGROUND

Laboy was arrested on July 28, 2012, on suspicion of DUI. Laboy's BAC was measured by an intoxilyzer as 0.15. Laboy did not dispute before the Superior Court that this offense was his third DUI: he pled guilty to his first DUI in Maryland District Court on August 27, 1999, and was found guilty by a Delaware jury of a second DUI on January 16, 2001. Because of his previous offense, Laboy was sentenced in 2001 by the Court of Common Pleas as a second-time offender.¹ Accordingly, in this case, the State charged Laboy as a third-time offender.

Consistent with his record, Laboy affirmed in a colloquy with the Superior Court after agreeing to a plea deal that he understood he was pleading guilty to a third offense and that he could be sentenced to a Class G felony as a third-time offender under the DUI statute.² He also signed a plea agreement,³ Truth in Sentencing guilty plea form,⁴ and revocation of driver's license form,⁵ which all stated that he was being sentenced for his third DUI offense.⁶ Laboy's counsel confirmed that *564 Laboy had entered the plea "after intense discussion over many months," and that counsel had "gone through the Truth-in-Sentencing Guilty Plea Form with my client in excruciating detail."⁷

Despite Laboy's acknowledgement and the record evidence of his two previous DUI convictions, the Superior Court sentenced Laboy as a first-time offender. At his sentencing hearing, the Superior Court opined, "I have some doubt about the first Maryland conviction. Probably it satisfies the statute. I mean, I don't think they would call it 'driving under the influence' if it was anything other than the statute that prohibits people from driving under the influence of alcohol or drugs."⁸ But the court informed Laboy: "I know in good faith I can treat this as a first offense because of the doubt I have over the Maryland conviction.... I am going to cut you a break, and I am going to sentence you as a first offender."⁹ The Superior Court then hedged: "if you are arrested for DUI again, you will clearly be a third offender. And if you get this judge, he may find you as a fourth offender. He may change his mind about the Maryland conviction."¹⁰

The Superior Court sentenced Laboy as a first-time offender to one year of Level V incarceration, suspended for the entire time to supervision at Level III, and a \$500

fine. The State moved to reargue, attaching to its motion a copy of a Superior Court decision affirming a defendant's *565 conviction as a second-time DUI offender when the first offense occurred in Maryland.¹¹ The Superior Court denied the State's motion, holding that the "State presented absolutely no evidence about the Maryland statute in effect at the time of Defendant's 1999 conviction. Therefore there was no basis upon which the court could conclude that Delaware's current statute and the 1999 Maryland statute are 'similar.'" ¹² The State has now appealed to this Court.

III. ANALYSIS

¹¹The State argues on appeal that the Superior Court erred as a matter of law in sentencing Laboy as a first-time offender despite his previous two DUI convictions. We agree: the DUI statute left no discretion to the Superior Court to sentence a third-time offender as a first-time offender.¹³

The DUI statute provides specific, mandatory penalties for DUI offenders who have committed "prior offenses."¹⁴ A first-time offender can be fined between \$500 and \$1,500, or "imprisoned not more than 12 months or both. Any period of imprisonment imposed under this paragraph may be suspended."¹⁵ By contrast, 21 *Del. C.* § 4177(d)(3) mandates that a third-time offender "be guilty of a class G felony, be fined not more than \$5,000 and be imprisoned not less than 1 year nor more than 2 years."¹⁶ Unlike a first-time offense, the first three months of the third-time offender's sentence cannot be suspended, "but shall be served at Level V and shall not be subject to any early release, furlough or reduction of any kind."¹⁷ These provisions leave no discretion to the sentencing judge: any DUI offender who has committed two "prior offenses" for purposes of the act must be sentenced in accordance with § 4177(d)(3).¹⁸

Nor does the DUI statute give discretion to the trial court to determine whether a previous conviction counts as a "prior offense": 21 *Del. C.* § 4177(e)(1) sets out its own definition of "prior or previous conviction or offense," separate from 11 *Del. C.* § 4215A, which otherwise defines "previous convictions" for sentencing purposes.¹⁹ The DUI statute defines a "prior offense" to include:

A conviction or other adjudication of guilt ... pursuant to § 4175(b) or *566 § 4177 of this title, *or a similar statute of any state or local jurisdiction, any federal or military reservation or the District of*

*Columbia ...; [or] Participation in a course of instruction or program of rehabilitation or education pursuant to § 4175(b) of this title, § 4177 of this title or this section, or a similar statute of any state, local jurisdiction, any federal or military reservation or the District of Columbia, regardless of the existence or validity of any accompanying attendant plea or adjudication of guilt.*²⁰

Here, the record is clear that Laboy was convicted in Maryland under a "similar statute" to Delaware's DUI statute. Although the State did not introduce a copy of the Maryland statute as evidence in the Superior Court proceedings, it did provide a certified copy of Laboy's criminal record from the Maryland District Court, which showed that Laboy pled guilty to "Dr. While Intox., Under the Infl. of Alcohol or Drugs."²¹ As a result, he was required to "abstain from alcohol," "submit to alcohol and drug evaluation," and use a "DWI monitor."²² Laboy's certified Delaware driving record, provided to the Superior Court with his presentencing report, indicated that Laboy's Delaware driver's license was revoked following the Maryland conviction, and was only returned after he completed an alcohol rehabilitation and treatment program.²³ As part of the Driver's License Compact, a pact among most states codified in Title 21 of the Delaware Code, the Division of Motor Vehicles is required to revoke driving privileges when a Delaware driver commits a motor vehicle offense in another state that would require revocation had the act occurred in Delaware.²⁴

Further, the certified records from our own Court of Common Pleas for Laboy's 2001 DUI offense stated that Laboy had been convicted of and sentenced for a second-offense DUI, which was based on the earlier Maryland conviction.²⁵ Under the DUI statute, Laboy was not permitted to challenge the validity of that earlier conviction in these proceedings.²⁶ There was thus more than sufficient evidence in the record to support the State's argument that the Maryland offense was sufficiently "similar" to a Delaware DUI for purposes of the DUI statute, and thus Laboy should have been treated as a third-time offender.²⁷

*567 Based on that record, the Superior Court erred in faulting the State for not presenting the text of the Maryland statute. The State had no reason to expect to have to prove the similarity of the Maryland statute by bringing in a copy, given Laboy's own acknowledgement

that he had committed two previous DUI offenses, Laboy's certified record from Maryland that the State introduced in its motion to sentence him as a third-time offender, and his conviction as a second-time offender in the Delaware Court of Common Pleas. His previous offense in Maryland was plainly similar to a Delaware DUI. Moreover, if the Superior Court had any doubts about the similarity of the relevant Maryland statute, it could have requested the parties to bring in a copy, or looked up the statute itself before or even during the sentencing hearing on its own computer in court.

^{12]} Laboy nonetheless now argues that under *Alleyne v. United States*, the State was required to prove "beyond a reasonable doubt" that his previous Maryland conviction "substantially conformed" to Delaware law, and it failed to meet this burden because it did not present the text of the statute to the Superior Court. His argument misreads the DUI statute and this Court's precedent interpreting it. In *Stewart v. State*, this Court held that "[a] plain reading of section 4177B(e)(1) reflects that a sentencing court in Delaware [i]s only required to determine that [the defendant] had been convicted in [another state] pursuant to a statute that was 'similar' to Delaware's."²⁸ The *Stewart* Court rejected the defendant's argument that the provisions of the habitual offender statute—which require "substantial conformance" of another state's law to Delaware's—should apply to DUIs, based on the plain language of the DUI statute.²⁹

The U.S. Supreme Court's decision in *Alleyne v. United States* does not alter that result.³⁰ In *Apprendi v. New Jersey*, the U.S. Supreme Court held that mandatory maximum penalties are elements of the crime which the State must prove beyond a reasonable doubt.³¹ *Alleyne* merely extended the Court's rationale in *Apprendi* to mandatory minimum penalties.³² But the holding in *Apprendi* specifically exempted a "prior conviction" as an element that "must be submitted to a jury and proved beyond a reasonable doubt."³³ The Court's analysis in *Alleyne* cited the holding in *Apprendi* with approval, and did not reconsider the exception created for "prior convictions."³⁴ We thus have no reason to reconsider this Court's holding in *Talley v. State*, in which we rejected a similar argument by a defendant convicted as a fourth-time DUI offender: "[h]ere, because the increase in Talley's sentence was occasioned solely by his prior

convictions, *Apprendi* is inapplicable."³⁵ Likewise, *568 *Alleyne* is inapplicable to this case, where Laboy is subject to enhanced penalties solely because of his two previous DUI convictions. The State thus did not need to prove beyond a reasonable doubt that Laboy had previously been convicted of two DUIs; it only needed to establish that he had twice been convicted, pled guilty, or participated in a DUI course or rehabilitation under § 4177 or "a similar statute of any state."³⁶ Laboy's certified court records from Maryland and Delaware were sufficient to meet this burden.

^{13]} ^{14]} We therefore reverse and remand so that the Superior Court can sentence Laboy as a third-time offender in accordance with 21 *Del. C.* § 4177(d)(3).³⁷

All Citations

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Footnotes

¹ App. to Opening Br. at 60 (Court of Common Pleas Criminal Docket and Sentence).

² App. to Opening Br. at 29 (Suppression Hearing Tr.).

3 App. to Opening Br. at 31 (Plea Agreement).

4 App. to Opening Br. at 32 (Truth in Sentencing Guilty Plea Form).

5 App. to Opening Br. at 33 (Revocation of Driver's License/Privilege to Drive).

6 Laboy's attorney nonetheless attempted to reserve the right to argue that Laboy's conviction in Maryland did not qualify as a previous offense for purposes of the DUI statute. See App. to Opening Br. at 28 (Suppression Hearing Tr.) ("But the Court does need to know, as does the State, that there may be the possibility that legally or factually the Maryland conviction might not be applicable.... My client understands, though, that even if we don't raise those issues that he could face the prospect of being sentenced as a third offense, and notwithstanding the fact that it was a 1999 trigger that might be the one that triggers it from another state ... he understands that he might become a Class G felon. He's entering this plea knowing that that's more likely than not...."). We note our concern about this feature of the record. Although neither party emphasizes it on appeal, Laboy's plea was not ambiguous. See *id.* at 29 (Superior Court: "It's your intention to plead guilty to Driving Under the Influence Third Offense as noted on the plea. Is that correct?" Laboy: "Yes.".... Superior Court: "You admit you're eligible for sentencing under 21 Delaware Code 4177(d)(3) based upon the following prior convictions: DUI, offense date 5-21-2000, conviction date January 16th, 2001; DUI in Maryland, offense date April 28th, 1999, conviction date April-August 27th, 1999.... Is that your understanding of the entire written plea agreement?" Laboy: "Yes."); App. to Opening Br. at 31 (Plea Agreement) ("Defendant will plead guilty to: Driving under the influence—3rd offense."). For Laboy to be allowed later on to renounce his plea by arguing, albeit without any legal or factual basis to do so, that he was not eligible to be sentenced as a third time DUI offender is troubling. If Laboy did not wish to plead guilty, he was free not to do so. What he was not free to do was to enter a plea of guilty to a third DUI offense under 21 *Del. C.* § 4177(d)(3), and then subject the State and Superior Court to debate about an issue that he had conceded. *Cf., Downer v. State* 543 A.2d 309, 312 (Del.1988) ("Downer, through a voluntary and intelligent plea bargain, has forfeited his right to attack the underlying infirmity in the charge to which he pleaded guilty."). For its part, the Superior Court should have either held Laboy to his plea or refused to accept it. Instead, scarce taxpayer resources of several kinds were wasted on further proceedings that involved an issue that the guilty plea itself had settled.

7 App. to Opening Br. at 28-29 (Suppression Hearing Tr.).

8 App. to Opening Br. at 73 (Sentencing Hearing Tr.).

9 *Id.* Notwithstanding his 2001 DUI conviction in Delaware, Laboy could not be sentenced as a second-time offender because more than ten years had passed between his first and second Delaware DUIs. Under the DUI statute, a "second offense" must be committed within 10 years of the first. See 21 *Del. C.* § 4177(d)(2) (providing enhanced penalties for "a second offense occurring at any time within 10 years of a prior offense"); § 4177(e)(2)(a) ("For sentencing pursuant to § 4177(d)(2) of this title, the second offense must have occurred within 10 years of a prior offense."). By contrast, there are no time limits for a third DUI to qualify as a "third offense" under the DUI statute. See 21 *Del. C.* § 4177(d)(3); § 4177B(e)(2)(b) ("For sentencing pursuant to § 4177(d)(3) ... of this title there shall be no time limitation and all prior or previous convictions or offenses as defined in paragraph (e)(1) of this section shall be considered for sentencing."). As a result, if Laboy's Maryland conviction did not qualify as a "previous conviction," his second DUI would not qualify either, and he would be eligible for sentencing as a first-time offender. But if the Maryland conviction qualified, Laboy would need to be sentenced as a third-time offender.

10 App. to Opening Br. at 73 (Sentencing Hearing Tr.).

11 See App. to Opening Br. at 76-77 (State's Motion for Rearg't) (citing *Davis v. State*, 2014 WL 1312742 (Del. Super. Feb. 28, 2014)).

12 App. to Answering Br. at 129 (Denial of Motion for Rearg't).

13 We review questions of law, including those involving statutory construction, *de novo*. See, e.g., *State v. Fletcher*, 974 A.2d 188, 195 (Del.2009).

14 21 *Del. C.* § 4177(d).

15 21 *Del. C.* § 4177(d)(1).

16 21 *Del. C.* § 4177(d)(3).

17 *Id.*

18 21 *Del. C.* § 4177(d)(11) ("If it shall appear to the satisfaction of the court at a hearing on the motion that the defendant falls within paragraph (d)(3) ..., the court shall enter an order declaring the offense for which the defendant is being sentenced to be a felony and shall impose a sentence accordingly.").

19 11 *Del. C.* § 4215A (defining "previous conviction" as "an offense specified in the laws of this State or ... an offense which is the *same as, or equivalent to*, such offense as the same existed and was defined under the laws of this State existing at the time of such conviction; or ... an offense specified in the laws of any other state, local jurisdiction, the United States, any territory of the United States, any federal or military reservation, or the District of Columbia which is the *same as, or equivalent to*, an offense specified in the laws of this State.") (emphasis added).

20 21 *Del. C.* § 4177(e)(1).

21 App. to Opening Br. at 51 (Dist. Ct. of Md. Traffic System Citation Information).

22 App. to Opening Br. at 53 (Dist. Ct. of Md. Traffic System Citation Information).

23 App. to Opening Br. at 118 (State of Delaware Driving Record).

24 See 21 *Del. C.* § 8101 ("(a) The licensing authority in the home state, for the purposes of suspension, revocation or limitation of the license to operate a motor vehicle, shall give the same effect to the conduct reported ... as it would if such conduct had occurred in the home state in the case of convictions for ... [d]riving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug.").

25 App. to Opening Br. at 59–60 (Court of Common Pleas Criminal Docket and Sentence).

26 See 21 *Del. C.* § 4177B(e)(5) ("In any proceeding under § 2742 of this title, § 4177 of this title or this section, a person may not challenge the validity of any prior or previous conviction, unless that person first successfully challenges the prior or previous conviction in the court in which the conviction arose and provides written notice of the specific nature of the challenge in the present proceeding to the prosecution at least 20 days before trial.").

27 We understand the Superior Court's impulse toward mercy and its good faith attempt to exercise lenity. But the DUI statute does not permit the Superior Court to deviate from the defined mandatory minimum penalties.

28 930 A.2d 923, 926 (Del.2007).

29 *See id.*

30 — U.S. —, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013).

31 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

32 *See Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

33 — U.S. —, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013).

- 34 See *Alleyne*, 133 S.Ct. at 2160, n.1 (noting that “[i]n *Almendarez-Torres v. United States* 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), we recognized a narrow exception to this general rule [that facts that expose defendants to greater penalties are elements of a separate offense] for the fact of a prior conviction. Because the parties do not contest that decision’s vitality, we do not revisit it for purposes of our decision today.”).
- 35 *Talley v. State*, 2003 WL 23104202, at *2 (Del. Dec. 29, 2003).
- 36 21 *Del. C.* § 4177(e)(1).
- 37 Laboy’s argument that there is a double jeopardy concern with reversing his illegal sentence also fails: under 10 *Del. C.* § 9902(f), the State has “an absolute right to appeal any sentence on the grounds that it is unauthorized by, or contrary to, any statute or court rule, in which case the decision or result of the State’s appeal shall affect the rights of the accused.” Here, his original sentence was contrary to the DUI statute. Re-sentencing Laboy within the mandatory parameters merely corrects that error. *Cf. Bozza v. United States*, 330 U.S. 160, 166–67, 67 S.Ct. 645, 91 L.Ed. 818 (1947) (holding that there is no double jeopardy concern when a judge corrects an erroneous sentence).

55 A.3d 360
Supreme Court of Delaware.

Cookie A. HUNTER, Defendant Below, Appellant,
v.
STATE of Delaware, Plaintiff Below, Appellee.

No. 355, 2011.

Submitted: Aug. 8, 2012.

Decided: Oct. 26, 2012.

Synopsis

Background: Defendant was convicted in the Superior Court, Kent County, of driving under influence (DUI), assault, and resisting arrest with force or violence. Defendant appealed.

Holdings: The Supreme Court, Holland, J., held that:

[1] noncompliance with manufacturer’s instructions for administration of blood alcohol content test rendered results unreliable;

[2] State had duty to preserve police department’s digital video recorder device which recorded activity inside police station; and

[3] appropriate remedy for State’s breach of its duty to preserve videorecording was missing evidence instruction, not judgment of acquittal.

Affirmed in part; reversed in part; remanded.

West Headnotes (8)

- [1] **Automobiles**
 - ☛ Conduct and Proof of Test; Foundation or Predicate
- Automobiles**
 - ☛ Reliability of particular testing devices

Phlebotomist’s use of blood alcohol testing tube beyond its expiration date and vigorous shaking

of tube after drawing sample, instead of “mixing of anticoagulant powder by slowly and completely inverting the tubes at least five times,” per testing kit instructions, rendered blood alcohol content test results unreliable, in prosecution for driving under influence (DUI).

Cases that cite this headnote

- [2] **Criminal Law**
 - ☛ Competency of evidence

The Supreme Court reviews a trial judge’s denial of a motion to suppress after conducting an evidentiary hearing for abuse of discretion.

Cases that cite this headnote

- [3] **Criminal Law**
 - ☛ Experiments and Tests; Scientific and Survey Evidence

Compliance with a manufacturer’s use requirements is the guarantee of reliability and accuracy that is the foundational cornerstone to the admissibility of the results of a scientific test; without that guarantee of reliability, there exists too great a risk that a jury will be persuaded by scientific evidence that is unreliable.

1 Cases that cite this headnote

- [4] **Criminal Law**
 - ☛ Destruction or Loss of Information

State had duty to preserve police department’s digital video recorder device which recorded activity inside police station, for purposes of prosecution for assault on police officer and resisting arrest based on events that occurred at station following defendant’s arrest for driving

under influence (DUI).

1 Cases that cite this headnote

- [5] **Criminal Law**
↔ Failure to call witness or produce evidence
Criminal Law
↔ Sanctions for destruction or loss

Police department's digital video recorder device which recorded activity inside police station, which defendant sought to show that his combative conduct and assault on emergency medical technician (EMT) were not voluntary, was not case-dispositive, and thus, appropriate remedy for State's breach of its duty to preserve videorecording was missing evidence instruction, and not judgment of acquittal on charges for assault and resisting arrest; videorecording was overwritten automatically every 28 days, so destruction was not deliberate or done in bad faith, independent testimony was sufficient to support charges, in that police officers and eyewitness gave corroborating testimony about events that occurred inside station, namely that defendant was violently combative and that defendant repeatedly kicked at police officers and EMTs, and recording would merely have been cumulative of testimony of defendant's mental health expert that defendant was not in control of his actions on night of arrest.

Cases that cite this headnote

- [6] **Constitutional Law**
↔ Duty to preserve

Fundamental fairness, as an element of due process, requires the State's failure to preserve evidence that could be favorable to the defendant to be evaluated in the context of the entire record. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

- [7] **Criminal Law**
↔ Destruction or Loss of Information

When evidence has not been preserved, the conduct of the State's agents is a relevant consideration, but it is not determinative.

1 Cases that cite this headnote

- [8] **Criminal Law**
↔ Destruction or Loss of Information

A relevant consideration for the jury when the State has failed to preserve evidence is the importance of the missing evidence, the availability of secondary evidence, and the sufficiency of the other evidence presented at trial.

Cases that cite this headnote

*362 Court Below—Superior Court of the State of Delaware, in and for Kent County, Cr. I.D. No. 0909001581.
Upon appeal from the Superior Court. AFFIRMED, in part; REVERSED, in part; and REMANDED.

Attorneys and Law Firms

James M. Stiller, Jr., Esquire, Schwartz & Schwartz, P.A.,
Dover, Delaware, for appellant.

John Williams, Esquire, Department of Justice, Dover,
Delaware, for appellee.

Before STEELE, Chief Justice, HOLLAND, BERGER,
JACOBS and RIDGELY, Justices, constituting the Court
en Banc.

Opinion

HOLLAND, Justice:

This is the defendant-appellant's, Cookie A. Hunter

(“Hunter”), appeal from his judgments of conviction, after a Superior Court jury trial, of Assault in the Second Degree (“Assault”), Resisting Arrest with Force or Violence (“Resisting Arrest”), and Driving Under the Influence, First Offense (“DUI”). Hunter raises two issues in this direct appeal. First, Hunter argues that it was error for the trial judge to admit the results of his blood alcohol content (“BAC”) blood test into evidence because the foundational requirements necessary to admit that scientific evidence were not met. Second, Hunter contends that the trial judge erred by not granting his motions for judgments of acquittal on the Assault and Resisting Arrest charges, because the State failed to preserve the videotape that recorded the events that led to those charges.

We have concluded that the results of Hunter’s BAC test were erroneously admitted into evidence. Therefore, the DUI judgment of conviction must be reversed. We have determined that Hunter’s motions for judgments of acquittal on the Assault and Resisting Arrest charges were properly denied. Therefore, those convictions are affirmed. Consequently, the judgments of the Superior Court are affirmed in part and reversed in part. This matter is remanded for further proceedings in accordance with this opinion.

*Facts*¹

At approximately 10:30 p.m. on September 2, 2009, Smyrna Police Department Officer Brandon L. Dunning (“Officer Dunning”) and his partner Sergeant Moore were travelling in an unmarked car near the area of North Main Street and West Glenwood Avenue in the town of Smyrna. Officer Dunning observed Hunter and another individual enter a tan Chevrolet S 10 truck. Hunter drove the truck across the grassy area of an apartment complex, into the property of a doctor’s office, and then down a back alley. Officer Dunning followed the truck for approximately four-tenths of a mile. When Hunter did not signal a right hand turn onto Delaware Street, Officer Dunning initiated a traffic stop.²

*363 When the truck was stopped, Officer Dunning noticed that Hunter had red, bloodshot, and glassy eyes, emitted a moderate odor of alcohol, and appeared nervous. Hunter told Officer Dunning that he was coming from his mother’s home in Dover, had made no stops, and had not been drinking alcohol. Beer cans were visible in the truck, including open cans on the floorboard.

Officer Dunning administered several field sobriety tests.

After Hunter failed the alphabet and counting backwards test and the finger dexterity test, he was asked to do additional field sobriety tests outside his vehicle. Hunter was unable to perform the walk and turn and one leg stand tests.

As a result of failing the field sobriety tests, the presence of an odor of alcohol, and Hunter’s red, bloodshot, and glassy eyes, he was handcuffed and placed in the rear seat of the police vehicle. Hunter began shouting that he was diabetic and needed to use his insulin pump. Officer Dunning unhandcuffed Hunter and allowed him to utilize his insulin pump. Thereafter, Hunter became uncooperative and had to be forcibly rehandcuffed.

Hunter was transported to the Smyrna police station. Officer Dunning testified about what happened at the police station after their arrival. Inside the police station, Hunter “became very uncooperative and combative,” and started fighting with Officer Dunning. When Hunter was on the floor of the police station, he repeated that he was diabetic and stated that he was going to go into shock.

The police called 911 to obtain medical assistance for Hunter. An ambulance was dispatched from the Smyrna American Legion. In the meantime, Hunter was crawling on the floor of the police station and banging his head on the walls. By the time the ambulance arrived, Hunter had become combative and was fighting with Officer Dunning.

Daniel Greek (“Greek”), an emergency medical technician (“EMT”) dispatched with the ambulance, testified that when he arrived at the Smyrna police station, Hunter was vulgar and combative. Greek determined that, although Hunter’s blood glucose was high, it was not a life threatening situation. Greek testified that Hunter was not in an altered mental state and that Hunter was in control of his actions at the police station. Greek noted that Hunter was able to answer questions by medical personnel.

After the ambulance arrived at the Smyrna police station, a decision was made to take Hunter to Kent General Hospital in Dover. A stretcher was brought in to transport Hunter. Officer Dunning testified that Hunter’s hands were handcuffed “because he was still being very combative and wanted to fight with us.” When an effort was made to strap Hunter’s legs to the stretcher, he began kicking. After Hunter violently kicked Greek in the right arm, Officer Dunning tasered Hunter in the left shoulder. Hunter did not lose consciousness, and after being tasered, he became cooperative.

As a result of being kicked by Hunter, Greek sustained serious injuries. An MRI was done on Greek's arm the next morning. According to Greek, "the elbow was basically destroyed. The ligaments were pulled away from the bones; and the bones themselves actually had some damage." Surgery was required to repair the damage to Greek's arm. As a result of his injury, Greek missed six months of work.

Eventually, Hunter was secured to the stretcher, and he was transported by ambulance to the hospital. At the hospital emergency room, Hunter "was still very volatile," and he refused to cooperate with a blood draw. Officer Dunning, two nurses, *364 and four other constables and security guards had to hold Hunter in order for the hospital phlebotomist, Roiann Gregory ("Gregory"), to take the blood sample.

When Hunter attempted to bite Officer Dunning during the hospital blood draw, he tasered Hunter a second time. Officer Dunning supplied Gregory with the police blood kit. Officer Dunning was present when Gregory took Hunter's blood sample.

Hunter's blood sample was taken at the hospital on September 2, 2009. The blood sample was tested on September 10 and 11, 2009, at the Delaware State Police Crime Laboratory by Deborah S. Louie ("Louie"). At the June 2010 Superior Court trial, Louie testified that Hunter's blood alcohol content on September 2, 2009 was 0.12%.

Hunter did not testify at his trial. The defense did present an expert medical witness, Gregory Villa Bona, M.D. ("Dr. Villa Bona"), who was Hunter's psychiatrist. The defense at trial to the charges of Assault and Resisting Arrest was not a denial that Hunter kicked Greek in the arm or engaged in combative and tumultuous behavior with Officer Dunning. Instead, the defense asserted that Hunter lacked the necessary *mens rea* to commit either of these two criminal offenses.

The BAC Test

¹¹ Hunter filed a motion to suppress his September 2, 2009 BAC test result of 0.12% because the blood test kit utilized by the Kent General Hospital phlebotomist, Gregory, had an August 31, 2009 expiration date. The Superior Court conducted an evidentiary hearing on Hunter's pretrial suppression motion. The only witness at the pretrial evidence suppression motion was Louie, an employee of the Delaware State Police Crime Laboratory.

She is in charge of the blood alcohol testing program in Kent and Sussex Counties.

In her direct examination at the suppression hearing, Louie testified that "[t]he expiration date applies only to the vacuum within the tube that is in the kit." She stated that the expiration date does not affect the blood sample. Louie also testified that the expiration date "does not have any bearing on the chemicals that are contained within that tube."

During her cross-examination at trial, Louie was asked to read from the manufacturer's specification sheet as follows:

The quantity of blood drawn varies with altitude, ambient temperature, barometric pressure, and *tube age*, venous pressure, and filling technique. (emphasis added).

Louie was then asked to reread the paragraph because she had read the first occurrence of the word "incorrect" as "inaccurate." She was then asked to look under the heading "storage" and to read the highlighted portion there, which she did read as follows: "*Do not* use tubes after their expiration date." (emphasis added). Notwithstanding the manufacturer's admonition not to use tubes from an expired kit, the trial judge denied Hunter's pretrial and renewed suppression motions, based upon Louie's testimony that using an expired kit was immaterial to the results.

At trial, Hunter raised a second objection to the blood alcohol content evidence obtained from Hunter's September 2, 2009 blood draw. Officer Dunning testified that he was present with Hunter at Kent General Hospital on September 2, 2009, and witnessed Hunter's blood draw by Gregory. During defense counsel's cross-examination of Officer Dunning at trial, the following exchange occurred:

Q. You said a Roiann Gregory was the phlebotomist, is that correct, the one who took the blood?

*365 A. Correct.

Q. So she extracted the blood into the tubes. And was Mr. Hunter still pretty much combative?

A. Yes.

Q. During the blood extraction, very combative?

A. Yes, sir.

Q. You said she put the blood in the tubes and then sealed it up and signed it, right—

A. Yes.

Q. —to prepare it for the evidence? Now, did you see her shake the tubes real good before she put them in the bag to make sure the tubes were mixed up properly?

A. They always perform that.

Q. Okay. So she shook it vigorously just to make sure everything was mixed up properly, right?

A. Yes.

After Officer Dunning testified that the phlebotomist shook the tube of Hunter's blood "vigorously," Hunter's trial attorney asked Officer Dunning to read aloud a portion of the collection kit instructions for a Qualified Blood Collector. Officer Dunning then read: "Item A: Immediately after blood collection, ensure proper mixing of anticoagulant powder by slowly and completely inverting the tubes at least five times. Do not shake vigorously." The written copy of the State Police blood collection instructions was introduced into evidence as Defense Exhibit # 1.

At the conclusion of the State's case-in-chief, Hunter moved for a judgment of acquittal on the DUI charge because the State failed to prove "the the blood draw was administered correctly." Defense counsel argued for dismissal of Hunter's DUI charge because "[t]here was testimony by the police officer that the vial was shaken vigorously. There was evidence admitted by the defendant that the instruction sheet on the blood test kit says: Do not shake vigorously. Clearly, that shows that the sample was taken incorrectly." The trial judge summarily denied the defense motion for a judgment of acquittal on the DUI charge.

^[2] Hunter contends that the Superior Court erred by admitting into evidence results of his BAC test for two independent reasons: first, because the test was administered after the kit's expiration date; and second, because the specific instructions for mixing the vial's contents were disregarded. We review a trial judge's denial of a motion to suppress after conducting an evidentiary hearing for abuse of discretion.³

^[3] In *Clawson v. State*, we stated that "the admissibility of intoxilyzer test results center on the State providing an adequate evidentiary foundation for the test result's admission."⁴ We held that it was error for the trial court to

admit into evidence the results of an Intoxilyzer 5000 test when it was determined that the manufacturer's protocol was not complied with before the test was administered.⁵ Following the manufacturer's use requirements ensures the reliability of the scientific test.⁶ It is this guarantee of reliability and accuracy that is the foundational cornerstone *366 to the admissibility of the results of a scientific test. Without that guarantee of reliability, there exists too great a risk that a jury will be persuaded by scientific evidence that is unreliable.

In *Clawson*, we held that "the admission of a test result that was not in compliance with the manufacturer's requirements jeopardized the fairness of [a] trial."⁷ In Hunter's case, using the expired vacutainer tubes in the blood test kit was in direct contravention of the manufacturer's specification sheet for the vacutainer tubes. In Hunter's case, shaking the tubes vigorously was in direct violation of the manufacturer's instructions for use of the kit.

In accordance with our holding in *Clawson v. State*, those two independent deviations from the manufacturer's required protocol, standing alone, each rendered the BAC test inadmissible due to the lack of a proper foundation. It was an abuse of discretion for the trial judge to deny Hunter's motion to suppress the results of the BAC test. Therefore, Hunter's DUI conviction must be reversed.

Unpreserved Digital Recording

During his trial testimony, Officer Dunning explained that the Smyrna Police Department had a digital video recorder ("DVR") device to record activity occurring within the police station. That DVR rewrites itself (tapes over) older images after twenty-eight days. Officer Dunning testified that any recording of the interaction between Hunter and others at the police station was never preserved and was automatically taped over after twenty-eight days. Officer Dunning also testified that he never observed what may have been on the DVR system.

At a sidebar conference during Officer Dunning's trial testimony, defense counsel for Hunter stated to the trial judge, "Actually, Your Honor, I would ask—since we know the tape does not exist now, I would ask that the *Deberry* instruction be read eventually to the jury." The trial judge responded that any jury instructions would be discussed "at the close of evidence."

Hunter's Defense

At the close of the State's case-in-chief on June 3, 2010, the defense moved for a judgment of acquittal on the charges of Assault and Resisting Arrest. Hunter's trial attorney argued that the State had failed to prove the *mens rea* element of either charge because there was no showing that Hunter was acting intentionally. In support of the dismissal motion, Hunter's attorney argued that "there was no persuasive testimony that says he was in control of his faculties...." The trial judge found that "there is sufficient evidence on each of the charges presented by the State," and summarily denied the motion for a judgment of acquittal.

Following this ruling, the defense presented Dr. Villa Bona as an expert witness. Dr. Villa Bona testified that Hunter, who was thirty-three years old at the time of the trial, had juvenile-onset diabetes and now has insulin-dependent diabetes. Dr. Villa Bona also explained that Hunter suffers from post-traumatic stress disorder ("PTSD") as a result of two traumatic incidents when Hunter was a young teenager. First, when Hunter was a young teenager, he witnessed his father commit suicide. Second, prior to the father's suicide, Hunter "was cornered by several older boys and held down and raped." Dr. Villa Bona told the Superior Court jury that "[i]t was a traumatic event. His limbs were held; he was struck repeatedly. They used objects. And he had a rather rough time with that."

*367 When asked at trial how the two prior traumatic incidents in Hunter's life would affect the patient's behavior if Hunter was being forcefully restrained in the police station, Dr. Villa Bona said, "It would very likely cause him to resist more than the regular person." When asked if Hunter might become violent if involuntarily restrained, Dr. Villa Bona stated: "He would probably respond in any way possible not to be tied down to be forcefully held."

Dr. Villa Bona testified that Hunter's reaction to being restrained by the police was not a conscious or voluntary conduct: "It would very likely be reflexive." Given Hunter's diabetic and PTSD conditions, if he was forcefully subdued and tied onto a stretcher, Dr. Villa Bona stated "a person in that situation with that history would respond violently to total containment. I don't know if they could respond any other way." When specifically asked if Hunter intended to kick Greek, Dr. Villa Bona testified: "He intended to get free. I don't think whether or not he kicked anyone was in his mind at all."

Thus, the defense, as presented by the expert testimony of

Dr. Villa Bona, was that Hunter was not acting either intentionally or voluntarily when he resisted arrest at the Smyrna police station and when he kicked Greek in the right arm. Dr. Villa Bona also noted that a diabetic should not consume alcohol since this can destabilize a patient's blood sugar. Although Dr. Villa Bona's expert opinions were not stated as being based upon the required evidentiary standard of a reasonable medical certainty or probability, there was no trial objection by the State to his expert opinion evidence.⁸

When Dr. Villa Bona's testimony concluded, the defense rested and renewed the motion for judgment of acquittal, again arguing that the State had failed to prove the *mens rea* element of either the Assault or the Resisting Arrest allegation. The trial judge denied the defense motion and ruled, in part:

As to the voluntariness or lack of voluntariness of the defendant's conduct regarding assault and resisting arrest, the person who had the most—the person who had both the most expertise and observed the defendant was the paramedic, the paramedic. He didn't witness him when he was being arrested, but he witnessed him later. And he testified the defendant was lucid and knew what he was doing. I am not going to reject that testimony and accept as fact the testimony of Dr. Villa Bona.

Jury Instruction Conference

At the jury instruction prayer conference, following the completion of all the trial testimony, Hunter's attorney again raised the issue that the Smyrna Police Department had not preserved a DVR recording of the events within the police station on the evening of September 2, 2009, when Hunter was taken into custody for the DUI offense. Hunter's attorney requested that the Assault and Resisting Arrest charges be dismissed for failure of the police to preserve the DVR recording. The Superior Court judge denied that motion.

As the prayer conference continued, however, the trial judge ruled that the failure of the police to preserve the DVR recording of what occurred during Hunter's altercation at the police station was negligent and that a missing evidence jury instruction was required. The trial

judge said that he had never given a *Deberry*⁹ *368 missing evidence jury instruction before, but that one was required in Hunter's case. The record reflects that a *Deberry* missing evidence instruction was given to Hunter's jury, using the language approved by this Court in *Lolly v. State*.¹⁰ Accordingly, the jury was instructed that if the DVR missing recording was available, its contents would be favorable to Hunter.

Missing Evidence Analysis

¹⁴ ¹⁵ On appeal, Hunter argues that while the trial judge did give a missing evidence jury instruction tracking the suggested language in *Lolly v. State*, the trial judge should have dismissed Hunter's two charges of Assault and Resisting Arrest. Hunter's argument is based upon *Johnson v. State* where this Court held that "the failure to gather and/or preserve case dispositive evidence will completely preclude a prosecution."¹¹ The record does not support Hunter's argument that the DVR recording, if preserved, would have been case dispositive.

The obligation to preserve evidence is rooted in the Fourteenth Amendment to the United States Constitution and Article 1, Section 7 of the Delaware Constitution.¹² The seminal case decided by this Court is *Deberry v. State*.¹³ The question presented in *Deberry* was "what relief is appropriate when the State had or should have had the requested evidence, but the evidence does not exist when the defense seek its production?"¹⁴ *Deberry* instructs that the inquiry is analyzed according to the following paradigm:

1) would the requested material, if extant in the possession of the State at the time of the defense request, have been subject to disclosure under Criminal Rule 16 or *Brady [v. Maryland]*?

2) if so, did the government have a duty to preserve the material? if there was a duty to preserve, was the duty breached, and what consequences should flow from a breach?

The consequences that should flow from a breach of the duty to gather or preserve evidence are determined in accordance with a separate three-part analysis which considers:

- 1) the degree of negligence or bad faith involved,
- 2) the importance of the missing evidence considering the probative value and reliability of

secondary or substitute evidence that remains available, and

3) the sufficiency of the other evidence produced at the trial to sustain the conviction.¹⁵

As we have previously noted under similar facts, a discussion of *Brady* is a fruitless exercise because the evidence is no longer available.¹⁶ Therefore, the first step in our *Deberry* missing evidence analysis is properly viewed in the context of Criminal Rule 16: "[U]nder Superior Court Criminal Rule 16(b), a defendant need only show that an item 'may be material to the preparation of his defense' to be discoverable."¹⁷

*369 In this case, Hunter filed a Criminal Rule 16 request for the DVR recording. The State was in possession of the DVR recording from the outset, having created the evidence. However, the State was unable to produce the DVR because it had been automatically recorded over by subsequent events. Hunter's defense at trial was that he was not acting intentionally on that evening. He alleges that the tape would have shown that he was unable to control himself. There is no doubt that a DVR recording of the events at the Smyrna police station would have been subject to disclosure to Hunter under Criminal Rule 16.

The second step in a *Deberry* analysis requires an evaluation of whether the government had a duty to preserve the DVR recording. Although this Court has declined to prescribe exact procedures, we have held that in fulfilling its duty to preserve evidence, law enforcement agencies should create rules broad enough to encompass any material that could be favorable to a defendant.¹⁸ In Hunter's case, the police were not gathering physical evidence that was then somehow misplaced; rather, they controlled the DVR equipment and created a recording of the events that led to the criminal charges at issue.

After the events at the Smyrna police station, it was clear that Hunter was going to be charged with Assault and Resisting Arrest. Without commenting on the general practice of a twenty-eight day automatic overwrite policy, increased diligence is required when a recording is made of an alleged event and the defendant is subsequently charged in connection with the event. That principle was discussed by this Court in *Hammond v. State*, when the State failed to preserve the crash vehicle even though criminal charges for vehicular homicide were pending.¹⁹ In this case, the State had an obligation to preserve the DVR recording and that duty was breached.

The State's failure to preserve the DVR recording requires an examination of the consequences that must

flow from that breach of duty. We begin by determining the degree of negligence or bad faith. Officer Dunning testified that the tape had never been reviewed after the recording, demonstrating that he did not know if the tapes would have been inculpatory or exculpatory for Hunter. Although the recording was ultimately overwritten, it was done automatically. There is no evidence that this was done deliberately or in bad faith.²⁰ Accordingly, the record supports the trial judge's conclusion that the Smyrna Police Department was negligent in failing to preserve the evidence by not preventing the automatic destruction of the recording after twenty-eight days.

The second consideration when there is a breach of the duty to preserve evidence is the importance of the missing evidence and the reliability of the remaining evidence. The other evidence in Hunter's case was the eyewitness testimony of Officer Dunning and EMT Greek, who was severely injured by Hunter. Eyewitness testimony evidence is probative and relevant, even though the credibility of a particular *370 witness is left to the province of the jury.²¹

Finally, we must address the question of whether the remaining evidence introduced by the State at trial was sufficient to sustain a conviction for the charges of Assault and Resisting Arrest. Hunter alleges that without the DVR recording, the State is unable to prove that he acted "intentionally," a necessary element of both Assault and Resisting Arrest. The record reflects, however, that the State was able to prove intentionality beyond a reasonable doubt.

A person is guilty of Resisting Arrest with Force or Violence when:

(1) The person intentionally prevents or attempts to prevent a peace officer from effecting an arrest or detention of the person or another person by use of force or violence towards said peace officer, or

....

(3) Injures or struggles with said peace officer causing injury to the peace officer.²²

A person is guilty of Assault in the Second Degree when "[t]he person recklessly or intentionally causes serious physical injury to another person."²³

Officer Dunning testified on behalf of the State that after allowing Hunter to self-administer the insulin pump, he struggled to handcuff Hunter. After being taken to the Smyrna Police Department, Hunter continued to fight and struggle with Officer Dunning. The decision was then made to transport Hunter to Kent General Hospital. While

attempting to secure Hunter's legs to the stretcher, Hunter repeatedly kicked at the police officers and the EMTs. Officer Dunning had to respond by using his stun gun on Hunter. At Kent General Hospital, while the staff was trying to draw Hunter's blood, he attempted to bite Officer Dunning, causing Officer Dunning to use his stun gun a second time.

EMT Greek also testified on behalf of the State. Greek corroborated Officer Dunning's accounts of Hunter's behavior. Greek testified that Hunter was violent and uncooperative, and that one of Hunter's kicks struck his right arm, causing severe ligament and bone damage. The injuries required surgery and caused Greek to miss six months of work. We hold that there is sufficient evidence in the record from which a jury was able to find Hunter guilty beyond a reasonable doubt for Resisting Arrest and Assault.

Missing Evidence Remedy

¹⁶¹ ¹⁷¹ ¹⁸¹ Nevertheless, the State must still bear responsibility for the Smyrna Police Department's failure to preserve the DVR recording. We remain convinced that fundamental fairness, as an element of due process, requires the State's failure to preserve evidence that could be favorable to the defendant "[to] be evaluated in the context of the entire record."²⁴ When evidence has not been preserved, the conduct of the State's agents is a relevant consideration, but it is not determinative. Equally *371 relevant is a consideration of the importance of the missing evidence, the availability of secondary evidence, and the sufficiency of the other evidence presented at trial.²⁵ "[T]here may well be cases which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair."²⁶ That is what we meant in *Johnson v. State* when we stated "the failure to gather and/or preserve case dispositive evidence will completely preclude a prosecution."²⁷

Hunter contends that it was error for the trial judge to refuse to issue a judgment of acquittal on the Assault and Resisting Arrest charges based upon the failure of the Smyrna Police Department to preserve the DVR recording. Hunter contends that the DVR recording would have been case dispositive with respect to those charges. Therefore, Hunter argues, fundamental fairness requiring a judgment of acquittal on those charges.²⁸

The record does not reflect that the DVR recording would

have been case dispositive evidence in this matter. Therefore, Hunter's criminal trial was not fundamentally unfair without that evidence. Hunter's trial defense was not a denial that he engaged in the conduct alleged (Assault and Resisting Arrest), but rather that Hunter lacked the required specific intent or *mens rea* to commit either offense because Hunter's mental condition, due to a combination of diabetes and PTSD, made his conduct at the Smyrna Police Station on September 2, 2009 involuntary.

The defense presented at trial through the expert testimony of Dr. Villa Bona, was that Hunter's conduct at the police station on the night of his DUI arrest was involuntary. Defense counsel argued to the jury in closing that Hunter should be acquitted because "[h]e never intended to harm anyone. He never intended to resist arrest." Given this defense that Hunter committed the conduct alleged, but his actions should be legally excused because Hunter was acting involuntarily, the missing DVR recording was not dispositive to resolving the disputed issue of whether Hunter was acting voluntarily or involuntarily.

The jury did not have to decide whether Hunter kicked Greek or resisted arrest because the physical conduct was essentially conceded. The issue for the jury was whether the required mental element of volitional action was present. A recording showing Hunter engaging in conduct, which he admitted, is only cumulative evidence that does not definitively resolve the disputed question of whether Hunter was unjustified in being combative or was

a frightened individual behaving involuntarily as a result of his diabetes or PTSD. If the jury believed Dr. Villa Bona, that Hunter was not in control of his actions at the police station, the jury could have acquitted him.

We hold that the trial judge properly determined that a missing evidence jury instruction was a sufficient remedy for the State's failure to preserve the DVR recording. Fundamental fairness did not require a judgment of acquittal on the Assault *372 and Resisting Arrest charges in the context of the entire record of Hunter's case. Therefore, those judgments of conviction are affirmed.

Conclusion

The Superior Court's judgment of conviction for DUI is reversed. The Superior Court's judgments of conviction for Assault in the Second Degree and Resisting Arrest with Force or Violence are affirmed. This matter is remanded for further proceedings in accordance with this opinion.

All Citations

55 A.3d 360

Footnotes

- 1 The underlying facts are not in dispute. The disagreement between the parties relates to the consequences that should flow from those facts. This recitation relies primarily upon the facts as set forth in the State's brief.
- 2 A violation of Del.Code Ann. tit. 21, § 4155. Hunter does not appeal his conviction for this violation.
- 3 *Rivera v. State*, 7 A.3d
- 4 *Clawson v. State*, 867 A.2d 187, 191 (Del.2005).
- 5 See *id.* at 192 (finding that it was error to admit the results of the test when the State only observed the defendant for nineteen minutes when the manufacturer required a twenty minute observation period).
- 6 *Id.*
- 7 *Id.* at 193.
- 8 See *Oxendine v. State*, 528 A.2d 870, 873 (Del.1987).

- 9 *Deberry v. State*, 457 A.2d 744 (Del.1983).
- 10 *Lolly v. State*, 611 A.2d 956, 962 n. 6 (Del.1992).
- 11 *Johnson v. State*, 27 A.3d 541, 548 (Del.2011).
- 12 *Id.* at 545 (citing *Deberry v. State*, 457 A.2d at 744).
- 13 *Deberry v. State*, 457 A.2d at 744.
- 14 *Id.* at 749.
- 15 *Johnson v. State*, 27 A.3d at 545–46 (internal citations omitted).
- 16 *Id.* at 546.
- 17 *Id.* (internal citations omitted).
- 18 *Deberry v. State*, 457 A.2d at 751–52. It is the imposition of this duty that ensures the government takes adequate steps to preserve evidence so that the defendant is not denied due process. *Id.* at 751.
- 19 *Hammond v. State*, 569 A.2d 81 (Del.1989).
- 20 Compare *State v. Wright*, 2011 WL 826357, at *3–4 (Del.Ct.Com.Pl.) (inferring willful destruction of DVR recording from the Rehoboth Police Department, because evidence demonstrated that the police had been warned before about failing to preserve recording, and continued to deliberately erase recordings).
- 21 *Hutchins v. State*, 153 A.2d 204, 207 (Del.1959) (“It is a well-settled general rule of law that the jury are the sole judges of the degree of credit to be given to the testimony and that the determination of the creditability of witnesses is not within the province of the reviewing court.”).
- 22 Del.Code Ann. tit. 11, § 1257.
- 23 Del.Code Ann. tit. 11, § 612(a)(2).
- 24 *Hammond v. State*, 569 A.2d at 87 (citing *United States v. Agurs*, 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)); *Deberry v. State*, 457 A.2d at 752; Del. Const. art. I, § 7.
- 25 *Bailey v. State*, 521 A.2d 1069, 1091 (Del.1987); *Deberry v. State*, 457 A.2d at 752.
- 26 *Hammond v. State*, 569 A.2d at 87 (citing *Arizona v. Youngblood*, 488 U.S. 51, 61, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988) (Stevens, J., concurring)).
- 27 *Johnson v. State*, 27 A.3d at 548.
- 28 *Hammond v. State*, 569 A.2d at 81.

RIDGELY, Justice, for the Majority:

Defendant-below/Appellant Freddie Flonnory (“Flonnory”) appeals from a conviction in the Superior Court of felony Driving Under the Influence of Alcohol (“DUI”), under 21 *Del. C.* § 4177(a) and (d)(3). Specifically, Flonnory challenges the Superior Court’s denial of his motion to suppress the results of a blood draw. Flonnory raises two claims on appeal. First, Flonnory contends that the trial court erred in holding that Delaware’s implied consent statute, 21 *Del. C.* § 2740(a), exempted the blood draw from the Fourth Amendment’s warrant requirement. Second, Flonnory contends that there was no voluntary consent, and that the trial court erred when it did not perform a Fourth Amendment totality of the circumstances analysis to determine whether Flonnory had in fact consented to the blood draw.

By its very nature, a blood draw is an intrusion into the human body that is fundamentally different from a breath sample.¹ The General Assembly has acknowledged that the “normal rules of search and seizure law” apply in this context.² And the normal rules require a search warrant for a blood draw absent a recognized exception to the warrant requirement.

¹ See *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 625 (1989) (“Unlike blood tests, breath tests do not require piercing the skin and may be conducted safely outside a hospital environment and with a minimum of inconvenience or embarrassment.”).

² 21 *Del. C.* § 2750(a).

When the State relies upon the consent exception to the warrant requirement to admit a chemical test of a blood draw, a Fourth Amendment totality of the circumstances analysis applies. Such an analysis was not applied in this case by the Superior Court. Accordingly, we remand this matter for further proceedings consistent with this Opinion.

*I. Facts and Procedural History*³

On September 8, 2012, Delaware State Police Corporal Andrew Pietlock (“Cpl. Pietlock”) pulled over Flonnory’s automobile after he observed Flonnory twice fail to signal during a turn. Cpl. Pietlock approached the driver’s side of Flonnory’s vehicle, where he immediately noticed that Flonnory’s eyes were glassy and bloodshot. Cpl. Pietlock also observed an open beer bottle in the vehicle, and smelled the odor of alcohol on Flonnory’s breath. When Cpl. Pietlock asked Flonnory how much he had to drink that night, Flonnory admitted to having one beer in addition to the beer seen in his vehicle.

Based on his observations, Cpl. Pietlock suspected Flonnory was intoxicated, and administered several field sobriety tests. Flonnory failed the field sobriety tests he was asked to perform.⁴ Cpl. Pietlock then requested that Flonnory take a Portable Breath Test (“PBT”). When Flonnory asked whether he had to take

³ Unless otherwise noted, the facts and procedural history are taken directly from the Superior Court’s Order denying Flonnory’s motion to suppress. *See State v. Flonnory*, 2013 WL 3327526 (Del. Super. 2013).

⁴ Flonnory “failed the alphabet, numbers, one-leg stand, and heel-to-toe-tests.” *Id.* at *2.

the PBT, Cpl. Pietlock informed Flonnory that he did not have to take “any test,” but that if he did not take the PBT, he would be arrested for DUI. Despite being informed of his right to refuse, Flonnory took the PBT. The PBT was administered at 10:02 p.m., at which time the device indicated that Flonnory’s blood alcohol concentration was 0.163, over twice the legal limit. Cpl. Pietlock arrested Flonnory for suspicion of DUI.

Flonnory was transported to the police station, where he was advised that a phlebotomist was going to conduct a blood draw. Cpl. Pietlock did not ask Flonnory for permission nor did he request a search warrant for authority to draw Flonnory’s blood.⁵ At 11:36 p.m., Flonnory’s blood was drawn by the phlebotomist. During the blood draw, Flonnory told the phlebotomist “that’s a good vein, don’t miss it.”⁶ Flonnory’s blood was analyzed by the Delaware State Police Crime Lab, which found a blood alcohol concentration of 0.14.

On October 22, 2012, Flonnory was indicted on one count for DUI and one count for Failure to Use Turn Signal.⁷ In December 2012, Flonnory filed a motion to suppress the results of the blood draw, claiming that the blood draw violated his

⁵ At oral argument before this Court, the State conceded that it has since instructed law enforcement officers to apply for a search warrant under all circumstances before performing a blood draw. Oral Argument at 28:51, 29:35–30:10, *Flonnory v. State*, No. 156, 2014 (Nov. 19, 2014) (“Post *McNeely*, warrants are being obtained in every instance Police are not, at this point, relying on the implied consent law.”), *available at* <http://courts.delaware.gov/supreme/oralarguments/>.

⁶ *Flonnory*, 2013 WL 3327526, at *2.

⁷ (A9) The State entered a *nolle prosequi* on the Failure to Use Turn Signal charge prior to jury selection. (A7)

rights under the Fourth Amendment. The trial court held a suppression hearing, but reserved its decision pending the United States Supreme Court's decision in *Missouri v. McNeely*.⁸ After *McNeely* was decided, the trial court determined that *McNeely's* holding was inapplicable to Delaware's implied consent statute. Accordingly, the trial court denied Flonnory's motion, and found that Flonnory provided consent under Delaware's implied consent statute simply by driving his vehicle. After a two-day jury trial, Flonnory was convicted of DUI. This appeal followed.

II. Discussion

A trial court's decision to grant or deny a motion to suppress evidence is reviewed for an abuse of discretion.⁹ A trial court's legal decisions are reviewed *de novo*.¹⁰ “To the extent the trial judge's decision is based on factual findings, we review for whether the trial judge abused his or her discretion in determining whether there was sufficient evidence to support the findings and whether those findings were clearly erroneous.”¹¹

⁸ *Missouri v. McNeely*, 133 S. Ct. 1552 (2013). In *McNeely*, the Supreme Court held that the natural dissipation of alcohol in a drunk-driving suspect's bloodstream does not constitute a *per se* exigency in every case to justify drawing the suspect's blood for testing without a warrant or the suspect's consent. *Id.* at 1558. *McNeely* states that whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances. *Id.* at 1563.

⁹ *McVaugh v. State*, 2014 WL 1117722, at *1 (Del. 2014) (citing *Lopez-Vazquez v. State*, 956 A.2d 1280, 1284 (Del. 2008)).

¹⁰ *Id.* (citing *McCallister v. State*, 807 A.2d 1119, 1122–23 (Del. 2002)).

¹¹ *Id.* (quoting *Lopez-Vazquez*, 956 A.2d at 1284).

The United States and Delaware Constitutions protect the right of persons to be secure from “unreasonable searches and seizures.”¹² Generally, “[s]earches and seizures are *per se* unreasonable, in the absence of exigent circumstances, unless authorized by a warrant supported by probable cause.”¹³ In addition to exigent circumstances, a recognized exception to the warrant requirement is for searches that are conducted pursuant to a valid consent.¹⁴ “Consent may be express or implied, but this waiver of Fourth Amendment rights need not be knowing and intelligent.”¹⁵

A blood draw is fundamentally different from a breath test because it involves an intrusion into the human body. As the United States Supreme Court explained nearly five decades ago:

Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned. The requirement that a warrant be obtained is a requirement that inferences to support the search be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.¹⁶

¹² U.S. Const. amend. IV; Del. Const. art. I, § 6.

¹³ *Scott v. State*, 672 A.2d 550, 552 (Del. 1996) (citing *Hanna v. State*, 591 A.2d 158, 162 (Del. 1991)).

¹⁴ *Id.* (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 221–22 (1973)).

¹⁵ *Cooke v. State*, 977 A.2d 803, 855 (Del. 2009) (citing *Schneckloth*, 412 U.S. at 241).

¹⁶ *See Schmerber v. California*, 384 U.S. 757, 769 (1966) (internal citations and quotation marks omitted).

More recently, the Supreme Court has stated that “[s]uch an invasion of bodily integrity implicates an individual’s ‘most personal and deep-rooted expectations of privacy.’”¹⁷ This is why a search warrant is required in the absence of exigent circumstances¹⁸ or consent. In order to determine whether consent was given voluntarily, courts examine the totality of the circumstances surrounding the consent, including:

(1) defendant’s knowledge of the constitutional right to refuse consent; (2) defendant’s age, intelligence, education, and language ability; (3) the degree to which the individual cooperates with police; and (4) the length of detention and the nature of questioning, including the use of physical punishment or other coercive police behavior.¹⁹

We have applied this very analysis before in the context of a blood draw. For example, in *Higgins v. State*, Higgins, who was driving intoxicated, was involved in single car accident.²⁰ When a Newark police officer arrived at the scene, he observed that Higgins’ eyes were bloodshot and glassy, and smelled the odor of alcohol emanating from him.²¹ The officer took Higgins to Christiana Hospital, where he was asked to sign a written consent form so that hospital personnel could draw his blood.²² When Higgins refused, the officer called a

¹⁷ *McNeely*, 133 S. Ct. at 1558 (quoting *Winston v. Lee*, 470 U.S. 753, 760 (1985)).

¹⁸ The trial court found no exigent circumstances in this case. *Flonnory*, 2013 WL 3327526, at *5.

¹⁹ *McNeely*, 133 S. Ct. at 1558 (citing *Schneekloth*, 412 U.S. at 241).

²⁰ *Higgins v. State*, 2014 WL 1323387, at *1 (Del. Apr. 1, 2014).

²¹ *Id.*

²² *Id.*

phlebotomist to come to the hospital to draw Higgins' blood.²³ While waiting for the phlebotomist, the officer told Higgins that if he refused the blood draw, he would lose his driver's license for one year, and also admonished Higgins that "he was lucky that he hadn't hit a kid that day."²⁴ Higgins, eventually stated "fine, I'll give blood," and cooperated while the phlebotomist drew his blood.²⁵ The blood draw revealed Higgins' blood alcohol concentration to be 0.20.²⁶

Higgins was arrested and indicted for felony DUI. Thereafter, he moved to suppress the blood draw results, claiming that his consent was not given voluntarily due to the officer's (i) calling a phlebotomist after he had refused to sign a hospital consent form to the blood draw, (ii) (possibly) telling the defendant that he would lose his license if he did not consent, and (iii) admonishing Higgins for his dangerous conduct.²⁷ The trial court denied the motion, and found that, under the totality of the circumstances, Higgins had voluntarily consented to having his blood drawn. On appeal, we affirmed the trial court's ruling. In so doing, we reviewed the totality of the circumstances as found by the trial court, and explained:

[T]he totality of the circumstances establishes that Higgins voluntarily consented to the blood draw. Because this

²³ *Id.*

²⁴ *Higgins*, 2014 WL 1323387, at *1.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at *2.

constituted his third DUI offense, Higgins was not an ignorant newcomer to the law. No argument is made that Higgins' age, intelligence, or education precluded his voluntary consent. And, [the officer's] testimony shows that Higgins was generally cooperative with police Fourth Amendment jurisprudence does not forbid a law enforcement officer from attempting to persuade an individual to consent to a search. Finally, calling the . . . phlebotomist did not cause Higgins to acquiesce[] to a claim of lawful authority. Neither [the arresting officer] nor the phlebotomist represented that they had authority to draw Higgins blood without his consent. Given the totality of the circumstances, Higgins voluntarily consented to the blood draw.²⁸

Notwithstanding this precedent, the State argues that a Fourth Amendment analysis was not required here. We disagree.

The General Assembly has acknowledged that “the normal rules of search and seizure law” apply in determining the admissibility of a chemical test in “any action or proceeding arising out of acts alleged to have been committed by any person while under the influence of alcohol.”²⁹ A chemical test of a person's blood is one of the ways the State may prove driving under the influence.³⁰ The procedure involves “a compelled physical intrusion beneath [one's] skin and into [one's] veins to obtain a sample” of blood.³¹ Due to the invasive nature of this procedure, a Fourth Amendment totality of the circumstances analysis must be performed when the search is not based upon a warrant or exigent circumstances in

²⁸ *Id.* at *2–3 (internal quotation marks omitted).

²⁹ 21 *Del. C.* § 2750(a).

³⁰ 21 *Del. C.* § 4177.

³¹ *Id.*

order to determine whether a defendant voluntarily consented to the blood draw.³² Here, the trial court erred when it concluded that “Defendant’s statutory implied consent exempted the blood draw from the warrant requirement”³³ of the Fourth Amendment.

The State argues in the alternative that the totality of the circumstances show that Flonnory voluntarily consented to the blood draw. As we have noted above, express or implied consent may waive Fourth Amendment rights. Whether this in fact occurred here under the totality of the circumstances is a determination we choose not to make for the first time on appeal. The trial court should determine in the first instance whether Flonnory consented, either expressly or impliedly, to the blood draw. Accordingly, we remand this matter so that the trial court may conduct a proper Fourth Amendment analysis. If the trial court determines, after considering the totality of the circumstances, that the consent exception to the warrant requirement does not apply, it is instructed to grant the motion to suppress, vacate the conviction, and to grant a new trial.

We respectfully disagree with the very thoughtful Dissent. The Dissent focuses on the Supreme Court’s decision in *McNeely*, and concludes that it has no

³² Our holding is consistent with recent decisions of other State Supreme Courts. See *State v. Fierro*, 853 N.W.2d 235, 243 (S.D. 2014) (ruling that a Fourth Amendment totality of the circumstances analysis must be performed to determine whether consent to a blood draw was voluntary); *State v. Wulff*, 337 P.3d 575, 581 (Idaho 2014) (same); *Byars v. State*, 336 P.3d 939, 942 (Nev. 2014) (same); *State v. Butler*, 232 Ariz. 84, 87 (Ariz. 2013) (same).

³³ *Flonnory*, 2013 WL 3327526, at *6.

application to the facts of this case. We recognize that the Court in *McNeely* did not expressly address the issue of consent. Nevertheless, its reasoning—derived from *Schmerber v. California*³⁴—is directly applicable to the facts of this case. We agree that Delaware’s implied consent statute, as stated by the Supreme Court, remains a “legal tool[] to enforce [Delaware’s] drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws.”³⁵ But the Supreme Court explained in *McNeely* that, “Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.”³⁶

The Dissent expresses concern that requiring police to obtain a warrant before performing a blood draw “would burden police officers and courts with the need to secure a large number of warrants, taking scarce police and judicial time away from other matters.” To the extent this is an extra step, the Delaware Department of Justice has already instructed law enforcement to take it using the technology available here.³⁷ As noted by the Supreme Court in *McNeely*, this argument on burden fails to account for technological advances “that allow for the more expeditious processing of warrant applications, particularly in contexts like

³⁴ *Schmerber*, 384 U.S. at 769 (“Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned.”).

³⁵ *McNeely*, 133 S. Ct. at 1566.

³⁶ *Id.* at 1563.

³⁷ See footnote 5, *supra*.

drunk-driving investigations where the evidence offered to establish probable cause is simple.”³⁸

III. Conclusion

This matter is **REMANDED** for further proceedings consistent with this Opinion. Jurisdiction is not retained.

³⁸ *McNeely*, 133 S. Ct. at 1561–62. The Dissent also posits in footnote 69 that Delaware’s implied consent statute for a chemical test of breath, blood, or urine has a corporate analogue in 8 *Del. C.* § 3114, which relates to personal jurisdiction. Section 3114 is not at issue here. We have expressly upheld the constitutionality of Section 3114 in *Armstrong v. Pomerance*, 423 A.2d 174, 177 (Del. 1980), and nothing in our Opinion today is intended to overrule that decision or affect the scope of Section 3114’s enforceability.

STRINE, Chief Justice, dissenting:

I respectfully dissent. In my view, the Superior Court grappled correctly with the precise question presented to it by the parties below: whether the U.S. Supreme Court’s decision in *Missouri v. McNeely*³⁹ rendered Delaware’s statutory implied consent statute invalid. After receiving supplemental briefs on that issue, the Superior Court determined that the Supreme Court in *McNeely* only addressed the question properly before it, namely “whether the natural dissipation of alcohol in the bloodstream establishes a *per se* exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk-driving investigations.”⁴⁰ The Superior Court concluded that *McNeely* did not speak to the separate question of whether the consent exception to the Fourth Amendment was satisfied by statutes like Delaware’s. Indeed, the Superior Court noted that to the extent the Court discussed implied consent statutes—which exist in some form in every state—it seemed to cite them with approval: “The Court did not make any specific rulings about Missouri’s implied consent statute; instead, the Court acknowledged that implied consent statutes are among the ‘broad range of legal tools [States have] to enforce their drunk-driving laws and to secure BAC evidence without undertaking nonconsensual blood draws.’”⁴¹ The Superior Court

³⁹ 133 S. Ct. 1552 (2013).

⁴⁰ *Flonnory*, 2013 WL 3327526, at *6 (quoting *McNeely*, 133 S. Ct. at 1558).

⁴¹ *Id.* (quoting *McNeely*, 133 S. Ct. at 1566).

thus adhered to this Court's prior decisions holding that Delaware's implied consent statute was consistent with the Fourth Amendment and that the implied consent Flonnory gave by exercising the privilege of driving was valid.⁴² In holding that the results of the blood search were admissible in evidence, the Superior Court made the required finding under the statute that the officer who arrested Flonnory had probable cause to believe that he had committed a DUI.⁴³

On appeal, the parties joined issue on the question that divided them below. Their briefs took different positions on the effect of *McNeely*, with the State trying to introduce for the first time the alternative argument that Flonnory actually consented to the blood draw. After oral argument, we invited supplemental submissions on the reading given to *McNeely* by other state courts.

With this central question having been exhaustively addressed by the parties and of interest to our law enforcement community, my colleagues have assumed for the sake of decision that *McNeely* silently invalidated our state's long-standing implied consent statute. They then reverse the Superior Court's judgment without explaining how it made an error, and remand for it to make a determination that the parties never previously requested it to make. Both parties will be surprised by the

⁴² *Id.* ("The Supreme Court's holding in *McNeely* does not alter the application of Delaware's Implied Consent Statutes to the facts of this case Therefore, *McNeely* does not affect this Court's finding that the results from the blood sample are admissible pursuant to the consent exception to the warrant requirement.").

⁴³ *Id.* at *7.

Majority Opinion, which does not address the issue that the parties argued before the Superior Court or on appeal.

Because I believe Delaware's statutory implied consent statute has safeguards that ensure its reasonable operation consistent with the Fourth Amendment, I dissent. I fear that assuming that *McNeely* undid reasonable implied consent regimes like Delaware's that were operating for many years without any indication of being abused will work no increase in liberty from unreasonable searches, but simply burden police officers and courts with the need to secure a large number of warrants, taking scarce police and judicial time away from other matters. Like the Superior Court, I decline to guess that *McNeely* silently proposed a costly solution to a problem that no one had identified as even existing.

Missouri v. McNeely addressed a separate, precise question that is not relevant for our purposes in this case. This Court has recognized the constitutionality of the implied consent statute on multiple occasions, because it relies on a recognized exception to the warrant requirement—consent—and has substantial procedural protections that make the admission of evidence contingent on a judicial finding that the search otherwise complied with the Fourth Amendment. When a person chooses to exercise the privilege to which the consent attaches, *i.e.*, driving on our roads, the statute deems that person to have consented to a search, so long as the statutory precautions are satisfied. *McNeely*

did not alter that analysis, because it did not address the long-standing consent exception to the warrant requirement.⁴⁴ Rather, as the Superior Court in this case determined based on the language of the opinion itself, *McNeely* solely focused on the separate exigency exception to the warrant requirement.

As we have held on numerous occasions, our statutory scheme is constitutional because it simply attaches a condition to a privilege that no one is required to exercise, which is a permissible legislative determination. The statutory regime also includes substantial safeguards, including the requirement that a judge find that probable cause existed, before the results of a search can be admitted into evidence.

A. We Have Held Delaware’s Implied Consent Statute to Be Consistent with the Fourth Amendment on Numerous Occasions

In 1960, this Court held in *State v. Wolf* that drawing blood from a person suspected of driving while intoxicated, when that person could not consent, constituted an illegal search.⁴⁵ In *Wolf*, the suspect was unconscious, but the police nevertheless drew and tested his blood.⁴⁶ This Court recognized the difficulty its holding would create for the police, and suggested that the General Assembly could remedy the problem by enacting a law deeming those who chose to drive on

⁴⁴ *South Dakota v. Neville*, 459 U.S. 553, 559, 564 (1983) (acknowledging implied consent law did not violate the Fourth or Fifth Amendments).

⁴⁵ *State v. Wolf*, 164 A.2d 865, 868 (Del. 1960).

⁴⁶ *Id.*

Delaware's roads to have consented to blood tests, if there was reason to suspect them of driving under the influence.⁴⁷ The General Assembly responded by passing an implied consent statute. The modern form of the statute, 21 *Del. C.* § 2740 *et seq.*, states that:

Any person who drives, operates or has in actual physical control a vehicle . . . shall be deemed to have given consent . . . to a chemical test or tests of that person's blood, breath and/or urine for the purpose of determining the presence of alcohol or a drug or drugs. The testing may be required of a person when an officer has probable cause to believe the person was driving, operating or in physical control of a vehicle [while intoxicated].⁴⁸

Under the original version of the statute, an officer could not perform the test if the suspect refused. But the General Assembly amended the statute in 1983 to provide that the police may perform tests over a suspect's objections in certain circumstances.⁴⁹ Section 2742 states:

If a person refuses to permit chemical testing, after being informed of the penalty of revocation for such refusal, the test *shall not be given* but the police officer shall report the refusal to the Department. The police officer *may*, however, take reasonable steps to conduct such chemical testing *even without the consent of the person* if the officer seeks to conduct such test or tests without informing the person of the penalty of revocation for such refusal and thereby invoking the implied consent law.⁵⁰

Section 2750 further provides:

⁴⁷ *Id.*

⁴⁸ 21 *Del. C.* § 2740(a).

⁴⁹ *Seth v. State*, 592 A.2d 436, 443–44 (Del. 1991).

⁵⁰ (emphasis added).

[T]he court shall admit the results of a chemical test of the person's breath, blood or urine according to normal rules of search and seizure law. *The informing or failure to inform the accused concerning the implied consent law shall not affect the admissibility of such results in any case, including a prosecution for a violation of § 4177 or this title.*⁵¹

To put it plainly, in accordance with the statutory scheme, police officers in Delaware, like Yogi Berra, come to and must take a proverbial “fork in the road” when they encounter a driver who they have probable cause to believe is under the influence of alcohol. Under § 2742, a police officer may:

- (1) inform the suspect of the administrative penalties that will ensue for refusing to submit to chemical testing; if the suspect does refuse, the officer cannot then perform the test; **or**
- (2) decline to inform the suspect of the implied consent statute, and perform chemical tests even without explicit consent, provided the amount of force used is not excessive and any blood test is performed by a medical professional.⁵²

This has been the law in Delaware for the past three decades, and we have recognized the validity of the implied consent scheme crafted by the General

⁵¹ (emphasis added).

⁵² 21 Del. C. § 2742. The Majority Opinion relies on *Higgins v. State* for the proposition that the totality of the circumstances test is required in all circumstances in which a suspect's blood is tested without a warrant, notwithstanding the implied consent statute. 2014 WL 1323387 (Del. Apr. 1, 2014). But the Majority Opinion fails to grapple with the distinction in the statutory scheme between police officers who have informed suspects of the right to refuse and those who have not. In *Higgins*' case, the officer did inform him of the penalties for failure to comply, and *Higgins*' argument rested on the premise that doing so was “coercive.” *Id.* at *2. That case, in which there was no discussion of implied consent or § 2740 at all, thus does not aid the Majority Opinion's contentions in this case, in which Flonnory was not informed of his right to refuse or the administrative penalties for doing so.

Assembly on numerous occasions.⁵³ We held in 1991 in *Seth v. State* that the implied consent statute gave the police the right to perform chemical testing on individuals they had probable cause to suspect had been driving while intoxicated, regardless of their actual consent.⁵⁴ In *Seth*, the suspect was arrested on probable cause of DUI, and initially refused to submit to an intoxilyzer.⁵⁵ The police officer did not inform him of the implied consent law, and after several minutes, the suspect submitted to the test.⁵⁶ The Court held that the suspect's actual consent was immaterial, and noted, "The net effect of the [1983] amendments is an officer's ability to require a suspect to submit to testing, without that person's consent or a reading of the implied consent law, so long as the officer has probable cause and the degree of force used is not excessive under the Fourth Amendment."⁵⁷

In 1993, this Court noted in *State v. Maxwell* that it was first necessary to establish that there was probable cause to justify a non-consensual blood draw

⁵³ See, e.g., *State v. Maxwell*, 624 A.2d 926, 931 (Del. 1993) (citing 21 *Del. C.* § 2740 for the proposition that the police could take a sample of the defendant's blood); *Seth*, 592 A.2d 436 (affirming conviction based on test conducted pursuant to the implied consent statute); *Brank v. State*, 528 A.2d 1185, 1189 (Del. 1987) ("[U]nder Delaware law the police can require a suspect to submit to testing without that person's consent."); *Morrow v. State*, 303 A.2d 633, 635 (Del. 1973) ("[T]he Legislature, in providing for the taking of a blood sample from one who is incapable of refusing to take such test, a rational and fair procedure . . .").

⁵⁴ 592 A.2d at 444.

⁵⁵ *Id.* at 438.

⁵⁶ *Id.*

⁵⁷ *Id.* at 444 (citing *South Dakota v. Neville*, 459 U.S. 553, 559 (1983); *Schmerber*, 384 U.S. 760 n.4 (1966)).

before its results would be admissible, consistent with the statute and the Fourth Amendment.⁵⁸ In 2008, the Superior Court remarked, “based on now well-settled precedent, the Court is satisfied that police officers may require DUI suspects to submit to chemical testing of their blood, even without consent, as long as ‘the means and procedures employed . . . respect[] relevant Fourth Amendment standards of reasonableness.’”⁵⁹ In 2009, the Superior Court reiterated the same standard, this time holding that it did not amount to the unreasonable use of force to restrain a suspect’s arm in order to perform a blood draw.⁶⁰

B. The U.S. Supreme Court’s Decision in *Missouri v. McNeely* Did Not Address Implied Consent Laws, and Does Not Suggest that Ours Is Invalid

Without explicitly saying so, the Majority Opinion appears to embrace Flonnory’s argument that the decision in *Missouri v. McNeely* rendered invalid the consent used to obtain his blood sample under Delaware’s implied consent statute. But *McNeely* did not suggest that implied consent statutes such as § 2740 were an invalid basis to invoke the consent exception to the Fourth Amendment’s warrant requirement. Instead, the case dealt with a precise and unrelated question: “whether the natural dissipation of alcohol in the bloodstream establishes a *per se* exigency that suffices on its own to justify an exception to the warrant requirement

⁵⁸ 624 A.2d at 928–29.

⁵⁹ *State v. Cardona*, 2008 WL 5206771, at *6 (Del. Super. Dec. 3, 2008) (citing *Schmerber*, 384 U.S. at 768 (1966)).

⁶⁰ *State v. Crespo*, 2009 WL 1037732, at *7–11 (Del. Super. Apr. 17, 2009).

for nonconsensual blood testing in drunk-driving investigations.”⁶¹ *McNeely* answered that specific question in the negative. Had the U.S. Supreme Court desired to invalidate a key feature of implied consent statutes that are on the books, in various shapes and forms, in all 50 states, I am confident the Court would have done so explicitly.⁶² Instead, the Court seemed to cite such laws with approval:

As an initial matter, States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws. For example, all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense.⁶³

⁶¹ *McNeely*, 133 S. Ct. at 1558; *see also id.* at 1569 (Kennedy, J., concurring) (“[The majority opinion] does not provide a framework where it is prudent to hold any more than that always dispensing with a warrant for a blood test when a driver is arrested for being under the influence of alcohol is inconsistent with the Fourth Amendment.”); *id.* at 1574 (Roberts, C.J., concurring in part and dissenting in part) (“The question presented is whether a warrantless blood draw is permissible under the Fourth Amendment ‘based upon the natural dissipation of alcohol in the bloodstream.’ The majority answers ‘It depends,’ and so do I.”); *id.* (Thomas, J., dissenting) (“This case requires the Court to decide whether the Fourth Amendment prohibits an officer from obtaining a blood sample without a warrant when there is probable cause to believe that a suspect has been driving under the influence of alcohol. Because the body’s natural metabolization of alcohol inevitably destroys evidence of the crime, it constitutes an exigent circumstance. As a result, I would hold that a warrantless blood draw does not violate the Fourth Amendment.”).

⁶² *See id.* at 1568 (“[I]n drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant.”); *id.* at 1569 (Kennedy, J., Concurring) (“States and other governmental entities which enforce the driving laws can adopt rules, procedures, and protocols that meet the reasonableness requirements of the Fourth Amendment and give helpful guidance to law enforcement officials. And this Court, in due course, may find it appropriate and necessary to consider a case permitting it to provide more guidance than it undertakes to give today.”).

⁶³ *Id.* at 1566.

McNeely is best read plainly, as a case where the Court dealt with the question of whether probable cause to suspect a driver of DUI invariably justifies a warrantless search because blood alcohol content naturally decreases over time.

Delaware's implied consent statute rests on a separate exception to the warrant requirement, which *McNeely* did not address. A warrantless search is only reasonable—and thereby constitutional—when conducted under a recognized exception, including exigency.⁶⁴ But consent is also a valid exception to the warrant requirement.⁶⁵ For consent to be valid, it must be “freely and voluntarily given,” determined by a totality of the circumstances.⁶⁶ But the person giving consent need not have made a knowing and intelligent decision to consent, and there is no duty on the part of the police to inform a suspect of the right to refuse or revoke consent.⁶⁷

Under the plain language of § 2740, Flonnory was deemed to have consented to chemical testing of his blood to determine the presence of alcohol when he chose to operate a vehicle. Our implied consent statute simply attaches a

⁶⁴ *Cooke*, 977 A.2d at 855. An exigency exists when circumstances make “the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment.” *McNeely*, 133 S. Ct. at 1558 (citing *Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011)).

⁶⁵ *Schneckloth*, 412 U.S. at 222.

⁶⁶ *Id.* at 222, 227 (citing *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968)).

⁶⁷ *Id.* at 235–37; *Cooke*, 977 A.2d at 855.

condition to a privilege that no one is required to exercise.⁶⁸ By making a decision to operate a vehicle on Delaware's roads, a driver is on notice by virtue of § 2740 (and the many other state laws to similar effect⁶⁹) that he is consenting to a search if the circumstances that the statute outlines come to pass.⁷⁰

Furthermore, the statute comes with important safeguards built in to ensure compliance with the Fourth Amendment. The statute makes explicit that the "normal rules of search and seizure law" apply to the admissibility of any evidence obtained.⁷¹ Under § 2750, before any test results are admissible in a criminal proceeding, a judge must review whether the statutory preconditions are met;

⁶⁸ *Bowersox v. State*, 819 A.2d 301, 303–04 (Del. 2003) (characterizing driving as a "privilege"); *S.S. v. State*, 514 A.2d 1142, 1144 (Del. Super. 1986) ("[T]he privilege to operate a motor vehicle is not a fundamental right . . .").

⁶⁹ See, e.g., 21 *Del. C.* § 2614 (creating stricter implied consent requirements for holders of commercial drivers' licenses). Delaware's implied consent statutes that apply in this context have a corporate analogue that was suggested by the U.S. Supreme Court itself. Before 1977, under Delaware law, an individual wishing to sue non-resident directors of Delaware corporations in Delaware could bring a *quasi in rem* action against the directors' shares, which would result in "sequestration" of those shares, effectively seizing them until the directors submitted to the jurisdiction of the Delaware courts. In holding that this practice was unconstitutional, the Supreme Court suggested that a scheme in which consent to the jurisdiction of Delaware courts was made a condition to the acceptance of a position as a fiduciary of a Delaware corporation would pass constitutional muster. *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977). Section § 3114 of the Delaware General Corporation Law, which deems directors and certain officers who serve as fiduciaries of Delaware corporations to consent to being served with process and be subject to the personal jurisdiction of the Delaware courts for causes of action related to their service, was adopted in direct response to this suggestion. See 8 *Del. C.* § 3114.

⁷⁰ See *Seth*, 592 A.2d at 443 ("21 *Del. C.* § 2740 renders the operation of a motor vehicle a constructive consent of the operator to submit to testing for alcohol or drugs by an officer having 'probable cause to believe' the operator was in violation of . . . § 4177 or § 2742.").

⁷¹ 21 *Del. C.* § 2750(a).

namely, that (1) the police officer in fact had probable cause,⁷² (2) the test was conducted without the excessive use of force,⁷³ and (3) any blood test was conducted by a medical professional.⁷⁴ This independent judicial review serves to protect the rights of all drivers, because it limits any incentive for police officers to conduct searches when they do not believe in good faith that there is probable cause to suspect a driver is intoxicated. The statute's requirement that the State convince the court that the statutory conditions are met explains the reference to the "normal rules of search and seizure law" in § 2750, because it clarifies that regardless of implied consent, the test results are only admissible if a judge determines the conditions were satisfied and the search was thus constitutionally reasonable.

These preconditions are consistent with practices the U.S. Supreme Court has held constitute sufficient protections for a warrantless blood draw to be constitutional under the Fourth Amendment.⁷⁵ The results of a blood test are only admissible if a judge determines that there was probable cause to perform the

⁷² See 21 Del. C. § 2740(a).

⁷³ See 21 Del. C. § 2742(a).

⁷⁴ 21 Del. C. § 2746.

⁷⁵ *McCann v. State*, 588 A.2d 1100, 1102 (Del. 1991) ("In *Schmerber*, the United States Supreme Court noted that the police were entitled to take blood from a suspected drunk driver without a warrant and based on probable cause unless the 'police initiated the violence, refused to respect a reasonable request to undergo a different form of testing, or responded to resistance with inappropriate force.'"); see also *Schmerber*, 384 U.S. at 760 n.4; *Crespo*, 2009 WL 1037732, at *7 ("The constitutional analysis in blood extraction cases hinges on three prongs: (1) probable cause to believe a suspect is driving under the influence; (2) a search warrant or a recognized exception under the Fourth Amendment; and (3) reasonableness.").

blood draw and that the procedures used were “reasonable.”⁷⁶ The requirements that no excessive force be used and that the test be conducted by a medical professional also ensure that the police respect the dignity of suspects.⁷⁷ In this way, the three conditions serve a “gate-keeping” function: any evidence obtained in violation of the Fourth Amendment will not be admissible at trial.

Here, it is not disputed that the police officer had probable cause to believe that Flonnory had been driving while under the influence of alcohol, nor is it disputed that the test was conducted without the use of force by a professional phlebotomist.⁷⁸ Thus, by operation of the implied consent statute, under the consent exception to the warrant requirement, the blood draw in this case complied with the Fourth Amendment.⁷⁹

⁷⁶ See Wayne R. LaFare, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.2(a) (5th ed. 2014) (“But the Fourth Amendment does not prohibit all searches, only ‘unreasonable’ searches, and thus the police are able to acquire much physical evidence without the cooperation or consent of the suspect.”).

⁷⁷ See *Rochin v. California*, 342 U.S. 165, 174 (1952) (finding inducing vomiting in suspect against his will amounted to “force so brutal and so offensive to human dignity” as to violate due process).

⁷⁸ See *Seth*, 592 A.2d at 444 (“The net effect of the amendments is an officer’s ability to require a suspect to submit to testing, without that person’s consent or a reading of the implied consent law, so long as the officer has probable cause and the degree of force used is not excessive under the Fourth Amendment.”).

⁷⁹ See *id.* at 445 (holding that the implied consent statute permits warrantless chemical testing); *Wolf*, 164 A.2d at 868 (positing an implied consent statute would obviate the need for a warrant in most cases). Moreover, there is no dispute that Flonnory never attempted to withdraw his implied consent. We therefore have no reason to consider whether he could have done so after he was stopped by the officer, and the statutory circumstances in which he had impliedly consented had already come to pass (thus negating the utility of the statutory scheme). The facts of the record make plain that Flonnory never refused the test, and in fact voluntarily offered “a good vein” to the phlebotomist.

C. Other State Courts Have Also Considered the Effect of *McNeely*, But Few of These Decisions Provide Guidance Based on the Facts in This Case

Because, as the U.S. Supreme Court noted in *McNeely*, “all 50 States have adopted implied consent laws,”⁸⁰ we are not the first state court to consider these issues. Some courts have read *McNeely* to stand only for its express, narrow holding.⁸¹ Others—some of which the Majority Opinion cites—have given it a broader reading based on what they believe it implies for issues the *McNeely* case never addressed.⁸² But in nearly all of the cases where courts rejected the validity

⁸⁰ *McNeely*, 133 S. Ct. at 1556.

⁸¹ For example, in a line of cases, including *McCoy v. North Dakota Department of Transportation*, 848 N.W.2d 659 (N.D. 2014), *State v. Smith*, 849 N.W.2d 599 (N.D. 2014), and *State v. Fletch*, 855 N.W.2d 389 (N.D. 2014), the North Dakota Supreme Court focused on the Court’s holding in *McNeely*. The court noted, “[The U.S. Supreme Court] held the natural dissipation of alcohol in the bloodstream is not per se exigent circumstances justifying an exception to the warrant requirement for nonconsensual blood testing in all drunk-driving investigations. Consent, however, is another exception to the warrant requirement.” *Fletch* at 392–93. Similarly, in *State v. Brooks*, 838 N.W.2d 563 (Minn. 2013), Minnesota’s Supreme Court also rejected a broad view of *McNeely*, quoting the decision’s analysis of implied consent laws as appropriate “legal tools.” The court remarked,

As a threshold matter, Brooks’s argument is inconsistent with the Supreme Court’s discussion of implied consent laws in *McNeely*. As the Supreme Court recognized in *McNeely*, implied consent laws, which ‘require motorists, as a condition of operating a motor vehicle within the State, to consent to [blood alcohol concentration] testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense,’ are ‘legal tools’ states continue to have to enforce their drunk driving laws. The Court noted that these laws typically require suspected drunk drivers to take a test for the presence of alcohol and mandate that a driver’s license will be revoked if they refuse a test. By using this ‘legal tool’ and revoking a driver’s license for refusing a test, a state is doing the exact thing Brooks claims it cannot do—conditioning the privilege of driving on agreeing to a warrantless search.

Id. at 572 (internal citations omitted).

⁸² See e.g., *Aviles v. State*, 443 S.W.3d 291 (Tex. App. 2014) (holding mandatory blood draw without consideration of the “totality of the circumstances” violated the Fourth Amendment); *Weems v. State*, 434 S.W.3d 655 (Tex. App. 2014) (holding that, in the case of a suspect who had two previous DWI convictions and was in an accident involving injury to another person, both

of implied consent, the suspect actively refused or resisted a blood test.⁸³ Those cases thus raise the question of whether statutory implied consent can be revoked *after* the conditions arise in which the driver has consented to be searched, an issue that we need not reach to decide this case. Flonnory did not refuse the test or revoke his consent. Faced with cases like Flonnory's, other state courts have read *McNeely* as it was written: assuming the nine Justices, in their separate opinions, made clear what they were addressing, and by implication of silence, what they were not addressing.⁸⁴

We should do so here. Our General Assembly has crafted an important statute to promote public safety. That statute provides important efficiencies to law enforcement while providing substantive and procedural protections to

factors that supported a mandatory blood draw of suspect under the statutory scheme, the suspect's Fourth Amendment rights were violated by the mandatory blood draw).

⁸³ See, e.g., *Byars v. State*, 336 P.3d 939 (Nev. 2014) (holding that the portion of Nevada's implied consent statute enabling an officer to use force to obtain a blood sample was unconstitutional); *State v. Wulff*, 337 P.3d 575 (Idaho 2014) (holding that courts must take a case by case approach to consent, hinging on the voluntariness of that consent under a totality of the circumstances test); *State v. Fierro*, 853 N.W.2d 235 (S.D. 2014) (holding that, when a suspect "verbally and physically refused to provide a sample," her "actions taken in their totality can hardly be taken as 'consent' by constitutional standards"). One possible exception is *State v. Butler*, 302 P.3d 609 (Ariz. 2013), but that case is distinguishable from Flonnory's in other respects. Most importantly, Butler was a 16 year old high school student whose blood was drawn in the principal's office of his school. The court held that under those circumstances, Butler could not be deemed to have voluntarily consented, "independent of" Arizona's implied consent statute. See *id.* Likewise, the Texas Court of Appeals' holding in *Aviles v. Texas* is also distinguishable. Texas' statutory regime permitted a police officer to take a blood sample from a DWI suspect without a warrant if the officer had "credible information" that the suspect has been previously convicted of DWI at least twice. *Aviles*, 443 S.W.3d at 291-92. The court initially held that this provision, which has no analogue in Delaware's statutory scheme, was constitutional, but reversed after the U.S. Supreme Court vacated and remanded the judgment. *Id.* at 292.

⁸⁴ See *Fletch* at 392-93; *Brooks* at 572.

guarantee that drivers' constitutional rights are respected. We should decline to upset the long-standing statutory scheme by speculating that the U.S. Supreme Court meant to invalidate statutory implied consent as an exception to the warrant requirement silently, in a case where that issue was not presented, and any express words on the topic would have been dictum anyway.

As a result, I dissent and would affirm the Superior Court's judgment of conviction.

89 A.3d 477 (Table)
Unpublished Disposition
(The decision of the Court is referenced in the
Atlantic Reporter in a 'Table of Decisions Without
Published Opinions.')

Supreme Court of Delaware.

Brian D. HIGGINS, Defendant Below, Appellant,
v.
STATE of Delaware, Plaintiff Below, Appellee.

No. 408, 2013.

Submitted: Jan. 22, 2014.

Decided: April 1, 2014.

Synopsis

Background: Based on stipulated trial record, defendant was convicted in the Superior Court, New Castle County, of felony driving while under the influence (DUI), and he appealed.

Holding: The Supreme Court, Jack B. Jacobs, J., held that defendant voluntarily consented to having his blood drawn at hospital after single car accident.

Affirmed.

West Headnotes (1)

[1] **Automobiles**

☛ Consent, express or implied

In driving under the influence (DUI) case, defendant voluntarily consented to having his blood drawn at hospital after single car accident; because this constituted his third DUI offense, defendant was not an ignorant "newcomer to the law," no argument was made that defendant's age, intelligence, or education precluded his voluntary consent, defendant was generally cooperative with police, even if somewhat argumentative with the emergency medical personnel, officer's informing defendant of the

consequence of refusal (loss of license) was not coercive, law permitted police to inform a DUI suspect of that consequence, and officer's calling phlebotomist did not cause defendant to acquiesce to a claim of lawful authority. U.S.C.A. Const.Amend. 4.; 21 Del.C. § 2742(a); 21 West's Del.C. § 4177.

2 Cases that cite this headnote

Court Below: Superior Court of the State of Delaware, in and for New Castle County, Cr. ID No. 1302007551.

Before HOLLAND, BERGER, and JACOBS, Justices.

ORDER

JACK B. JACOBS, Justice.

*1 This 1st day of April 2014, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. Defendant-below/appellant Brian D. Higgins ("Higgins") appeals from a felony conviction for driving while under the influence ("DUI"), under 21 Del. C. § 4177(a) and (d)(3). Specifically, Higgins challenges the Superior Court's denial of his motion to suppress blood test results. Higgins claims that he did not voluntarily consent to having his blood drawn, and that this Court should require law enforcement officials to obtain written consent before drawing blood from suspects in DUI cases. We find no merit to Higgins' appeal and affirm.

2. Higgins was involved in a single car accident on September 3, 2012 in Newark, Delaware. The collision sheered a telephone pole in half, uprooted a small tree, and caused significant damage to Higgins' car.¹ At approximately 4:20 p.m., Newark Police Officer Daniel Bystricky arrived at the scene to investigate the accident. Upon his arrival, Officer Bystricky observed that Higgins' clothing was "disheveled," Higgins was resisting the emergency medical crew's efforts to take him to the hospital, Higgins' eyes were bloodshot and glassy, and a "very faint" odor of alcohol emanated from him.

Eventually, Higgins was taken to Christiana Hospital and Officer Bystricky arrived at the hospital sometime thereafter.²

3. At Christiana, hospital personnel told Officer Bystricky that they would draw Higgins' blood (for a blood alcohol concentration test) only if Higgins signed a written consent form. Higgins indicated that he would not sign a consent form. Accordingly, Officer Bystricky called Omega Medical Center and requested an Omega phlebotomist come to Christiana Hospital to draw Higgins' blood. While waiting for the phlebotomist, Officer Bystricky possibly³ told Higgins that if he refused the blood draw, he would lose his driver's license for one year. Bystricky also admonished Higgins that "he was lucky that he hadn't hit a kid that day."⁴ According to Bystricky's testimony, Higgins responded by saying "fine, I'll give blood."⁵ Bystricky further testified that Higgins cooperated while the phlebotomist drew his blood. The blood sample test revealed a blood alcohol concentration of 0.20.

4. Higgins was arrested on February 26, 2013, and thereafter was indicted for felony DUI under 21 *Del. C.* § 4177 by a Superior Court grand jury.⁶ On May 6, 2013, Higgins moved to suppress all evidence gathered by the Newark Police, including Higgins' blood test results. After a hearing at which Officer Bystricky testified, the trial judge denied that motion on June 28, 2013, ruling that Higgins had voluntarily consented to having his blood drawn. On July 18, 2013, Higgins was found guilty on a stipulated trial record. He was sentenced that same day to two years in custody at Level V, suspended after 90 days for one year at Level III probation. Higgins timely appealed.

*2 5. We review a trial court's denial of a motion to suppress, after an evidentiary hearing, for abuse of discretion.⁷ A trial judge's legal conclusions are reviewed *de novo*,⁸ and we will not disturb a trial judge's factual findings unless they are clearly erroneous.⁹

6. Higgins' sole claim on appeal is that the trial judge erred by denying his suppression motion, because the blood test results were the fruit of an illegal search in violation of the Fourth and Fourteenth Amendments of the United States Constitution. Therefore, Higgins argues, his conviction must be vacated and a new trial must be granted. Higgins argues that by: (i) calling the Omega phlebotomist after Higgins had refused to sign a hospital consent form, (ii) (possibly) telling Higgins that he would lose his license if he did not consent, and (iii) admonishing Higgins for his dangerous conduct, Officer Bystricky coerced Higgins' consent to the blood draw.

Higgins also urges this Court to adopt a new rule that would require law enforcement officers to obtain the written consent of suspects in DUI cases before drawing their blood. The State responds that Higgins' consent was voluntarily given and was not a product of coercion and, moreover, that even if Higgins did not consent, exigent circumstances justified the search.

7. The main issue presented is whether the Superior Court erred in finding that Higgins had voluntarily consented to having his blood drawn. We conclude that the court did not err. It therefore is unnecessary to address the issue of whether exigent circumstances justified the warrantless search.¹⁰

8. The Fourth Amendment to the United States Constitution protects against "unreasonable searches and seizures."¹¹ A warrantless search is deemed *per se* unreasonable unless that search falls within a recognized exception.¹² One recognized exception is a search conducted with a person's voluntary consent.¹³ To be deemed "voluntary," consent need not be "knowing and intelligent,"¹⁴ but it cannot be the product of coercion by threat or force.¹⁵ Whether or not consent was given voluntarily is determined by examining "the totality of the circumstances surrounding the consent, including (1) knowledge of the constitutional right to refuse consent; (2) age, intelligence, education, and language ability; (3) the degree to which the individual cooperates with police; and (4) the length of detention and the nature of questioning, including the use of physical punishment or other coercive police behavior."¹⁶ The State bears the burden of showing that consent was voluntarily given.¹⁷

9. Here, the totality of the circumstances establishes that Higgins voluntarily consented to the blood draw. Because this constituted his third DUI offense, Higgins was not an ignorant "newcomer to the law."¹⁸ No argument is made that Higgins' age, intelligence, or education precluded his voluntary consent.¹⁹ And, Officer Bystricky's testimony shows that Higgins was generally cooperative with police, even if somewhat argumentative with the emergency medical personnel.

*3 10. The determination as to whether Higgins' consent was voluntary turns on whether the police (here, Officer Bystricky) used coercive tactics to obtain that consent.²⁰ We conclude that Bystricky did not. First, informing Higgins of the consequence of refusal (loss of license) was not coercive. Indeed, 21 *Del. C.* § 2742(a), clearly permits police to inform a DUI suspect of that consequence.²¹ Second, Officer Bystricky's discussion of the seriousness of Higgins' conduct did not contain any veiled threats—he attempted to reason with Higgins.²²

Fourth Amendment jurisprudence does not forbid a law enforcement officer from attempting to persuade an individual to consent to a search.²³ Finally, calling the Omega phlebotomist did not cause Higgins to “acquiesce[] to a claim of lawful authority.”²⁴ Neither Officer Bystricky nor the phlebotomist represented that they had authority to draw Higgins blood without his consent. Given the totality of the circumstances, Higgins voluntarily consented to the blood draw. Therefore, the trial court did not abuse its discretion, or commit any error, by finding that Higgins’ consent was voluntarily given and, as a consequence, denying his suppression

motion.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

All Citations

89 A.3d 477 (Table), 2014 WL 1323387

Footnotes

- 1 A witness (who had been driving in the opposite direction at the time of the accident) told the police that Higgins had been speeding and then veered off the road.
- 2 Officer Bystricky testified that he arrived at the hospital a little over an hour after he had arrived at the scene of the accident.
- 3 Officer Bystricky testified that, although he could not recall, it was a “possibility” that he told Higgins of the consequences of refusing the blood draw.
- 4 Appellant’s Appendix at A16.
- 5 *Id.*
- 6 Higgins was initially charged with misdemeanor DUI in October 2012. However, because this offense was Higgins’ third DUI offense, the misdemeanor charge was dropped and he was charged with felony DUI in accordance with 21 Del. C. § 4177(d)(3).
- 7 *McAllister v. State*, 807 A.2d 1119, 1122 (Del.2002) (citing *Liu v. State*, 628 A.2d 1376, 1379 (Del.1993); *Alston v. State*, 554 A.2d 304, 308 (Del.1989)).
- 8 *McAllister*, 807 A.2d at 1123 (citing *Downs v. State*, 570 A.2d 1142, 1144 (Del.1990)).
- 9 *Lopez–Vazquez v. State*, 956 A.2d 1280, 1285 (Del.2008).
- 10 Because it is not necessary to resolve this case, we refrain from creating a new rule requiring police officers to obtain the written consent of DUI suspects before taking a blood sample.
- 11 U.S. CONST. amend. IV. It is well established that drawing blood constitutes a search covered by the Fourth Amendment. See *Missouri v. McNeely*, — U.S. —, —, 133 S.Ct. 1552, 1558, 185 L.Ed.2d 696 (2013).
- 12 *Missouri*, 133 S.Ct. at 1558; *Cooke v. State*, 977 A.2d 803, 854 (Del.2009) (citing *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)).
- 13 *Cooke*, 977 A.2d at 855 (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)).
- 14 *Id.* (citing *Schneckloth*, 412 U.S. at 241).
- 15 *Schneckloth*, 412 U.S. at 233.

- 16 Cooke, 977 A.2d at 855.
- 17 Schneckloth, 412 U.S. at 222.
- 18 See *United States v. Watson*, 423 U.S. 411, 424–25, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976) (explaining that defendant, who had previously been arrested for a similar offense, was not a newcomer to the law).
- 19 The trial court found that although Higgins was intoxicated, “he was sober enough to have given consent.” Appellant’s Appendix at A31. See *United States v. Luciano*, 329 F.3d 1, 8 (1st Cir.2003) (concluding that defendant was sufficiently sober to give voluntary consent).
- 20 It stands to reason that coercion requires some sinister action (even if implied) on the part of law enforcement. See *Schneckloth*, 412 U.S. at 233.
- 21 21 *Del. C.* § 2742(a) provides, in part, that “[i]f a person refuses to permit chemical testing, after being informed of the penalty of revocation for such refusal, the test shall not be given....” See *McCann v. State*, 588 A.2d 1100, 1101 (Del.1991) (“According to [§ 2742(a)], a person suspected of DUI has no right to refuse chemical testing unless a police officer informs him that he may lose his license for a year if he withholds consent.”).
- 22 Higgins’ citation to *Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977) and the “Christian burial speech” is inapposite. *Brewer* involved a violation of a defendant’s Sixth Amendment right to counsel, where a law enforcement officer made comments intended to elicit a confession outside of the presence of defendant’s attorney.
- 23 See *Schneckloth*, 412 U.S. at 233 (“[A]lthough [defendant] had at first refused to turn the [evidence] over, he had soon been persuaded to do so and ... force or threat of force had not been employed to persuade him.”) (discussing *Davis v. United States*, 328 U.S. 582, 66 S.Ct. 1256, 90 L.Ed. 1453 (1946)).
- 24 *Bumper v. N. Carolina*, 391 U.S. 543, 550, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968) (“When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion-albeit colorably lawful coercion. Where there is coercion there cannot be consent.”).

2014 WL 4942177

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

Superior Court of Delaware.

State of Delaware
v.
Kimberly S. Mauk, Defendant.

Case No. 1310011475

Date Submitted: June 27, 2014

Date Decided: September 29, 2014

*Upon Defendant's Motion to Bar Statements Procured in
Violation of Miranda: DENIED Upon Defendant's
Motion to Suppress: DENIED*

Attorneys and Law Firms

Edmund Daniel Lyons, Esquire, 1526 Gilpin Ave,
Wilmington DE 19806, for Defendant.

Barzilai K. Axelrod, Esquire, Deputy Attorney General,
Department of Justice, Carvel State Office Building, 820
N. French Street, Wilmington, DE 19801, for the State of
Delaware

OPINION

JURDEN, J.

I. INTRODUCTION

*1 Defendant Kimberly Mauk is charged with Driving a Vehicle while Under the Influence of Alcohol ("DUI"), two counts of Vehicular Assault First Degree, two counts of Vehicular Assault Second Degree, and Driving a Vehicle While License is Suspended or Revoked, relating to a two-vehicle collision that occurred on October 18, 2013. Mauk has filed a motion to suppress certain

statements she made to the chief investigating officer and a motion to suppress the results of a blood test taken at the hospital. For the reasons stated below, Mauk's motions to suppress are **DENIED**.

II. FACTS

On October 18, 2013, at approximately 6:49 p.m., Delaware State Trooper Cpl. Scott Mauchin ("Cpl. Mauchin") was dispatched to a two-vehicle collision at the intersection of Concord Pike and Fairfax Boulevard in New Castle County Delaware.¹ When Cpl. Mauchin arrived at the scene around 7:18 p.m., emergency medical technicians, fire department personnel, and two other Delaware State Troopers were already at the scene.² Mauk was the only occupant in her vehicle and the second vehicle contained a family of four, including two adults and two children.³ All of the occupants of both vehicles were transported to Christiana Hospital by ambulance before Cpl. Mauchin had the chance to speak with any of them.⁴ According to three independent witnesses at the scene, the accident occurred when Mauk made a left turn across oncoming traffic.⁵ A second trooper at the scene advised Cpl. Mauchin that he had approached Mauk's vehicle and could smell alcoholic beverages coming from the front compartment area of the vehicle.⁶

Cpl. Mauchin left the accident scene and went to the hospital, where he arrived between 8:05 p.m. and 8:10 p.m.⁷ Upon arrival, after securing permission from Mauk's treating nurse,⁸ Cpl. Mauchin made contact with Mauk to make his own assessment of her and to determine what happened at the collision scene.⁹ When Cpl. Mauchin entered Mauk's hospital room, she was on a gurney with two IV lines in her arms.¹⁰ The only other person in the room was Nurse Mary Kathleen Fillingame ("Nurse Fillingame").¹¹ Mauk had been administered 0.5 milligrams of Dilaudid, a narcotic pain medication.¹² Nurse Fillingame, who administered the Dilaudid, testified that 0.5 milligrams is a "very small [dose] for an adult."¹³

When Cpl. Mauchin began to discuss the accident with Mauk, he noticed that Mauk was groggy and her speech was slurred and slow, but her eyes were not dilated or glassy.¹⁴ While talking to Mauk, Cpl. Mauchin also detected a moderate odor of alcoholic beverage on her breath from about two feet away.¹⁵

When Cpl. Mauchin asked Mauk what happened, she stated that she was turning left on a green light and was

hit.¹⁶ Cpl. Mauchin asked Mauk if she had consumed any alcohol prior to the collision and Mauk initially said “no.”¹⁷ Upon being informed that he could smell an odor of alcohol on her breath, Mauk said “not recently,” and then said that she had two beers at Seasons Pizza.¹⁸ Cpl. Mauchin was familiar with the area, and knew that Seasons Pizza was a few miles north of where the collision occurred.¹⁹

*2 At this point, Cpl. Mauchin informed Mauk that he suspected that she was driving under the influence and wanted to acquire a blood sample from her.²⁰ Cpl. Mauchin explained to Mauk that the hospital had an Authorization For Specimen Acquisition form²¹ (“Consent Form”) that she “needed to sign ... in order for one of the hospital staff to withdraw blood, but that she could refuse it.”²² Cpl. Mauchin told Mauk that the “alternative to refusing” was that he would obtain a search warrant.²³

While Cpl. Mauchin was discussing the Consent Form with Mauk, Chris Belair, Mauk’s significant other and father of her children, arrived along with their two children.²⁴ According to Cpl. Mauchin, he and Belair discussed the situation outside of Mauk’s hospital room.²⁵ During their conversation, Cpl. Mauchin stated that he “had every intention of leaving there with a blood sample.”²⁶ Contrary to Belair’s testimony, Cpl. Mauchin denied telling Belair that if Mauk did not consent, “the penalties would be higher.”²⁷

Following his conversation with Cpl. Mauchin, Belair and Mauk’s children went into Mauk’s hospital room and Cpl. Mauchin remained outside.²⁸ After a few minutes, Belair stepped out of Mauk’s hospital room and told Cpl. Mauchin that “she’ll give you consent.”²⁹ Cpl. Mauchin then entered the room, and Mauk signed the Consent Form at 8:51 p.m.³⁰ By signing the form, Mauk gave “permission to Christiana Care Health Services to take [blood] ... for police purposes.”³¹ The Consent Form provided that the test was “blood alcohol determination” and the purpose was “driving under the influence.”³² In addition to Mauk, two hospital nurses signed the form as well.³³ At no point in this process was Mauk handcuffed.³⁴

After she signed the Consent Form but before her blood was drawn, Mauk asked whether the driver of the second vehicle would be giving a blood sample.³⁵ Cpl. Mauchin responded in the negative and explained that the second driver was not suspected of driving under the influence.³⁶ Upon hearing this, Mauk became upset and agitated.³⁷ Cpl. Mauchin advised Mauk that he was aware of Mauk’s prior DUI’s and she yelled back, “they had nothing to do with this!”³⁸ At no time during or after this conversation did Mauk withdraw her consent.³⁹

When Nurse Fillingame was unable to draw Mauk’s blood, she called a phlebotomist who successfully drew Mauk’s blood at 9:10 p.m.⁴⁰ Cpl. Mauchin noted that Mauk’s demeanor and composure during the blood draw was the same as it had been prior to the blood draw—Mauk was “lying on the gurney and seemed relaxed.”⁴¹ Nurse Fillingame testified that had Mauk not provided consent, she would not have drawn blood.⁴² According to Cpl. Mauchin, his interaction with Mauk at the hospital lasted approximately 35 minutes from first contact to a few minutes after the blood draw.⁴³

After the blood draw, Cpl. Mauchin spent approximately two hours checking up on the occupants of the other vehicle. Cpl. Mauchin said that the purpose of this part of his investigation was to assess the extent of their injuries and to determine their vantage point as to the events that had transpired.⁴⁴ Cpl. Mauchin noted that the driver of the second vehicle was conscious, alert, and showed no signs of being under the influence of any type of alcohol or drug.⁴⁵

*3 Mauk was arrested on October 20, 2013, upon her release from the hospital.⁴⁶

III. STANDARD OF REVIEW

On a motion to suppress evidence seized during a warrantless search or seizure, the State bears the burden 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.”⁴⁷ “The burden of proof on a motion to suppress is proof by a preponderance of the evidence.”⁴⁸

IV. PARTIES’ CONTENTIONS

Mauk filed two motions in connection with her October 20, 2013 arrest. First, Mauk filed a motion to exclude the statements she made to Cpl. Mauchin at the hospital. Mauk argues that these statements were obtained in violation of *Miranda*⁴⁹ because she was subject to custodial interrogation but was never advised of her *Miranda* rights. The State argues that Mauk was not in custody at the hospital because routine accident investigation at the scene or at the hospital does not constitute custodial interrogation.

Second, Mauk moved to suppress the results of Mauk's blood testing conducted at the hospital, arguing that the blood draw was an impermissible search in violation of the Fourth Amendment of the U.S. Constitution, and Article 1, Sections 6 and 7 of the Delaware Constitution because there was no warrant or probable cause. Mauk argues that her consent was not voluntarily given because she was under the influence of both alcohol and pain medication at the time she signed the Consent Form and during the blood draw itself. Mauk also argues that Cpl. Mauchin coerced her into consenting to the blood draw by threatening to get a warrant if she did not consent.

V. DISCUSSION

1. Admissibility Of Mauk's Statements

Miranda warnings are only required when a suspect is both in custody and subject to interrogation by a State agent.⁵⁰ A law enforcement officer becomes obligated to administer *Miranda* warnings "only where there has been such a restriction on a person's freedom as to render him in custody."⁵¹ The legal standard used to determine custody is "whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest."⁵² "When determining whether an interrogation has occurred in a custodial setting ... the court must review the totality of the circumstances surrounding the interrogation by applying an objective, reasonable person standard."⁵³

*4 Here, the Court must examine the totality of the circumstances to determine whether Mauk was subject to custodial interrogation at the hospital. This Court has held that, "[i]nvestigation at the scene immediately following an accident is considered routine, initial investigation, even where questioning occurs at the hospital."⁵⁴ However, there is no *per se* "hospital rule" in a custody inquiry because each case must be determined on a case-by-case basis.⁵⁵

In *DeJesus v. State*, investigating officers went to the emergency room to speak to the defendant who was being treated for a stab wound.⁵⁶ The defendant was "lying on a hospital gurney and appeared to be in great pain," when an investigating officer asked the defendant what had happened.⁵⁷ After eliciting an incriminating statement, the defendant was then provided an incomplete recitation of his *Miranda* rights. The defendant contended that he was in custody during the interview at the hospital because he was not free to leave the hospital at any time.⁵⁸ The

Delaware Supreme Court concluded that:

[w]hile [the defendant's] freedom of movement was undoubtedly restricted throughout his hospitalization, his confinement was caused by his own physical incapacity—not police compulsion. At no time did the police attempt to physically restrain [the defendant]: he was not handcuffed, nor did the police guard his hospital room to prevent his escape. Further, the detectives did not impede [the defendant's] release from the hospital. Rather, [the defendant] left on his own accord.⁵⁹

In *State v. Pustolski*, a vehicular fatality case, the defendant was transported to the hospital by ambulance.⁶⁰ At the hospital and after the defendant was prescribed pain medication, the investigating officer spoke to the defendant without a recitation of the defendant's *Miranda* rights.⁶¹ The treating nurse also obtained a sample of the defendant's blood after the defendant signed a hospital consent form that noted that the defendant was under arrest.⁶² The Court held that the defendant was not subject to custodial interrogation because the defendant was not restrained in handcuffs, the defendant was unable to leave as a result of her medical condition and not police custody, and the officers' conversation was part of the reconstruction unit's investigation.⁶³ Additionally, the Court concluded that the language on the hospital consent form stating that the defendant was under arrest was not determinative of custody status, but merely "a fact that the totality of circumstances suggests the contrary."⁶⁴

Here, similar to *DeJesus* and *Pustolski*, the totality of the circumstances indicates that Mauk was not formally arrested and any confinement was caused by her own physical incapacity, not police compulsion. Cpl. Mauchin was unable to obtain statements at the collision scene because all of the persons involved were being treated by medical personnel and were transported to the hospital by ambulance. Upon arriving at the hospital, after first securing permission from Mauk's treating nurse, Cpl. Mauchin made contact with Mauk to make his own assessment of Mauk and to determine what happened at the collision scene. Cpl. Mauchin was the only trooper present in the hospital room and Mauk's significant other and children freely moved throughout the area. There were times when Cpl. Mauchin left the Mauk's vicinity and did not stand on guard at Mauk's door. Mauk's freedom was only restricted by her medical condition, and not by handcuffs or any other police restraint.

*5 Mauk argues that Cpl. Mauchin's testimony that if Mauk had attempted to leave the hospital he probably would not have let her leave before he obtained her blood sample, demonstrates that Mauk was subject to custodial interrogation.⁶⁵ A determination of custody depends on objective circumstances of the interrogation, not the subjective views harbored by the police officer.⁶⁶ There is no evidence that Mauk could reasonably believe her freedom of action or movement was restricted during Mauk's limited questioning with Cpl. Mauchin.

2. Admissibility Of The Results Of Mauk's Blood Test
Mauk claims that the blood draw violated the Fourth Amendment because there was no probable cause or warrant.

The Fourth Amendment of the United States Constitution and Delaware Constitution protects against "unreasonable searches and seizures."⁶⁷ A warrantless search is deemed unreasonable unless that search falls within a recognized exception.⁶⁸ If a search proceeds without a warrant, the State must prove by a preponderance of evidence that the search fell within an established exception to the warrant requirement.⁶⁹ A compelled physical intrusion beneath the skin to obtain a blood sample for use as evidence in a criminal investigation is considered a search.⁷⁰

One recognized exception to a warrantless search is a search conducted with a person's voluntary consent.⁷¹ "To be deemed 'voluntary,' consent need not be 'knowing and intelligent,' but it cannot be the product of coercion by threat or force."⁷²

To determine whether consent was given voluntarily, the Court must examine "the totality of the circumstances surrounding the consent" including: (1) knowledge of the constitutional right to refuse consent; (2) age, intelligence, education, and language ability; (3) the degree to which the individual cooperates with police; and (4) the length of detention and the nature of questioning, including the use of physical punishment or other coercive police behavior.⁷³

It is undisputed that Mauk signed the Consent Form to have her blood drawn. Mauk argues that her ability to consent was hampered because she was under the influence of both alcohol and the pain medication at the time the Consent Form was signed and during the blood draw. She further claims that Cpl. Mauchin coerced her into consenting to the blood draw by threatening to get a warrant if she did not consent.

Here, the totality of the circumstances establishes that Mauk voluntarily consented to the blood draw. Cpl. Mauchin explained to Mauk that she could either consent to the blood draw or he could obtain a search warrant to do so. Outside the presence of Cpl. Mauchin, Mauk had the opportunity to discuss the Consent Form with her significant other. The language of the Consent Form makes clear that she was providing consent for police purposes. Neither Mauk's age, intelligence, nor education precluded her voluntary consent. In fact, given Mauk's previous DUI convictions, she was not "an ignorant newcomer to the law."⁷⁴

*6 During Cpl. Mauchin's discussions with Mauk, she was cooperative. Although Mauk became upset when she learned that the other vehicle driver was not going to have his blood drawn, Mauk never withdrew consent and remained relaxed during the blood draw.⁷⁵ Cpl. Mauchin estimated that his interaction with Mauk lasted approximately 35 minutes from first contact to a few minutes after the blood draw. During this time, Mauk was not handcuffed and Cpl. Mauchin was the only trooper present.

Under Delaware law, " '[t]he mere fact that one has taken drugs does not render consent involuntary,' nor does intoxication 'render a confession involuntary.' "⁷⁶ "[T]he use of drugs is just one factor the court must consider while looking at the totality of the circumstances to decide if a statement is 'the product of an essentially free and unconstrained choice.' "⁷⁷ The relevant inquiry is whether the person consenting "knew what she was doing and had a reasonable appreciation of the nature and significance of his or her actions."⁷⁸

The record indicates that Mauk "seemed to be groggy," but understood and was able to answer the questions posed to her. Cpl. Mauchin asked Mauk a series of questions relating to the collision and Mauk was able to tell Cpl. Mauchin that she was turning left on a solid green light and was hit. Mauk also recalled the events leading up to the collision. The fact that she was concerned that the other driver's blood was not being drawn indicates that she understood the meaning and implications of her own consent.

With regard to Mauk's argument that Cpl. Mauchin coerced her into consenting to the blood draw, while this Court has invalidated consent when officers unlawfully claimed to possess a warrant,⁷⁹ "Fourth Amendment jurisprudence does not forbid a law enforcement officer from attempting to persuade an individual to consent to a search."⁸⁰ In this case, Cpl. Mauchin did not dishonestly claim to possess a warrant, but only informed Mauk of his

lawful intentions if she refused to consent.

Because the Court has found that Mauk voluntarily consented to the blood draw, the Court will not address the question of whether probable cause or exigent circumstances existed.⁸¹

For the foregoing reasons, Defendant's Motions to Suppress are **DENIED. IT IS SO ORDERED.**

All Citations

Not Reported in A.3d, 2014 WL 4942177

VI. CONCLUSION

Footnotes

1 Transcript of March 14, 2014 Suppression Hearing at 9–10 (No. 43) (“Tran.”).

2 *Id.* at 11–12, 13–14.

3 *Id.* at 18.

4 *Id.* at 14.

5 *Id.* at 16.

6 *Id.* at 15.

7 *Id.* at 16–17.

8 *Id.* at 65.

9 *Id.* at 19–20.

10 *Id.* at 20.

11 *Id.*

12 *Id.* at 113.

13 *Id.* at 145.

14 *Id.* at 21–22.

15 *Id.* at 22–23.

16 *Id.* at 21.

17 *Id.* at 23.

18 *Id.* at 23–24.

19 *Id.* at 24.

20 *Id.* at 25.

21 Joint Exhibit at 12–13.

22 *Id.*

23 *Id.*

24 *Id.* at 26–27.

25 *Id.*

26 *Id.* at 28.

27 *Id.* at 79.

28 *Id.* at 28–30.

29 *Id.* at 30.

30 *Id.* at 32–33. See Joint Exhibit at 12–13.

31 *Id.* at 31–32, 82–83. See Joint Exhibit at 12–13.

32 *Id.* at 32.

33 *Id.*

34 *Id.* at 33.

35 *Id.* at 35–36.

36 *Id.*

37 *Id.* at 97.

38 *Id.*

39 *Id.* at 56.

- 40 *Id.* at 53.
- 41 *Id.* at 36.
- 42 *Id.* at 138–39.
- 43 *Id.* at 37.
- 44 *Id.* at 40–42.
- 45 *Id.*
- 46 *Id.* at 38.
- 47 *State v. Iverson*, 2011 WL 1205242, at *3 (Del.Super.2011) (citing *Hunter v. State*, 783 A.2d 558, 560–61 (Del.2001)).
- 48 *Id.*
- 49 *Miranda v. Arizona*, 384 U.S. 436 (1966).
- 50 *Illinois v. Perkins*, 496 U.S. 292, 297 (1990).
- 51 *Stansbury v. California*, 511 U.S. 318, 322 (1994).
- 52 *California v. Beheler*, 463 U.S. 1121, 1125 (1983).
- 53 *DeJesus v. State*, 655 A.2d 1180, 1190 (Del.1995) (citing *Marine v. State*, 607 A.2d 1185, 1193 (Del.1992)). See also *Stansbury*, 511 U.S. at 323 (“Our decisions make clear that the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned.”).
- 54 *Fuentes v. State*, 2002 WL 32071656, *2 (Del.Super.2002); *Hammond v. State*, 569 A.2d 81 (Del.1989); *Laury v. State*, 260 A.2d 907, 908 (Del.1969). In *Hammond*, on an appeal following a conviction of vehicular homicide, the Delaware Supreme Court held that statements made by a hospitalized defendant to police who were primarily concerned with identifying the victims were not custodial in nature. *Hammond*, 569 A.2d at 94.
- 55 *DeJesus*, 655 A.2d at 1191.
- 56 *Id.* at 1186–87.
- 57 *Id.* at 1187.
- 58 *Id.* at 1190.
- 59 *Id.* at 1191.
- 60 *State v. Pustolski*, No. 0903005777, slip op. at 2 (Del.Super.Ct. Nov. 30, 2009).

61 *Id.* at 7.

62 *Id.* at 9–10.

63 *Id.* at 16–18.

64 *Id.* at 16.

65 Tran. at 54.

66 *Stansbury*, 511 U.S. at 323.

67 U.S. CONST. amend. IV; Del. CONST. art. I, § 6.

68 *Katz v. United States*, 389 U.S. 347, 357 (1967); *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *Higgins v. State*, 89 A.3d 477, *2 (Del.2014).

69 *Missouri v. McNeely*, 133 S.Ct. 1552, 1558 (2013); *Schneckloth*, 412 U.S. at 222; *Scott v. State*, 672 A.2d 550, 552 (Del.1996).

70 *McNeely*, 133 S.Ct. at 1558.

71 *Schneckloth*, 412 U.S. at 221–22; *Scott*, 672 A.2d at 552; *Higgins*, 89 A.3d at *2.

72 *Higgins*, 89 A.3d at *2 (quoting *Schneckloth*, 412 U.S. at 241, 233).

73 *Cooke v. State*, A.2d 803, 855 (Del.2009).

74 See *Higgins*, 89 A.3d at *2 (explaining that the defendant who had previously been arrested for a similar offense was not a newcomer to the law).

75 *Id.*

76 *Pustolski*, No. 0903005777, slip op. at 19 (quoting *State v. Caldwell*, 2007 WL 1748663, *3 (Del.Super. May 17, 2007)).

77 *Id.*

78 *Id.*

79 *Cooke v. State*, 977 A.2d 803, 857 (Del.2009) (distinguishing cases in which consent to search was invalidated when searching officers represented they had a warrant, when in fact, none exist).

80 *Higgins*, 89 A.3d at *3 (citing *Schneckloth*, 412 U.S. at 233).

81 See *Missouri v. McNeely*, 133 S.Ct. 1552 (2013); *Schmerber v. California*, 384 U.S. 757 (1966).

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2015 WL 3507963

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UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

Superior Court of Delaware,
IN AND FOR KENT COUNTY.

State of Delaware,
v.
Titus W. Hobbs, Defendant.

I.D. No. 1403014647

Submitted: April 20, 2015

Decided: May 29, 2015

Upon Defendant's Motion to Suppress. *Denied.*

Attorneys and Law Firms

Gregory R. Babowal, Esquire of the Department of
Justice, Dover, Delaware; attorney for the State.

John R. Garey, Esquire of John R. Garey, P.A., Dover,
Delaware; attorney for the Defendant.

ORDER

WITHAM, R.J.

*1 Upon consideration of the Defendant's Motion to Suppress pursuant to Superior Court Criminal Rule 41(f), the State's Opposition, and the record of this case, it appears that:

1. On September 19, 2014, Titus Hobbs ("Defendant") moved to suppress evidence obtained at the scene of his arrest, and at the police station where he was detained. The Court heard oral argument concerning this motion on April 1, 2015. Following the argument, both the State and Defendant filed supplemental briefs in support of their respective positions concerning Defendant's motion.

2. Corporal Edwin H. Justiniano ("Corporal Justiniano") was dispatched to the Royal Farms on Route 10 in Dover,

DE, on the early morning of March 21, 2014. There had been reports of a pickup truck parked near the store, whose occupant was asleep at the wheel. Upon arrival, Corporal Justiniano discovered Defendant in the parking lot, asleep in the front seat of his blue Ford F-150 truck, with the engine running. Attached to the truck was a camper. According to Corporal Justiniano, the door to the Defendant's truck was partially open. Defendant disputes this part of Corporal Justiniano's narrative, claiming that the door was closed. In any event, Corporal Justiniano roused the sleeping Defendant, finding that a strong odor of alcohol emanated from the truck's cabin. Corporal Justiniano further observed Defendant exiting the car with some difficulty, having to hold on to the side of the truck for support.

3. Defendant's behavior and overall demeanor led Corporal Justiniano to believe Defendant was under the influence of alcohol. Upon questioning, Defendant revealed he had been drinking the prior evening. Corporal Justiniano also noted Defendant's mumbled speech. These factors together, prompted Corporal Justiniano to conduct several field sobriety tests to determine Defendant's level of intoxication. Among these tests were: (1) an alphabet test; (2) a counting test; (3) a finger to nose test; (4) a Horizontal Gaze Nystagmus ("HGN") test; and (5) a Portable Breath Test ("PBT"). According to Corporal Justiniano, Defendant failed all five sobriety tests.

4. Following Defendant's deficient performance on the field tests, Corporal Justiniano transported the Defendant to Troop # 3 Station. It was there that Defendant's blood was drawn in order to measure his blood alcohol level. The procedure was performed by Hal Blades ("Mr. Blades"), the Delaware State Police Phlebotomist. Although there is some dispute as to the events preceding the drawing of blood, the parties agree that Defendant signed a consent form relating to the procedure. Defendant claims he showed some reluctance to having his blood drawn, but acquiesced as he believed the police would force the procedure on him, if he were to refuse. Both Corporal Justiniano and Defendant, further agree that Defendant was not told he could refuse the test. However, inspection of the executed consent form reveals that the executor acknowledges his right to refuse.

*2 5. Upon filing his motion to suppress the evidence obtained concerning his sobriety on the morning in question, Defendant was represented by prior counsel. At present, and during the oral argument, Defendant is/was represented by new counsel. The Court, therefore, considers solely the arguments put forward by

Defendant's counsel during oral argument, as well as in the supplemental briefing. This is, also, the preference intimated by Defendant's current counsel at argument. Given this substitution of counsel in the midst of Defendant's pending motion, the Court will forgo consideration of the tardiness implicated by a motion whose argument was heard over six months from its filing. Moreover, the State points out that even the initial motion's filing was overdue. However, the Court does so in this situation singularly, and at its discretion, purposefully avoiding any precedential treatment of the motion.

6. Defendant's motion to suppress is premised upon the blood test constituting an unreasonable search and seizure, violating the U.S. and Delaware Constitutions. Defendant formulates his argument in two parts: (1) the field sobriety tests did not create probable cause, justifying the blood test; and (2) the consent form was invalid, thereby necessitating the issuance of a warrant, prior to blood being drawn.

7. As regards the first point, Defendant has failed to establish why the results of the field sobriety tests were insufficient to establish the probable cause required to conduct a blood test. Defendant's sole contention is that only the HGN test is certified by the NHTSA. The Court deems this of little consequence. In Delaware, "[p]robable 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."¹ "[P]olice 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."² Importantly this information or these facts, need not be "sufficient evidence to convict."³ Where Defendant failed five field sobriety test—in addition to the equally egregious fact that Defendant was asleep at the wheel of a running car—an officer has established probable cause to investigate further, and order a blood test.

8. The second part of Defendant's argument necessitates consideration of the U.S. Supreme Court's holding in *Missouri v. McNeely*.⁴ In considering a Fourth Amendment unlawful search and seizure argument, the U.S. Supreme Court ruled that probable cause, in and of itself, was not enough to permit the involuntary drawing of a suspect's blood, without a warrant.⁵ With respect to the circumstances underlying the case at bar, the drawing of Defendant's blood would be contrary to *McNeely* and the Fourth Amendment, where it was: (1) involuntary; and (2) done in the absence of a warrant. Although there is no dispute that Corporal Justiniano did not obtain a

warrant, *McNeely* is, nonetheless, inapplicable as this Court finds Defendant to have consented to the blood work.

9. Defendant argues that the blood test was administered without his approval, as the consent form he signed was invalid. Therefore, under *McNeely*, even if probable cause existed, Corporal Justiniano could not order Defendant's blood to be drawn, sans warrant. Defendant bases his invalidity argument on the fact that the form was a boilerplate printout, which Defendant argues, was not intended for consenting to blood being drawn. The form is, instead, said to be for searches of premises and of physical persons. Further, reading the language of the form in a highly technical manner, Defendant avers that the blood had to be drawn by an "officer." As per Defendant, Mr. Blades, the phlebotomist, was not an officer. Lastly, Defendant takes issue with the fact that Corporal Justiniano did not inform him of his right to refuse the blood test, and that a warrant would have to be issued, in the event of such a refusal.

*3 10. The Court finds Defendant's position with regard to the opaqueness of the consent form to be unpersuasive. Rather than strengthening Defendant's argument, the Court deems the broadness of the form's language to bolster the claim that consent to blood work may be effectuated by the form. The Court sees the form as intentionally indefinite, so as to encompass the various types of searches police officers conduct. Therefore, Defendant's zeroing in on the term "officer," where Mr. Blades is a phlebotomist employed by the Delaware State Police, strikes this Court as precisely the type of argument the breadth of the form's language was meant to avoid.⁶ More importantly, as this is Defendant's motion, the burden of proof is on him to provide support for the contention that "officer" is strictly limited to *police* officers. Defendant has failed to do so.

11. Lastly, the Court addresses the argument that Defendant's execution of the consent form had no effect, as Corporal Justiniano did not inform him of his right to refuse the blood test. As mentioned previously, although Corporal Justiniano admits he did not inform Defendant of the necessity of a warrant, were Defendant to not comply, the form executed by Defendant acknowledges the right to refuse a search. Indeed, Defendant's signature is directly below text to that effect. However, of even greater significance is the fact that both the Legislature and the Delaware Supreme Court have determined that "[a]n arresting officer is *not* required to advise a suspect of any right to refuse testing ..."⁷ The Delaware Supreme Court in *Seth v. State*, reasoned that the Legislature did away with the requirement of consent to testing by

enacting 21 *Del. C.* § 2740 and § 2750.⁸ § 2740(a) provides that “any person who drives, operates or has in actual physical control a vehicle ... within the State shall have been deemed to have given consent ... to a chemical test or tests of that person’s blood ...” To this, the Delaware Supreme Court reads § 2750 as adding that, even if the right to refusal is not revealed, the evidence is, nonetheless, admissible, so long as Fourth Amendment concerns are not implicated.¹⁰ The U.S. Supreme Court has clarified that Fourth Amendment considerations are relevant where there is no probable cause, and the drawing of blood is not consensual.¹¹ Such is not the case here. Therefore, whether Defendant was informed of his right to refusal has no bearing on the admissibility of the

blood test evidence.

12. For the foregoing reasons, Defendant’s Motion to Suppress is **DENIED**.

IT IS SO ORDERED.

All Citations

Not Reported in A.3d, 2015 WL 3507963

Footnotes

1 *Lefebvre v. State*, 19 A.3d 287, 292 (Del.2011) (internal quotations omitted).

2 *Id.*, at 292–293 (internal quotations omitted).

3 *Id.*, at 292.

4 133 S.Ct. 1552 (2013).

5 *Id.*

6 In addition, the Court recognizes the State’s citation to Black’s Law Dictionary, defining “officer” broadly as a “[p]erson holding office of trust, command or authority in ... government ... or other institution or organization.” Black’s Law Dictionary 1085 (6th Ed. 1990).

7 *Seth v. State*, 592 A.2d 436, 445 (Del.1991) (emphasis added).

8 *Id.*, at 436.

9 21 *Del. C.* § 2740(a).

10 *Seth*, 592 A.2d at 445 (“[s]ection 2570(a) eliminates any defense to admissibility not implicating the Fourth Amendment”).

11 *McNeely*, 133 S.Ct. 1552.

2013 WL 5913393

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

Superior Court of Delaware

State of Delaware

v.

Othelo K. Predeoux, Defendant.

Case No. 1203013161

Submitted: November 1, 2013

Decided: November 4, 2013

Upon Consideration of Defendant's Motion to Suppress,
GRANTED.

Attorneys and Law Firms

David Holloway, Esquire, Deputy Attorney General,
Delaware Department of Justice, Carvel State Office
Building, 820 North French Street, Wilmington, Delaware
19801, Attorney for the State.

Darryl J. Rago, Esquire, Assistant Public Defender,
Office of the Public Defender, Carvel State Office
Building, 820 North French Street, Second Floor,
Wilmington, Delaware 19801, Attorney for the
Defendant.

OPINION

RAPPOSELLI, J.

INTRODUCTION

*1 On March 27, 2012, Defendant Othelo Predeoux ("Defendant") was required to submit to a warrantless search in the form of a non-consensual blood draw. The State intends to introduce the evidence obtained as a result of the search against Defendant at trial. Defendant

moved to suppress this evidence and filed his motion on October 14, 2013. The State submitted a response on October 30, 2013. Oral arguments were heard on November 1, 2013. This Court finds that the State failed to meet its burden of proving that the warrantless search fell within an established exception to the warrant requirement. Therefore, Defendant's Motion to Suppress is **GRANTED**.

FACTUAL HISTORY

On March 27, 2012, at approximately 8:00 am, Delaware State Police officer, Corporal Shannon King ("Cpl. King"), and at least three other officers were called to the scene of a two motor vehicle accident in which Defendant was one of the drivers. Upon arrival, Cpl. King observed emergency response personnel moving Defendant from the driver's seat to a stretcher and into an ambulance. While in the ambulance, Defendant told Cpl. King that he had been "T-boned" by the other driver. Cpl. King detected an odor of alcohol and asked Defendant if he had consumed any alcohol. Defendant said no. Nonetheless, Cpl. King asked another officer to administer a Portable Breath Test ("PBT") which resulted in a "passing" breath alcohol level of .051. Defendant was then transported to Christiana Care Hospital via ambulance while Cpl. King continued his investigation at the scene of the accident. Cpl. King then interviewed the second driver who stated that the accident was caused by Defendant. The interview lasted approximately five minutes and then Cpl. King traveled to the hospital to continue to speak with Defendant. At the hospital, after a CJIS inquiry, Cpl. King learned that the date in question was also Defendant's birthday and asked Defendant again if he had consumed any alcohol. This time, Defendant contradicted his earlier statement and admitted to drinking "one shot" of alcohol the previous night. Cpl. King then contacted Omega Services, with whom DSP has a service contract, to conduct a blood draw on Defendant. No warrant was obtained. Defendant was charged with Driving Under the Influence, Driving with a Suspended License and Failure to Yield at an Intersection.

DISCUSSION

Defendant contends that the warrantless blood draw in this case was an impermissible search in violation of the Fourth Amendment of the U.S. Constitution, and Article

1, Sections 6 and 7 of the Delaware Constitution.¹ The Fourth Amendment to the United States Constitution provides, in pertinent part, that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against all unreasonable searches and seizures, shall not be violated.” “On a motion to suppress, the State bears the burden of establishing that the challenged search or seizure comported with the rights guaranteed ... by the U.S. Constitution, the Delaware Constitution, or Delaware statutory law. The burden of proof on a motion to suppress is proof by a preponderance of evidence.”²

*2 If a search proceeds without a warrant, the State must prove by a preponderance of evidence that the search fell within an established exception to the warrant requirement.³ “This principle applies to the type of search at issue in this case, which involved a compelled physical intrusion beneath [the] skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation.”⁴

It is well established that one exception to the warrant requirement exists “when exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable.”⁵ The exigent circumstances exception to the warrantless drawing of blood was recently addressed by the United States Supreme Court in *Missouri v. McNeely*.⁶ In *McNeely*, the U.S. Supreme Court held that the natural metabolization of alcohol in the bloodstream does not present a *per se* exigency that justifies an exception to the general rule that nonconsensual blood testing generally requires a warrant.⁷ Rather, the Court concluded that the exigency in a drunk-driving “context must be determined case by case based on the totality of the circumstances.”⁸ As required by *McNeely*, this Court looks at the totality of the circumstances to determine if there existed exigent factors beyond “the natural metabolization of alcohol in the bloodstream” sufficient to justify the warrantless blood draw.

The State asks this Court to distinguish this case from *McNeely* by arguing that the facts are more analogous to the 1966 U.S. Supreme Court decision of *Schmerber v. State of California*.⁹ *Schmerber* is similar to this case because it involved the warrantless blood draw of a suspect injured in an automobile accident. In *Schmerber*, the Court upheld the warrantless blood draw because the

officer “might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant under the circumstances, threatened the destruction of evidence.”¹⁰

While this Court agrees that the *Schmerber* facts are somewhat similar to the facts in this case—both involved a motor vehicle accident and an injured suspect—the State has failed to provide evidence showing that the officer in this case was confronted with an emergency. Unlike the evidence presented in *Schmerber*, Cpl. King’s testimony clearly established that there were no exigent circumstances which prevented him from obtaining a warrant. Cpl. King arrived at the scene of the accident shortly before 8 am. He testified that he spent approximately a few minutes at the scene speaking with both Defendant and the other driver. He managed to investigate the scene of the accident, speak to the persons involved in the accident, run a CJIS inquiry, travel to the hospital, re-interview Defendant, call upon the DSP provider, Omega Services, and complete the blood draw by 9:07 am. Delay was not an issue in this case. At no time did Cpl. King testify that he was faced with an emergency that objectively justified a warrantless search. In fact, Cpl. King testified that he simply did not think to obtain a warrant, not that he feared that waiting for one would somehow threaten the destruction of evidence.

CONCLUSION

*3 This Court finds that the State has failed to meet its burden of proof. No exigent circumstances existed in this case to justify the non-consensual blood draw without a proper warrant. Therefore the Motion to Suppress is hereby **GRANTED** and any and all evidence from said search is excluded under *McNeely*.

IT IS SO ORDERED.

All Citations

Not Reported in A.3d, 2013 WL 5913393

Footnotes

¹ The issue of probable cause was not raised by Defendant, and thus not discussed by this Court. The sole issue before this Court is whether the warrantless search fell within an established exception to the warrant requirement.

² *State v. Anderson*, 2001 WL 1729141, at *2 (Del.Super.Nov. 29, 2001) (citations omitted).

3 *Missouri v. McNeely*, 133 S.Ct. 1552, 1558, 185 L.Ed.2d 696 (2013).

4 *Id.*

5 *Id.* at 1558.

6 *Id.*

7 *Id.* at 1556.

8 *Id.*

9 *Schmerber v. State of California*, 384 U.S. 757 (1966).

10 *Id.* at 770.

116 A.3d 883
Supreme Court of Delaware.

State of Delaware, Plaintiff–Below,
Appellee/Cross–Appellant,
v.
Jeffrey W. Barnes, Defendant–Below,
Appellant/Cross–Appellee.

No. 52, 2014

Submitted: May 20, 2015

Decided: June 2, 2015

11 Del. Code § 4205.

Cases that cite this headnote

^[2] **Criminal Law**
☛ Review De Novo

Supreme Court reviews issues of statutory construction de novo.

Cases that cite this headnote

Synopsis

Background: After defendant, who had pled guilty to his fifth driving under the influence (DUI) offense, was granted early release by Board of Parole, State filed emergency motion to correct illegal sentence. The Superior Court, Sussex County, denied motion but nonetheless concluded that defendant should not have been released because he had not completed the mandatory portion of his sentence. Defendant appealed and State cross-appealed.

^[3] **Statutes**
☛ Language

The starting point for the interpretation of a statute is the statute’s language.

Cases that cite this headnote

[Holding:] The Supreme Court, Strine, C.J., held that the Truth In Sentencing (TIS) Act, amending criminal statutes to eliminate parole in certain circumstances, does not apply to persons serving prison sentences for felony DUI offenses.

Affirmed.

^[4] **Statutes**
☛ Evidence as to construction in general; admissibility

When a statute is susceptible to two different interpretations, the court is required to interpret the statute based on available, relevant information and evidence.

Cases that cite this headnote

West Headnotes (7)

^[1] **Pardon and Parole**
☛ Offenses, punishments, and persons subject of parole

The Truth In Sentencing (TIS) Act, amending criminal statutes to eliminate parole in certain circumstances, does not apply to persons serving prison sentences for felony driving under the influence (DUI) offenses. 21 Del. Code § 4177;

^[5] **Administrative Law and Procedure**
☛ Consistent or longstanding construction; approval or acquiescence
Courts
☛ Previous Decisions as Controlling or as Precedents

When a statute has been applied by courts and

state agencies in a consistent way for a period of years, that is strong evidence in favor of that interpretation.

1 Cases that cite this headnote

¹⁶¹

Courts

Previous Decisions as Controlling or as Precedents

Under the doctrine of stare decisis, Supreme Court must take seriously the longstanding interpretation of a statute held by the Superior Court, especially when it has been relied upon by the key actors in the criminal justice system.

Cases that cite this headnote

¹⁷¹

Statutes

Legislative silence, inaction, or acquiescence

The longtime failure of the legislature to alter a statute after it has been judicially construed is persuasive of legislative recognition that the judicial construction is the correct one.

Cases that cite this headnote

Court Below: Superior Court of the State of Delaware in and for Sussex County, C.A. No. S14M-01-002 THG Upon appeal from the Superior Court. **AFFIRMED.**

Attorneys and Law Firms

Elizabeth R. McFarlan, Esquire, Sean P. Lugg, Esquire (argued), Karen V. Sullivan, Esquire, Kathryn J. Garrison, Esquire, State of Delaware Department of Justice, Wilmington, Delaware, for the State of Delaware.

*884 Robert H. Robinson, Jr., Esquire, Bernard J. O'Donnell, Esquire (argued), Office of Public Defender, Wilmington, Delaware, for Jeffrey W. Barnes.

Before STRINE, Chief Justice; HOLLAND, VALIHURA, VAUGHN, and SEITZ, Justices, constituting the Court en banc.

STRINE, Chief Justice:

I. INTRODUCTION

This appeal involves a single question: whether the provisions of the Truth In Sentencing Act of 1989 (the “TIS Act”) that indisputably abolished parole as to Title 11 and Title 16 of the Delaware Code also apply to felony DUI offenses imposed under § 4177 of Title 21. If the answer to that question is yes, as the State now argues, felony DUI offenders are ineligible for parole. But for nearly a generation, the judicial and administrative answer to the question has consistently been no. That is, the Superior Court and the Board of Parole have operated with the understanding that the provisions of the TIS Act that eliminated parole do not apply to felony DUI offenses. In addition, the Delaware Sentencing Accountability Commission (“SENTAC”), which is statutorily charged with providing guidelines to courts and attorneys about sentencing practices in criminal cases, adhered to this position in its 2014 Benchbook. Because the Code can reasonably be interpreted to continue parole eligibility for DUI offenses, that longstanding judicial and administrative interpretation must be given great weight.¹ We thus adhere to principles of *stare decisis* and judicial restraint, and give the Code the reading most consistent with the settled expectations of the public.²

II. THE TRUTH IN SENTENCING ACT

The General Assembly passed the Truth In Sentencing Act on July 17, 1989, to provide more certainty about the length of sentences to be served by criminal defendants.³ The TIS Act expressly amended statutes contained in Titles 11 and 16 only, *885 although many of the amended provisions, including those governing the accumulation of good time credits, had previously been applied to offenses contained in other titles by the interaction of the Code’s provisions.⁴ Most relevant to this appeal, the TIS Act amended 11 *Del. C.* § 4205 to state, “[n]o sentence to Level V incarceration imposed pursuant to this Section is subject to parole.”⁵ Section 4205 is a backbone provision of Title 11 that sets forth certain minimum and maximum sentences for levels of felonies

contained in the Code.⁶ The TIS Act also stated that it took effect with respect to “all crimes” committed after June 30, 1989.⁷

When the TIS Act was enacted, DUIs were unclassified misdemeanor offenses contained in § 4177 of Title 21.⁸ In 1995, the General Assembly amended § 4177 to create felony DUI offenses. The maximum penalties for felony offenses were increased in 2009, and the minimum penalties for felony DUI offenses were increased in 2012.⁹ Accordingly, persons imprisoned for DUI offenses today are serving longer sentences than those who were incarcerated when the TIS Act was enacted.

III. PROCEDURAL BACKGROUND¹⁰

The procedural background of this case is complicated. On May 24, 2013, Jeffrey Barnes pled guilty to his fifth DUI offense. The Superior Court sentenced Barnes under *886 21 *Del. C.* 4177(d) to five years at Level V incarceration for his class E felony.¹¹ In accordance with what seems to have been standard practice in the Superior Court for DUI offenses, the sentence order designated the offense as “non-TIS.”¹²

In August 2013, Barnes filed an application to the Board of Parole for early release. The Board granted Barnes’ application over the State’s opposition and Barnes was released after serving only six months of his sentence. The State then filed an emergency motion to correct an illegal sentence in the Superior Court, arguing for the first time that Barnes’ sentence was erroneously labeled as “non-TIS” because the TIS Act applied to felony DUI convictions, and thus Barnes was ineligible for parole. After the Superior Court refused to rule on the State’s motion,¹³ the State filed two petitions for a writ of mandamus directing the Board of Parole to rescind its decision releasing Barnes.¹⁴

On January 24, 2014, the Superior Court issued an order addressing both of the State’s petitions.¹⁵ In determining that Barnes was eligible for parole, the Superior Court relied on a previous decision of that court finding that DUI sentences are non-TIS offenses,¹⁶ but nonetheless concluded that Barnes should not have been released because he had not completed the portion of his sentence that was mandatory under 21 *Del. C.* § 4177.

Barnes then appealed and the State filed a cross-appeal of right under 10 *Del. C.* § 9902(e). Shortly thereafter, Barnes filed a notice of voluntary dismissal of his appeal because his term of incarceration would have ended by the time his appeal was decided, and thus, the issue of his incarceration had become moot. The State, however,

wished to maintain its *887 cross-appeal, and both parties filed briefs. After hearing oral argument, this Court decided to resolve the central question—whether a felony DUI is covered by the TIS Act—*en banc*, after briefing and oral argument, as a matter of public importance.¹⁷ Accordingly, the Court appointed the Public Defender, who represented Barnes, to support the position that felony DUIs are not covered by the TIS Act. Although Barnes did not wish to pursue his appeal given his release, for the sake of clarity, we refer to him as the proponent of the position that the TIS Act does not apply to felony DUI offenses. Barnes took that position in his briefing and in oral argument in front of this Court, before the Public Defender was appointed to submit additional briefing.¹⁸

IV. ANALYSIS

¹¹The parties dispute whether the TIS Act eliminated parole for all crimes contained in the Delaware Code, including felony DUI offenses contained in Title 21, or only crimes contained in Titles 11 and 16. The State argues that because the TIS Act states that it applies to “all crimes,” persons serving prison sentences for felony DUIs, which are crimes under the definition in Title 11,¹⁹ are ineligible for parole. By contrast, Barnes contends that the TIS Act provisions that eliminated parole only apply to crimes contained in Titles 11 and 16, because the TIS Act only amended and referred to statutes contained in those titles.²⁰ Barnes also points out that for nearly a generation, the Board of Parole and the Superior Court have operated under the understanding that felony DUI offenses are eligible for parole, and SENTAC adhered to that position in its 2014 Benchbook.

In addressing this matter, we hew to a narrow version of the dispute before us, *888 which is whether defendants convicted of felony DUI offenses under 21 *Del. C.* § 4177 are eligible for parole. Because the debate about this specific question arises twenty years after the adoption of felony DUIs, it would be hazardous to make any broader pronouncement about the complicated interaction of the various Code titles than is necessary to resolve this appeal.

¹² ¹³ ¹⁴We review issues of statutory construction *de novo*.²¹ The starting point for the interpretation of a statute begins with the statute’s language.²² When a statute is susceptible to two different interpretations, as it is here,²³ the court is required to interpret the statute based on “available, relevant information and evidence.”²⁴

We acknowledge that the State’s argument is a strong one

as an initial matter. If one were interpreting the Code in 1995, shortly after the adoption of felony DUIs, this Court might take the position that the better reading of the statute is the one that the State now advances.²⁵ But, the contrary interpretation advanced by Barnes is also a reasonable one. The most direct provision of the Code upon which the State relies in this appeal is 11 *Del. C.* § 4205, which states, “[n]o sentence to Level V incarceration imposed pursuant to this Section is subject to parole.”²⁶ Admittedly, § 4177 makes a fifth DUI offense a class E felony, and § 4205 specifies the backbone terms of incarceration for each class of felonies. But the Code also states that Title 11 will not govern the sentencing for crimes in other titles if the “context otherwise requires.”²⁷ Section 4177 of Title 21 is largely a self-contained statute, and includes detailed prescriptions for sentencing a DUI offender, including the maximum and minimum term of incarceration.²⁸ As such, a court *889 need not look to § 4205 when sentencing a felony DUI offender, as the State conceded at oral argument. In fact, to do so would be hazardous, because § 4205 only fixes the maximum term of incarceration for a class E felony at five years. This would not give a judge enough information to sentence a class E felony DUI offender, such as Barnes, because § 4177 has detailed provisions governing the sentence range that must be followed in sentencing such an offender and the minimum amount of time that he must serve.²⁹

Reading the Code to continue parole eligibility for felony DUI offenders is not only plausible, it the interpretation that has been held by the Superior Court and the Board of Parole—both composed of sophisticated, repeat players in our criminal justice system, who grapple with the Code on a daily basis—for the entire period since DUIs were made felonies in 1995. The Superior Court has twice addressed the question raised in this appeal and each time concluded that Title 21 offenses are not subject to the TIS Act.³⁰ The Attorney General was a party to both of those cases, but did not challenge the Superior Court’s finding in either, despite the reality that its acquiescence ensured that the defendants would not be subject to provisions of the TIS Act that would have otherwise limited the amount of good time credit available to each.³¹ In addition, the Board of Parole, which has authority to release on parole persons incarcerated for non-TIS sentences,³² claims that it has continually exercised jurisdiction over Title 21 offenses since the passage of the Act in 1989, and has granted parole to persons incarcerated for DUI offenses.³³

Moreover, SENTAC stated that Title 21 offenses are not covered by the TIS Act in its 2014 Benchbook, which is used by all judges and attorneys who handle criminal cases.³⁴ SENTAC is a committee composed *890 of “four

members of the judiciary ... appointed by the Chief Justice, the Attorney General, the Public Defender, the Commissioner of Correction and four members at large.”³⁵ It thus represents key stakeholders in our criminal justice system. In addition, the General Assembly has given SENTAC statutory authority to interpret the Code to establish “detailed, objective criteria” for judges to use when assigning punishment for offenders.³⁶

The consistent position taken by both the judicial and administrative branches supports the plausibility of Barnes’ interpretation for a compelling reason. It suggests that, for a generation, none of the key governmental stakeholders most involved in implementing the felony DUI provisions of the Code—the Department of Justice, the Public Defender, the Department of Correction, the Board of Parole, SENTAC, and the Superior Court—believed the enactment of the TIS Act to have deprived the Board of Parole of authority to grant parole to offenders convicted under § 4177.³⁷ Their understanding is entitled to strong consideration when giving practical effect to what the Code means, given the important role that the Superior Court, Board of Parole, and SENTAC play in giving life to the Code in the most central way relevant to this appeal: how the Code operates to impose punishment on offenders.

¹⁵¹ ¹⁶¹When a statute has been applied by courts and state agencies in a consistent way for a period of years, that is strong evidence in favor of that interpretation.³⁸ Under the doctrine of *stare decisis*, *891 we must take seriously the longstanding interpretation of a statute held by our Superior Court, especially when it has been relied upon by the key actors in our criminal justice system.³⁹ The doctrine of *stare decisis* exists to protect the settled expectations of citizens because, “[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.”⁴⁰ The same principles also explain the weight given to long-standing administrative interpretations that have been relied upon by the public.⁴¹ *892 Predictability and certainty in the law is all the more important when the statute in question involves criminal penalties, as it does here.⁴²

¹⁷¹Yet after years of acquiescence, the State now asks this Court to deem this settled interpretation implausible under the plain language of the statute, even though it has been held by sophisticated stakeholders in our criminal justice system for over a decade. And it asks us to weigh in even though the General Assembly is aware of the long-standing, contrary interpretation and has not acted to alter it. “[W]hen the prior judicial interpretation was subject to being overturned by the operation of the

legislative process and was not overturned, the justification for departing from *stare decisis* is even more tenuous.”⁴³ A fundamental canon of statutory construction states that “[t]he long time failure of [the legislature] to alter [a statute] after it had been judicially construed ... is persuasive of legislative recognition that the judicial construction is the correct one.”⁴⁴

We know the General Assembly is aware that the Board of Parole continues to exercise jurisdiction over persons imprisoned for crimes contained in Title 21 because it considered legislation that would have clarified the application of the TIS Act last session.⁴⁵ The fact that the Board of Parole’s *893 exercise of jurisdiction over Title 21 offenses has been brought to the attention of General Assembly, who has not altered it, further cautions against our taking action to disrupt the settled sentencing practices employed by courts, the Department of Correction, and the Board of Parole.⁴⁶

For the foregoing reasons, we adhere to *stare decisis*, the principles of consistency and predictability we have articulated, and therefore hold that the TIS Act does not apply to felony DUI offenses under 21 *Del. C.* § 4177. If the General Assembly wishes to amend the Code to alter this long-standing interpretation, it is free to do so.

Footnotes

- 1 See, e.g., *Council 81, American Fed’n of State, County and Municipal Employees v. Delaware*, 293 A.2d 567, 571 (Del.1972) (“In seeking legislative intent, we give due weight to the practices and policies existing at the time [the statute] was enacted.... A long-standing, practical, and plausible administrative interpretation of a statute of doubtful meaning will be accepted by this Court as indicative of legislative intent.”); *Delaware v. Mayor of Wilmington*, 163 A.2d 258, 264 (Del.1960) (“[W]here a statute is doubtful or ambiguous in its terms, a practical administrative interpretation over a period of time, if founded upon plausibility, will be accepted by the courts as indicative of the legislative intent.”).
- 2 See *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) (*stare decisis* is “the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process”); Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 289–90 (1990) (“[I]nevitability of change touches law as it does every aspect of life. But stability and moderation are uniquely important to the law.... [R]estraint in decisionmaking and respect for decisions once made are the keys to preservation of an independent judiciary and public respect for the judiciary’s role as a guardian of rights.”).
- 3 See 67 Del. Laws, ch. 130 [hereinafter “TIS Act”] § 1 (“The purposes of this Act are: To achieve truth in sentencing by assuring that the public, the State and the Court will know that the sentence imposed by the Court will be served by the defendant; and that, the defendant will know what the actual effect of the sentence will be....”).
- 4 See, e.g., *State v. Clyne*, 2002 WL 1652149, *2 (Del.Super. July 22, 2002) (in calculating the amount of good time credit earned by the defendant, who was imprisoned for a felony DUI offense under Title 21, the Superior Court reasoned that because the TIS Act did not apply to DUI offenses, it was required to apply “old law,” *i.e.*, the good time credit provisions contained in Title 11 before it was amended by the TIS Act. This suggests that these good time credit provisions had previously applied to crimes in Title 21.); *cf. State v. Williams*, 1975 WL 167882, *1 (Del.Super. Aug. 7, 1975) (noting that 11 *Del. C.* § 4201, which at the time stated that, “[a]ny offense defined outside this Criminal Code which is declared to be a felony without specification of the classification thereof shall be deemed a class E felony,” accordingly set the punishment for felonies defined without a classification in Title 21).

All Citations

116 A.3d 883

5 TIS Act § 6 (amending 11 *Del. C.* § 4205(j)). The TIS Act also added a new Section 4354 to Title 11, which states, "[n]o sentence imposed pursuant to the provisions of the Truth in Sentencing Act of 1989 shall be subject to parole under the provisions of this subchapter." TIS Act § 7 (adding 11 *Del. C.* § 4354).

6 See 11 *Del. C.* § 4205(b) ("The term of incarceration which the court may impose for a felony is fixed as follows: (1) For a class A felony not less than 15 years up to life imprisonment to be served at Level V except for conviction of first-degree murder in which event § 4209 of this title shall apply. (2) For a class B felony not less than 2 years up to 25 years to be served at Level V. (3) For a class C felony up to 15 years to be served at Level V. (4) For a class D felony up to 8 years to be served at Level V. (5) For a class E felony up to 5 years to be served at Level V. (6) For a class F felony up to 3 years to be served at Level V. (7) For a class G felony up to 2 years to be served at Level V.").

7 TIS Act § 4 ("The provisions of Title 11 and Title 16, which are repealed by this Act shall remain in force and effect for the purpose of trial and sentencing for *all crimes* which occur prior to 12:01 a.m., June 30, 1990.") (emphasis added).

8 See 21 *Del. C.* § 4177 (1988) (providing penalties for DUI offenses); 21 *Del. C.* § 4102 (19632009) (providing that all offenses in the Title 21 are misdemeanors unless otherwise designated); 11 *Del. C.* § 4202 (1988) (providing that misdemeanors outside of the Criminal Code without specification were unclassified misdemeanors).

9 77 Del. Laws, ch. 162 (amending 21 *Del. C.* § 4177); 77 Del. Laws, ch. 167 (same).

10 The undisputed facts are drawn from the Superior Court's order and the record presented by the parties on appeal.

11 *State v. Del. Bd. Of Parole*, 2014 WL 595870, *1 (Del.Super. Jan. 24, 2014) [hereinafter "Order"].

12 See *id.*; see also *Owens v. State*, 2010 WL 8250841 (Del.Super. Dec. 6, 2010); *State v. Clyne*, 2002 WL 1652149 (Del.Super. July 22, 2002). We note that the record indicates that the automated sentencing software that has been used for the Superior Court for many years reflects this long-standing understanding and automatically generates the notation "NON-TIS" for DUI offenses. See, e.g., App. to Op. Br. at 10.

13 The Superior Court stated in an office conference with the State and Barnes' counsel that it did not think the sentence was illegal because "[the court's] reading of ... the case law and [its] personal experience on SENTAC ... [is that] felony DUIs have not been considered TIS sentences.... The felony DUIs came into existence six years after the TIS came into effect." App. to Op. Br. at 82.

14 The first petition was captioned as a criminal case and was directed at Barnes. The second, filed several weeks later, was captioned as a civil action and directed at the Board of Parole.

The Board of Parole submitted a letter in response to the first writ filed by the State, stating that it did not oppose the State's position: "[T]he Board has reviewed the motion filed by the [State] in this case. Following review and consultation with counsel, the Board has decided that it does not oppose this motion." Supp.App. to Op. Br. at 8. In this appeal, however, the Board of Parole submitted a letter stating that it "has always maintained that [the TIS Act] amended Title 11 and Title 16 offenses only.... [and] that it does maintain authority over any/all Title 21 cases." App. to Cross-Appellee's Ans. Br. at 1.

15 See Order. The Superior Court also formally denied the State's motion to correct an illegal sentence as meritless. See Order at *2 ("The State ... filed an emergency motion to correct an illegal sentence, which is an inappropriate motion because the sentence was not illegal. That motion is denied as meritless.").

16 Order at *2 (citing *State v. Clyne*, 2002 WL 1652149, *4 n. 6 (Del.Super. July 22, 2002)).

17 See *State v. Barnes*, No. 52, 2014 (Order) (Del. Nov. 13, 2014) ("[W]e believe that the State is entitled to maintain its cross-appeal under 10 *Del. C.* § 9902(e)1 because its cross-appeal asserts that the Superior Court erred in denying its motion to correct an illegal sentence and that motion in essence challenged the underlying judgment of conviction. Although defendant Barnes's appeal is ambiguous as to which order it challenges, it involves the same issue, and in challenging the grant of mandamus, it also contested the legality of the original judgment of conviction. And because the substantive issue the State raises—whether a felony DUI offense is covered by the Truth In Sentencing Act—is very important, this is a fitting matter for review under 10 *Del. C.* § 9903. Indeed, the substantive issue is important enough that it should be addressed *en banc* after full briefing on the merits."); see also 10 *Del. C.* § 9902(e) ("The State

shall have an absolute right to appeal to an appellate court any ruling of a lower court on a question of law or procedure adverse to the State in any case in which the accused was convicted and appeals from the judgment, except that the decision or result of the State's appeal shall not affect the rights of the accused unless the accused, on his or her appeal, is awarded a new trial or a new sentencing hearing. Once the State perfects its cross-appeal, the appellate court shall review and rule upon the questions presented therein regardless of the disposition of the defendant's appeal."); 10 *Del. C.* § 9903 ("The State may apply to the appellate court to permit an appeal to determine a substantial question of law or procedure, and the appellate court may permit the appeal in its absolute discretion.... [and] the court may require the Public Defender of this State to defend the appeal and to argue the cause.").

18 See Cross-Appellee's Ans. Br. at 13-16.

19 See 11 *Del. C.* § 233 defines a "crime or offense" as "an act or omission forbidden by a statute of this State and punishable upon conviction by: (1) Imprisonment; or (2) Fine...." Because felony DUI offenses are punishable by both imprisonment and fines, they are crimes under the Title 11. See 21 *Del. C.* § 4177.

20 As Barnes points out, the TIS Act itself is titled "An Act to Amend Title 11 and Title 16 to Provide for Truth in Sentencing."

21 See *Snyder v. Andrews*, 708 A.2d 237, 241 (Del. 1998).

22 See *Freeman v. X-Ray Assocs., P.A.*, 3 A.3d 224, 227 (Del.2010) (citing *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1246 (Del. 1985)) ("We must give effect to the legislature's intent by ascertaining the plain meaning of the language used.").

23 See, e.g., *Harvey v. City of Newark*, 2010 WL 4240625, at *6 ("[I]t would seem rare indeed to discover that a practical construction that had been relied upon for many years was based on an entirely implausible reading of the text at issue.").

24 2A *Sutherland Statutory Construction* § 45:2 (7th ed.).

25 Because the TIS Act applies to "all crimes," and felony DUI offenses are crimes under the Code, the State's argument that the TIS Act eliminated parole for felony DUI offenses is reasonable. See TIS Act § 4; 11 *Del. C.* § 233; 21 *Del. C.* § 4177. Such a reading would also be consistent with the policy goal of the TIS Act, "[t]o achieve truth in sentencing by assuring that the public, the State and the Court will know that the sentence imposed by the Court will be served by the defendant; and that, the defendant will know what the actual effect of the sentence will be," and accord with the General Assembly's recent amendments to § 4177, which demonstrate an intent to treat felony DUIs as serious crimes. See TIS Act § 1A; 77 Del. Laws, ch. 162 (amending 21 *Del. C.* § 4177); 77 Del. Laws, ch. 167 (same).

26 11 *Del. C.* § 4205(j) (emphasis added).

27 See 11 *Del. C.* § 103 (stating that Title 11 sets the punishment for offenses contained within Title 11 and also for "any offense defined in a statute other than this Criminal Code" "unless otherwise expressly provided, or unless the context otherwise requires.").

28 Section 4177 provides for a five-year maximum sentence for class E felony DUIs, and also includes detailed provisions addressing the appropriate sentence for DUIs of all classes. See, e.g., 21 *Del. C.* § 4177(d)(5) ("For a fifth offense occurring any time after 4 prior offenses, be guilty of a class E felony, be fined not more than \$10,000 and imprisoned not less than 3 years nor more than 5 years.").

29 See *id.*

30 See *State v. Clyne*, 2002 WL 1652149, *4 n. 6 (Del.Super. July 22, 2002) ("Driving Under the Influence of Alcohol is not encompassed by Delaware's Truth In Sentencing ... Act. Petitioner's sentence, therefore, is a non-TIS sentence."); *Owens v. State*, 2010 WL 8250841, *2 (Del.Super. Dec. 6, 2010) (citing *Clyne* for the proposition that "driving under the influence ... is a non-TIS sentence").

31 In *Clyne*, the Superior Court determined that because the TIS Act did not apply to Title 21 offenses, the amendments

that reduced good time credit for offenders did not apply. Accordingly, the Superior Court referred to “old law”—that is, the provisions of Title 11 that had been in effect before the TIS Act was enacted—to compute the defendant’s good time credits for his felony DUI offense. 2002 WL 1652149, *4 n. 6 (Del.Super. July 22, 2002). In 2010, the General Assembly amended Title 11 to ensure that the TIS Act provisions for good time credits would be consistently applied to all offenses, other than a life sentence, thus overruling *Clyne*. See Order at *3–4. This amendment formed the basis for the Superior Court’s decision to refer to the TIS Act when allocating good time credit for Barnes’ prison sentence for his fifth felony DUI, even after it had determined that the offense was not subject to the TIS Act. *Id.*

32 11 Del. C. §§ 4346; 4354.

33 In this appeal, the Board of Parole submitted a letter stating that it “has always maintained that [the TIS Act] amended Title 11 and Title 16 offenses only [and] that it does maintain authority over any/all Title 21 cases.” App. to Cross–Appellee’s Ans. Br. at 1. The State does not contest the Board’s rendition of history, other than pointing out that it cannot verify it because the Board of Parole does not maintain records of the types of applications it grants.

34 See 2014 SENTAC Benchbook at 88 (“Title 21 and Title 23 Offenses. These offenses are not covered by Truth in Sentencing but are provided as a reference for commonly prosecuted motor vehicle offenses: ... Driving a Vehicle While Under the Influence....”), available at http://courts.delaware.gov/superior/pdf/benchbook_2013.pdf.

35 The Delaware Sentencing Accountability Commission (SENTAC), State of Delaware, available at <http://cjc.delaware.gov/sentac/sentac.shtml>.

36 11 Del. C. §§ 6580(b); 6581(c).

37 See, e.g., *Council 81, American Fed’n of State, County and Municipal Employees v. Delaware*, 293 A.2d 567, 571 (Del.1972) (“In seeking legislative intent, we give due weight to the practices and policies existing at the time [the statute] was enacted.... A long-standing, practical, and plausible administrative interpretation of a statute of doubtful meaning will be accepted by this Court as indicative of legislative intent.”); cf. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) (“We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.”) (internal citations omitted); *Vassallo v. Haber Electric Co.*, 435 A.2d 1046 (Del.1981) (“An administrative agency’s construction of regulations enacted by it and statutes it administers are given great weight by the courts, provided said construction is not clearly erroneous.”); *State Farm Mut. Auto Ins. Co. v. Mundorf*, 659 A.2d 215 (Del.1995) (“Although the interpretation of a regulation is ultimately a question of law for a court to decide, substantial weight and deference is accorded to the construction of a regulation enacted by an agency which is also charged with its enforcement.”); *Division of Social Services of Dept. of Health and Social Services v. Burns*, 438 A.2d 1227 (Del.1981) (“This deference is reflected in the standard of judicial review that an administrative agency’s interpretation of its rules and regulations will not be reversed unless clearly erroneous.”).

38 See, e.g., *Vegso v. Bd. of Trustees of the Employees Ret. Sys. of New Castle County*, 1986 WL 9019, at *4 (Del.Super. Aug. 20, 1986) (where legislation is “doubtful or ambiguous in its terms, a practical administrative interpretation over a period of time, if founded upon plausibility, will be accepted by the courts as indicative of the legislative intent”) (citing *Delaware v. Mayor of Wilmington*, 163 A.2d 258, 264 (Del.1960)); *J.N.K., LLC v. Kent County Levy Court*, 974 A.2d 197, 209 (Del. Ch.2009) (citing *Delaware v. Mayor of Wilmington* and holding that deferring to a county’s interpretation of its own code is proper when the interpretation is “long-standing”); *Green v. Sussex County*, 668 A.2d 770, 775 (Del.Super.1995) (citing *Delaware v. Mayor of Wilmington* for the same proposition); *McCusker v. Ret. Comm. of the City of Dover*, 1986 WL 13993, at *3 (Del.Super. Nov. 21, 1986) (same); 2A *Sutherland Statutory Construction* § 45:2 (7th ed. 2010) (same).

39 See *Seinfeld v. Verizon Commc’ns, Inc.*, 909 A.2d 117, 124 (Del.2006) (“Under the doctrine of *stare decisis*, settled law is overruled only for urgent reasons and upon clear manifestation of error.”) (internal quotations omitted); *Oscar George, Inc. v. Potts*, 115 A.2d 479, 481 (Del.1955) (“*stare decisis* means that when a point has been once settled by decision it forms a precedent which is not afterwards to be departed from or lightly overruled or set aside....”); *Harvey v. City of Newark*, 2010 WL 4240625, *6 (Del. Ch. Oct. 20, 2010) (“When the interpretation of a statute has been the subject of litigation and the court has read the statute in a certain way, that interpretation should not be lightly set aside

by future courts.”); *cf.* 3 Sutherland *Statutory Construction* § 61:1 (7th ed.) (citing *Shaw v. Merchants' Nat. Bank*, 101 U.S. 557, 25 L.Ed. 892 (1879), for the proposition that courts should interpret statutes to make “the least, rather than the most, change in common law”); *Johnson v. Mathews*, 539 F.2d 1111 (8th Cir.1976) (“Ambiguities must be resolved in favor of that interpretation which affords a full opportunity for equity courts to exercise their traditional practices.”).

40 *Landgraf v. USI Film Products*, 511 U.S. 244, 265, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994); *see also Oscar George, Inc.*, 115 A.2d at 481 (*stare decisis*'s “support rests upon the vital necessity that there be stability in our courts in adhering to decisions deliberately made after careful consideration”); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (noting the importance, in reevaluating the rule set forth in *Roe v. Wade*, of “whether the rule’s limitation on state power could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it”); *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) (*stare decisis* is “the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process”); *United States v. Title Ins. Co.*, 265 U.S. 472, 485, 44 S.Ct. 621, 68 L.Ed. 1110 (1924) (noting the importance of citizens’ ability to rely on settled law, and the court’s inclination to avoid causing “injurious results” to those who have relied on that law in the event that the court alters it); *see also John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139, 128 S.Ct. 750, 169 L.Ed.2d 591 (2008) (“[O]ur reexamination of well-settled precedent could nevertheless prove harmful.... To overturn a decision settling one ... matter simply because we might believe that decision is no longer ‘right’ would inevitably reflect a willingness to reconsider others. And that willingness could itself threaten to substitute disruption, confusion, and uncertainty for necessary legal stability.”); Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 289–90 (1990).

41 *See, e.g., Skidmore v. Swift & Co.*, 323 U.S. 134, 137–40, 65 S.Ct. 161, 89 L.Ed. 124 (1944) (holding that agency interpretations of ambiguous statutes are entitled to respect by courts to the extent that they have persuasive power based on consistency, factual basis, and expertise); *Helvering v. Griffiths*, 318 U.S. 371, 403, 63 S.Ct. 636, 87 L.Ed. 843 (1943) (deferring to an administrative interpretation of the Internal Revenue Code that had been held and enforced by the relevant government agencies for seven years because a contrary result would create hardship for taxpayers, unsettle tax administration, and subject the government agencies to many demands that the Court could not “anticipate and provide for”).

42 *Cf. Basic v. U.S.*, 446 U.S. 398, 100 S.Ct. 1747, 64 L.Ed.2d 381 (1980) (noting that the Court’s holding is consistent with “the canons of statutory construction that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity”); *State v. Haskins*, 525 A.2d 573, 576 n. 3 (Del.Super. 1987) (“[W]hen a criminal statute is ambiguous, it should be construed against the State and read in favor of the defendant.”), *rev’d on other grounds*, 540 A.2d 1088 (Del. 1988); 3 Sutherland *Statutory Construction* § 59.03 (stating the general principle that ambiguous penal statutes are strictly construed against the government).

43 *Harvey v. City of Newark*, 2010 WL 4240625, at *7.

44 *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488, 60 S.Ct. 982, 84 L.Ed. 1311 (1940); *see also IBP, Inc. v. Alvarez*, 546 U.S. 21, 32, 126 S.Ct. 514, 163 L.Ed.2d 288 (2005) (“Considerations of *stare decisis* are particularly forceful in the area of statutory construction, especially when a unanimous interpretation of a statute has been accepted as settled law for several decades.”); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977) (“[W]e must bear in mind that considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court’s interpretation of its legislation.”); *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 260, 128 S.Ct. 1020, 169 L.Ed.2d 847 (2008) (Roberts, C.J., concurring) (“In matters of statutory interpretation, where principles of *stare decisis* have their greatest effect, it is important that we not seem to decide more than we do.”); *Hilton v. South Carolina Public Railways Com’n*, 502 U.S. 197, 202, 112 S.Ct. 560, 116 L.Ed.2d 560 (1991) (“Congress has had almost 30 years in which it could have corrected our decision in *Parden* if it disagreed with it, and has not chosen to do so. We should accord weight to this continued acceptance of our earlier holding. *Stare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision....”); *cf. Bob Jones University v. United States*, 461 U.S. 574, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983); *Grove City College v. Bell*, 465 U.S. 555, 568, 104 S.Ct. 1211, 79 L.Ed.2d 516 (1984); 82 C.J.S. *Statutes* § 466 (“A long-standing administrative construction of a statute is accorded great weight in the determination of legislative intent because the legislature is presumed to have acquiesced in that construction if it has not amended the statute.”).

45 The General Assembly ultimately tabled H.B. 415, which would have amended the TIS Act to state: “All Title 21 felony offenses shall be covered by this Act and any amendments thereto.” App. to Answering Br. at 135. The record does not

indicate why the Bill was tabled.

- 46 See *United States v. Rutherford*, 442 U.S. 544, 554 n. 10, 99 S.Ct. 2470, 61 L.Ed.2d 68 (1979) (“[O]nce an agency’s statutory construction has been ‘fully brought to the attention of the public and the Congress,’ and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.”) (quoting *Apex Hosiery*, 310 U.S. at 489, 60 S.Ct. 982).

116 A.3d 1232
Supreme Court of Delaware.

April Milligan, Defendant Below–Appellant,
v.
State of Delaware, Plaintiff Below–Appellee.

No. 173, 2014

Submitted: May 6, 2015

Decided: June 10, 2015

Synopsis

Background: Defendant was convicted in the Superior Court, Sussex County, of driving under influence (DUI) and improper lane change. Defendant appealed.

Holdings: The Supreme Court, Vaughn, J., held that:

^[1] Confrontation Clause did not require State to present live testimony of each person who exercised custody or control over defendant’s blood sample, for purposes of establishing chain of custody of same;

^[2] failure by director of state police crime lab to sign Chain of Possession Log when removing defendant’s sealed blood sample from refrigerator for testing did not render blood analysis report inadmissible due to break in chain of custody;

^[3] director’s inability to recall her analysis of defendant’s blood sample went to weight of evidence of blood analysis report, not admissibility;

^[4] wrong date noted on autosampler loading list for blood kit, which was dated one day after analysis was actually performed, did not render blood analysis report inadmissible; and

^[5] director’s inability to recall whether she or another technician had prepared control samples did not render blood test results unreliable.

Affirmed.

West Headnotes (12)

^[1] **Criminal Law**
☛ Reception and Admissibility of Evidence

The Supreme Court reviews a trial court’s ruling admitting or excluding evidence for abuse of discretion.

Cases that cite this headnote

^[2] **Criminal Law**
☛ Rulings as to Evidence in General

If the Supreme Court conclude that there was an abuse of discretion with respect to an evidentiary ruling, the Court must then determine whether there was significant prejudice to deny the accused of his or her right to a fair trial.

Cases that cite this headnote

^[3] **Criminal Law**
☛ Review De Novo

Alleged constitutional violations relating to a trial court’s evidentiary rulings are reviewed de novo.

Cases that cite this headnote

^[4] **Criminal Law**
☛ Use of documentary evidence

Confrontation Clause did not require State to present live testimony of each person who exercised custody or control over defendant’s blood sample, for purposes of establishing chain of custody of same, in trial for driving under influence (DUI). U.S. Const. Amend. 6; 21 Del.

Code § 4177(h)(3).

1 Cases that cite this headnote

^{15]} **Criminal Law**
☛Availability of declarant

Testimonial statements against a defendant are inadmissible, under the Confrontation Clause, unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. U.S. Const. Amend. 6.

Cases that cite this headnote

^{16]} **Criminal Law**
☛Out-of-court statements and hearsay in general

Before deciding whether an out-of-court statement violates the Confrontation Clause, it must first be determined whether a statement is testimonial in nature. U.S. Const. Amend. 6.

Cases that cite this headnote

^{17]} **Criminal Law**
☛Right of Accused to Confront Witnesses

The Sixth Amendment Confrontation Clause does not require each and every individual who possessed the evidence to provide live testimony in order to establish chain of custody. U.S. Const. Amend. 6.

2 Cases that cite this headnote

^{18]} **Automobiles**
☛Identification and integrity of sample

Failure by director of state police crime lab to sign Chain of Possession Log when removing defendant's sealed blood sample from refrigerator for testing did not render results of blood test inadmissible due to break in chain of custody, in trial for driving under influence (DUI), where director testified that she removed blood kit from crime lab refrigerator and that seal was intact. 21 Del. Code §§ 4177(h)(3), 4331(3).

Cases that cite this headnote

^{19]} **Automobiles**
☛Identification and integrity of sample

Blood analysis report was not inadmissible in trial for driving under influence (DUI) due to alleged break in chain of custody of blood kit containing defendant's blood sample, based on defendant's claim that blood kit could not have been sealed when state police crime lab director retrieved it from lab refrigerator because chemical test report signed by lab employee who received it was located inside sealed blood kit and could only have been accessed after seal was broken, where director testified that, after she opened kit, she would permit employee who received kit to transpose information to Chemical Test Report. 21 Del. Code § 4177(h)(3).

Cases that cite this headnote

^{110]} **Automobiles**
☛Evidence of Sobriety Tests

Inability of state police crime lab director to recall her analysis of defendant's blood sample went to weight of evidence of blood analysis report, not admissibility, in trial for driving under influence (DUI).

Cases that cite this headnote

[11] **Automobiles**

☛Conduct and Proof of Test; Foundation or Predicate

Wrong date noted on autosampler loading list for blood kit containing defendant's blood sample, which was dated one day after analysis was actually performed, did not render blood analysis report inadmissible, in trial for driving under influence (DUI); state crime lab director testified that list was prepared by laboratory technician prior to start of analysis, that technician who prepared list only worked until 3 p.m. and would often prepare lists that were to be run next day, and that, in defendant's case, technician likely prepared list believing that director would not be using samples until following day, and that, after technician left for day, however, she decided to begin sample run.

Cases that cite this headnote

[12] **Automobiles**

☛Reliability of particular testing devices

Inability of state police crime lab director to recall whether she or another technician had prepared control samples used to calibrate chromatograph used in performing analysis of defendant's blood sample did not render results of blood test unreliable, in trial for driving under influence (DUI); although director may not have personally prepared control samples, she reviewed results of testing and found them to be reliable.

Cases that cite this headnote

*1233 Court Below: Superior Court of the State of Delaware in and for Sussex County, No. 1310009696 Upon appeal from the Superior Court. **AFFIRMED.**

Attorneys and Law Firms

Michael R. Abram, Esquire, Law Office of Michael R.

Abram, Georgetown, Delaware, for Appellant.

*1234 Kathryn J. Garrison, Esquire, Department of Justice, Georgetown, Delaware, for Appellee.

Before HOLLAND, VALIHURA, and VAUGHN, Justices.

Opinion

VAUGHN, Justice:

Defendant–Below/Appellant April Milligan appeals her convictions of Driving Under the Influence and Improper Lane Change. Milligan raises two claims on appeal. First, she claims that the Superior Court erred by admitting documentation relating to the chain of custody in the absence of live testimony, which she contends violated her right to confront her accusers as guaranteed by the Sixth Amendment to United States Constitution¹ and Section 7 of the Delaware Constitution.² Specifically, she argues that in order for a blood test to be admitted, all of those who took possession of the blood sample, regardless of whether it was packaged at the time, must testify at trial. Second, Milligan claims that the Superior Court abused its discretion by allowing the State to introduce the results of her blood draw without first establishing a proper foundation. We find no merit to these claims and affirm.

I. FACTUAL AND PROCEDURAL HISTORY

On September 12, 2013, a motorist called 911 after noticing a split telephone pole, plastic debris on the side of the road, and a damaged car in the middle of a nearby field. Paramedics and Trooper Jordan Rollins responded to the call. After being extricated from the car, Milligan was transported to Nanticoke Memorial Hospital. Trooper Rollins secured a search warrant for a blood draw and watched as a phlebotomist, Lewis Purcell, drew Milligan's blood.

Once the blood draw was complete, Trooper Rollins transported the blood kit to Troop 5, where he sealed it and put it in an evidence refrigerator. The kit was transported to the Delaware State Police Crime Lab on September 18, 2013, where it was received by Deborah Louie. At the lab, the blood kit was retrieved by Juliann Willey, the crime lab director, so that she could perform an analysis of the blood. Willey signed the Chemical Test Report located inside the blood kit, but did not sign the Chain of Possession Log located on the outside of the kit.

Willey did, however, testify that the blood kit was sealed when she took possession of it. Milligan's blood test revealed a blood alcohol content ("BAC") of 0.15 percent.

Prior to testing the blood sample, control samples were prepared and run through the chromatograph to ensure the machine was working properly.³ Willey testified that these samples may be prepared by any chemist or lab technician in *1235 the laboratory, and that she could not remember whether she prepared the control samples used in Milligan's test.⁴ She did, however, testify that she analyzed the results to ensure that they were reliable.

In November 2013, Milligan was charged by indictment with a third offense of Driving Under the Influence, Failure to Have Insurance Card in Possession, and Improper Lane Change. At trial, the State introduced the blood analysis report prepared by Willey. The State also introduced two other documents in order to prove the blood sample's chain of custody: (1) the Chain of Possession Log, which was located on the outside of the blood kit, and (2) the Chemical Test Report,⁵ which was located inside the blood kit (collectively, the "Documents"). Trooper Rollins, Willey, and the phlebotomist that drew Milligan's blood also testified regarding the blood sample's chain of custody. At the end of the one-day jury trial, Milligan was found guilty of Driving Under the Influence and Improper Lane Change. This appeal followed.

II. DISCUSSION

¹¹ ¹² ¹³ We review a trial court's ruling admitting or excluding evidence for abuse of discretion.⁶ "If we conclude that there was an abuse of discretion, we must then determine whether there was significant prejudice to deny the accused of his or her right to a fair trial."⁷ Alleged constitutional violations relating to a trial court's evidentiary rulings are reviewed *de novo*.⁸

Delaware's Chain of Custody Law

¹⁴ "In general, Delaware's chain of custody law requires that the State authenticate the evidence proffered and eliminate the possibilities of misidentification and adulteration, not to an absolute certainty, but simply as a matter of reasonable probability."⁹ Procedures for establishing chain of custody in a Driving Under the Influence ("DUI") case are governed by 10 *Del. C.* § 4331

and 21 *Del. C.* § 4177(h)(3). 10 *Del. C.* § 4331(1) defines "chain of custody" to include:

[i] the seizing officer; [ii] the packaging officer, if the packaging officer is not also the seizing officer; and [iii] the forensic toxicologist or forensic chemist or other person who actually touched the substance and not merely the outer sealed package in which the substance *1236 was placed by the law-enforcement agency before or during the analysis of the substance.¹⁰

21 *Del. C.* § 4177(h)(3) sets forth chain of custody requirements specific to the charge of DUI:

For purposes of establishing the chain of physical custody or control of evidence defined in this section which is necessary to admit such evidence in any proceeding, a statement signed by each successive person in the chain of custody that the person delivered it to the other person indicated on or about the date stated is *prima facie* evidence that the person had custody and made the delivery stated, without the necessity of a personal appearance in court by the person signing the statement, in accordance with the same procedures outlined in § 4331(3) of Title 10.¹¹

In this appeal, Milligan does not dispute that the State presented all witnesses necessary to establish chain of custody under Delaware law. Instead, she argues that Delaware's chain of custody law is unconstitutional, as it interfered with her right to confront all of those who took possession of her blood sample.

The Sixth Amendment Confrontation Clause

The Sixth Amendment to the United States Constitution, which applies to the states through the Fourteenth Amendment,¹² provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."¹³

¹⁵ ¹⁶ In *Crawford v. Washington*, the United States

Supreme Court held that the Confrontation Clause guarantees a defendant the right to confront all of those who bear testimony against him.¹⁴ Testimonial statements against a defendant are “inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination.”¹⁵ Thus, before deciding whether a statement violates the Confrontation Clause, it must first be determined whether a statement is testimonial *1237 in nature. The *Crawford* Court defined “testimony” as “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact,”¹⁶ and provided the following basic contours of testimonial statements:

[E]x parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially, extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions, statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.¹⁷

Five years after *Crawford* was decided, the Supreme Court considered the Confrontation Clause implications of admitting sworn certificates of forensic analysts. In *Melendez-Diaz v. Massachusetts*, the trial court allowed certified lab reports indicating the weight and identity of cocaine to be admitted into evidence.¹⁸ The defendant was convicted and his convictions were affirmed by the state appeals courts.¹⁹ The Supreme Court, by a 5–4 vote, vacated the defendant’s conviction, with the majority determining that the “certificates of analysis” were “incontrovertibly a ‘solemn declaration or affirmation made for the purpose of establishing or proving some fact,’ ” and were thus testimonial in nature.²⁰ The Court observed that certificates of analysis were functionally identical to live in-court testimony, doing “ ‘precisely what a witness does on direct examination,’ ”²¹ and that the analysts who authored them were witnesses for Sixth Amendment purposes.²² The Court, citing its decision in *Crawford*, held that “[a]bsent a showing that the analysts were unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to be confronted with the analysts at trial.”²³

The Court was also careful, however, to reject the notion that the prosecution must call everyone whose testimony is relevant to establishing the chain of custody, the authenticity of the sample, or the accuracy of the testing device used to perform the analysis. The Court stated:

*1238 [W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution’s case. While the dissent is correct that “[i]t is the obligation of the prosecution to establish the chain of custody, ...” this does not mean that everyone who laid hands on the evidence must be called. As stated in the dissent’s own quotation, ... “gaps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility.” It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (if the defendant objects) be introduced live. Additionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records.²⁴

The Supreme Court once again addressed the scope of the Confrontation Clause in *Bullcoming v. New Mexico*.²⁵ In *Bullcoming*, the defendant was on trial for driving under the influence, and objected to the prosecution’s attempt to admit a blood alcohol content analysis report through the testimony of an analyst who did not perform or observe the defendant’s blood test.²⁶ Following the reasoning set forth in *Melendez-Diaz*, the Court held that the admittance of “a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification,” violates a defendant’s rights under the Confrontation Clause.²⁷

Although the BAC report in *Bullcoming* was unsworn, the Court found it to be testimonial because it was created solely for an evidentiary purpose.²⁸ The Court emphasized that the forensic laboratory report at issue did more than merely report a “machine-generated number;”²⁹ the report verified that the lab had received the blood sample intact with the seal unbroken, that the testing analyst performed a particular test in accordance with a specific protocol, and that nothing affected the integrity of the sample or the validity of the analysis.³⁰ The Court concluded that these representations, “relating to past events and human actions not revealed in raw, machine-produced data, are [meant] for cross-examination.”³¹

*1239 In a concurring opinion, Justice Sotomayor emphasized the narrow scope of the majority’s decision and reaffirmed the proposition that not all of those in the chain of custody are required to provide live testimony. In so doing, Justice Sotomayor cited the relevant language of *Melendez-Diaz* and stated: “[Not] every person noted on

the BAC report must testify.”³²

Most recently, in *Martin v. State*, this Court had occasion to address the scope of the Confrontation Clause in light of the Supreme Court’s decisions in the aforementioned cases.³³ In *Martin*, the Superior Court allowed the prosecution to admit a blood analysis report through the testimony of laboratory manager who certified the report but neither observed nor performed the testing.³⁴ On appeal, we held that the trial court’s decision to admit the report without the testing analyst’s testimony violated the defendant’s Sixth Amendment confrontation rights.³⁵ We reasoned:

[L]ike the testifying analyst in *Bullcoming*, [the laboratory manager] merely reviewed [the testing analyst’s] data and representations about the test, while having knowledge of the laboratory’s standard operating procedures, without observing or performing the test herself. Particularly here where the State presented critical evidence to a jury, the defendant had a right guaranteed by the Sixth Amendment to confront the analyst who performed the test in order to determine her proficiency, care, and veracity.³⁶

The Admission of the Documents Did Not Violate the Confrontation Clause

Milligan argues that the introduction of the Documents in accordance with 21 Del. C. § 4177(h)(3)³⁷ violated her rights under the Sixth Amendment Confrontation Clause. Specifically, she contends that the admittance of the Documents, which purported to show the chain of possession of her blood sample, conflicted with the United States Supreme Court’s decision in *Melendez–Diaz*.³⁸ She argues that every individual who possessed her blood sample was required to provide live in-court testimony.³⁹

¹⁷We find Milligan’s first claim to be unpersuasive. First, and most obvious, Milligan’s argument contradicts the plain language of *Melendez–Diaz*, which provides that not every individual who may have relevant testimony for the purpose of establishing chain of custody must appear in person as part of the prosecution’s case.⁴⁰ This language, which is specifically *1240 cited by Milligan,

unambiguously states that not everyone who “laid hands” on the evidence need testify to satisfy the Confrontation Clause.⁴¹ We believe Milligan’s claim falls squarely within the scope of this rule.⁴² In short, Milligan’s reading of *Melendez–Diaz* directly conflicts with the very language that she cites.⁴³ The Sixth Amendment Confrontation Clause does not require each and every individual who possessed the evidence to provide live testimony in order to establish chain of custody.

Additionally, *Melendez–Diaz* and the other cases relied upon by Milligan are factually distinguishable from the case at bar and provide minimal support for her contention that her Confrontation Clause rights were violated. *Melendez–Diaz*, *Bullcoming*, and *Martin* all addressed situations in which a forensic report was admitted to prove evidentiary facts at issue other than, or in addition to, chain of custody.⁴⁴ It was on those separate grounds that the plaintiffs’ Confrontation Clause challenges focused. For example, in *Melendez–Diaz*, the reports were admitted to prove the weight and identity of the cocaine, and it was on those grounds that the plaintiff’s claimed his constitutional *1241 rights were being violated.⁴⁵ Similarly, in *Martin*, the report was entered into evidence to show that the defendant tested positive for phencyclidine.⁴⁶ Here, the Documents, as conceded by Milligan, were offered into evidence for the sole purpose of proving chain of custody.⁴⁷

Moreover, unlike those cases, which involved one or more absent certifying or testing analysts, the testing and certifying analyst in this case testified and was subject to cross-examination by the defense. Willey explained in detail the process used to test Milligan’s blood and testified to the results of the analysis at trial, where the defense was provided a full opportunity to cross-examine her. For these reasons, we reject Milligan’s first claim and find that her rights under the Confrontation Clause were not violated.

The Trial Court Did Not Abuse Its Discretion by Admitting the Blood Test Results

Apart from her attack on the constitutionality of the chain of custody statute, Milligan claims that the trial court abused its discretion by allowing the results of her blood test to be admitted into evidence before a proper foundation had been established. Milligan points to the following incidents to support her argument: Willey’s failure to sign the Chain of Possession Log; Louie’s signing of the Chemical Test Report, which was located inside the sealed blood kit; Willey’s failure to specifically

recall testing Milligan's blood sample; the incorrect date on the autosampler loading list; and the possibility that control samples may have been created by a technician other than Willey. We will address each of these issues in turn.

¹⁸First, Milligan argues that Willey's failure to sign the Chain of Possession Log resulted in a broken chain of custody. The Chain of Possession Log shows that the blood kit was received at the crime lab by Louie on September 18, 2013, at 1:45 p.m. The next required signature on the Chain of Possession Log would have been Willey's, which would have been required after removing the blood kit from the evidence refrigerator for testing. Willey did not sign the Chain of Possession Log, but she did testify in court that she removed the blood kit from the crime lab evidence refrigerator and that the seal was intact. Thus, Milligan's argument that Willey did not sign the Chain of Possession Log is inconsequential.

¹⁹Second, Milligan argues that the blood kit could not have been sealed when Willey received it because the Chemical Test Report, which Louie signed, was located inside the sealed blood kit and could only have been accessed after the seal was broken. But Willey explained in court that after she opened the kit, she would permit the employee who received the kit (here, Louie), to transpose information to the Chemical Test Report. This plausible explanation was accepted by the trial court, and Milligan has failed to put forth any meritorious reason as to why it should not be accepted on appeal. Thus, Milligan's second argument fails.

¹⁰Third, Milligan argues that the blood analysis report should not have been admitted into evidence because Willey did not specifically recall her analysis of the blood sample. In *Demby v. State*, the testimony of two police officers relating to *1242 chain of custody "reflected an incomplete recollection of the events that transpired following their receipt" of a controlled substance from the defendant.⁴⁸ There, this Court stated:

We have never interpreted [Delaware's chain of custody law] as requiring the State to produce evidence as to every link in the chain of custody. Rather, the State must simply demonstrate an orderly process from which the trier of fact can conclude that it is improbable that the original item has been tampered with or exchanged.⁴⁹

We concluded that "any inconsistency in the authenticity testimony presented by the State in this case affected the weight and not the admissibility of the evidence

presented."⁵⁰

Similar to the police officers in *Demby*, Willey's incomplete recollection of events would affect the weight, and not the admissibility of the evidence. Thus, the trial court did not abuse its discretion by allowing the blood analysis into evidence despite Willey's inability to specifically recall testing Milligan's blood sample.

¹¹Fourth, Milligan argues that the wrong date on the autosampler loading list clouded the credibility of the test results. Willey testified that she performed the blood analysis on September 18, 2013. The date on the autosampler loading list was September 19, 2013. Willey testified that the list is prepared by a laboratory technician prior to the start of the analysis. When asked why the list bore the wrong date, Willey explained that the technician who prepared the list only worked until 3 p.m. and would often prepare lists that were to be run the next day. Willey testified that in this case, the technician likely prepared the list believing that Willey would not be using the samples until the next day. After the technician left for the day, however, Willey decided to begin the sample run.

Willey provided a reasonable explanation for the erroneous date and Milligan has failed to offer any evidence that the mistake affected the results of the test or prejudiced her in any way. Accordingly, the trial court's decision to admit the blood results despite the incorrect date was not an abuse of discretion.

¹²Finally, Milligan argues that the validity of the blood test results are questionable because Willey could not recall whether she or another technician had prepared the control samples used to calibrate the chromatograph. This argument is also meritless. Although Willey may not have personally prepared the control samples, she reviewed the results of the testing and found them to be reliable.

For all of the preceding reasons, we conclude that a proper foundation was established for the admission of Milligan's blood test results.

III. CONCLUSION

The judgment of the Superior Court is **AFFIRMED**.

All Citations

116 A.3d 1232

Footnotes

- 1 In pertinent part, the Sixth Amendment to the United States Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him...." U.S. Const. amend. VI.
- 2 In pertinent part, article I, section 7 of the Delaware Constitution states that "[i]n all criminal prosecutions, the accused hath a right ... to meet the witnesses in their examination face to face." Del. Const. art. I, § 7. Because Milligan does not argue that the Delaware Constitution affords greater protection than the Sixth Amendment, we limit our analysis to the U.S. Constitution. See *Stafford v. State*, 59 A.3d 1223, 1231 (Del.2012) (citations omitted).
- 3 "One of the more effective types of instruments used for modern chemical analyses is the *chromatograph*. A chromatograph is capable of *separating* multiple contaminants or *analytes* that may be present in the same sample, thus preventing potential interferences in identifying and detecting the compounds of interest." *Env. Sci. Deskbook* § 3:43 (2015) (emphasis in original).
- 4 The record is unclear as to who prepared the samples used in Milligan's blood test.
- 5 The Chemical Test Report contained the following information: (1) the name of the test subject (Milligan), (2) the type of case (DUI), (3) the type of sample (blood), (4) the person taking sample (Lewis Purcell), (5) the investigating officer (Trooper Rollins), (6) where the sample was received from (Delaware State Police Crime Lab), (7) who received the sample (Deborah Louie), the date and time taken, (8) the kit number, (9) the expiration date, (10) the results of the analysis (0.15 BAC), (11) the police agency or Troop (Troop 5), (12) the name of the witness, (13) the complaint # , (14) the citation # , and (15) the signature of the analyst (Willey). (A28)
- 6 *Fuller v. State*, 860 A.2d 324, 329 (Del.2004) (citing *Howard v. State*, 549 A.2d 692, 693 (Del.1988)).
- 7 *Johnson v. State*, 878 A.2d 422, 425 (Del.2005) (citing *Seward v. State*, 723 A.2d 365, 372 (Del.1999)).
- 8 *Smith v. State*, 913 A.2d 1197, 1234 (Del. 2006) (citing *Flonnory v. State*, 893 A.2d 507, 515 (Del. 2006)).
- 9 *Demby v. State*, 695 A.2d 1127, 1131 (Del.1997) (citing *Tatman v. State*, 314 A.2d 417, 418 (Del.1973)).
- 10 10 *Del. C.* § 4331(1).
- 11 21 *Del. C.* § 4177(h)(3). 10 *Del. C.* § 4331(3) similarly requires each successive person in the chain of custody to sign a statement, and does not require their personal appearance in court. § 4133(3) states, in pertinent part:
[A] statement signed by each successive person in the chain of custody that the person delivered it to the other person indicated on or about the date stated is *prima facie* evidence that the person had custody and made the delivery as stated, without the necessity of a personal appearance in court by the person signing the statement.
- 12 *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009) (citing *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965)).
- 13 U.S. Const. amend. VI.
- 14 *Crawford v. Washington*, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). *Crawford* involved a tape-recorded statement to police in which the defendant's wife described the defendant stabbing the victim with a knife. The Washington Supreme Court found that the statement bore the necessary indicia of reliability and permitted its admission. In reversing the decision, the United States Supreme Court abrogated prior controlling precedent and found that the statement violated the Confrontation Clause. The Court held that the Confrontation Clause prohibits the

“admission of testimonial statements of a witness who did not appear at trial unless [the witness] was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” *Id.* at 53–54, 60, 124 S.Ct. 1354.

15 *Melendez–Diaz*, 557 U.S. at 309, 129 S.Ct. 2527 (citing *Crawford*, 541 U.S. at 54, 124 S.Ct. 1354).

16 *Crawford*, 541 U.S. at 51, 124 S.Ct. 1354 (citations and quotations omitted).

17 *Id.* at 51–52, 124 S.Ct. 1354 (citations and quotations omitted). The Supreme Court later elaborated on its definition of testimony in *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). In *Davis*, the Supreme Court found that a statement is testimonial if: (1) the circumstances objectively indicate there is no ongoing emergency, and (2) the statement is made in response to an interrogation which has the primary purpose of establishing or proving events relevant to later criminal prosecution. *Id.* at 822, 126 S.Ct. 2266.

18 *Melendez–Diaz*, 557 U.S. at 309, 129 S.Ct. 2527.

19 *Id.*

20 *Id.* at 310, 129 S.Ct. 2527 (quoting *Crawford*, 541 U.S. at 51, 124 S.Ct. 1354).

21 *Id.* at 310–11, 129 S.Ct. 2527 (quoting *Davis*, 547 U.S. at 830, 126 S.Ct. 2266).

22 *Melendez–Diaz*, 557 U.S. at 311, 129 S.Ct. 2527. Justice Scalia, writing for the majority, emphasized that “under Massachusetts law, the *sole purpose* of the affidavits was to provide prima facie evidence of the composition, quality, and the net weight of the analyzed substance.” *Id.*

23 *Id.* (emphasis in original) (internal quotations omitted).

24 *Id.* at 311 n.1, 129 S.Ct. 2527. (emphasis in original).

25 *Bullcoming v. New Mexico*, — U.S. —, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011). In *Bullcoming*, the Supreme Court granted *certiorari* on the following question:

Does the Confrontation Clause permit the prosecution to introduce a forensic laboratory report containing a testimonial certification, made in order to prove a fact at a criminal trial, through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification. [sic]

Id. at 2713.

26 *Id.* at 2709. The prosecution offered the report as a business record without calling the report’s author, who was unavailable because he was on unpaid sick leave. Instead, the prosecution called another analyst, who testified and was cross-examined on the general practices and procedures of the testing office. *Id.* at 2711–12.

27 *Bullcoming*, 131 S.Ct. at 2710, 2715.

28 *Id.* at 2717.

29 *Id.* at 2714.

30 *Id.*

31 *Bullcoming*, 131 S.Ct. at 2714.

32 *Id.* at 2721 n.2 (Sotomayor, J., concurring).

33 *Martin v. State*, 60 A.3d 1100, 1109 (Del.2013).

34 *Id.* at 1101.

35 *Id.* at 1109–10.

36 *Id.* at 1109.

37 21 Del. C. § 4177(h)(3).

38 *Melendez–Diaz*, 557 U.S. at 310–11, 129 S.Ct. 2527.

39 Although Milligan concedes at one point in her Opening Brief that the State need not offer testimony of every single person in the chain of custody, that is nonetheless what she is seemingly arguing on appeal. See Appellant's Op. Br. at 2 ("[Delaware's chain of custody law] clearly violates the confrontation clause as it does not afford the Defendant the opportunity to cross examine the people that have taken possession of the evidence.").

40 *Melendez–Diaz*, 557 U.S. at 311 n.1, 129 S.Ct. 2527. A number of other courts have also interpreted the *Melendez–Diaz* decision to stand for the proposition that not all individuals in the chain of custody must testify. See, e.g., *United States v. Ortega*, 750 F.3d 1020, 1025–26 (8th Cir.2014) ("[C]hain of custody alone does not implicate the Confrontation Clause.") (citations and quotations omitted); *United States v. Young*, 510 Fed.Appx. 610, 611 (9th Cir.2013) ("[T]he absence of chain-of-custody testimony [does not] implicate the Confrontation Clause.") (citing *Melendez–Diaz*, 557 U.S. at 311 n.1, 129 S.Ct. 2527.); *United States v. Johnson*, 688 F.3d 494, 505 (8th Cir.2012) ("[W]e find that the notations on the lab report by technician Schneider indicating when she checked the methamphetamine samples into and out of the lab—while relevant to the question of chain of custody—were not the kind of testimonial statements offered or admitted to prove the truth of the matter asserted.") (quotations omitted); *Vann v. State*, 229 P.3d 197, 211 (Alaska Ct.App.2010) ("As noted in the *Melendez–Diaz* footnote, and as confirmed by Alaska cases on this subject, Evidence Rule 901 does not require the State to bring forward every witness who had custody of, or contact with, the physical evidence in question, nor does it require the State to affirmatively negate every conceivable possibility of mishandling or tampering.").

41 *Melendez–Diaz*, 557 U.S. at 311 n.1, 129 S.Ct. 2527. At trial, Milligan's counsel answered in the affirmative when he was asked by the court if he believed that *Melendez–Diaz* stood for the proposition that everyone who touched the evidence must testify. Appellant's Op. Br.App. at A7.

42 Appellee's Ans. Br.App. at B47–51. Milligan also seems to contend that all of those whose testimony may be relevant in establishing the accuracy of the testing device must provide live testimony to satisfy the Confrontation Clause. This argument is similarly foreclosed by the express language of *Melendez–Diaz*. *Melendez–Diaz*, 557 U.S. at 311 n.1, 129 S.Ct. 2527 ("[W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing ... accuracy of the testing device, must appear in person as part of the prosecution's case.").

43 See Appellant's Op. Br. at 8 (citing *Melendez–Diaz*, 557 U.S. at 311 n.1, 129 S.Ct. 2527). Should all of the individuals in the chain of custody be required to appear in court, then even routine chain of custody representations would be at risk of becoming unnecessarily tedious. To broaden the Confrontation Clause to such an extent would not only conflict with the Supreme Court's specific language in *Melendez–Diaz*, but also discourage prosecutorial efficiency and deter judicial economy.

44 In addition to chain of custody information, the Chemical Test Report also contains Milligan's BAC level. Milligan, however, concedes that the report was admitted solely to prove chain of custody and does not contest the fact that Willey was the certifying and testing analyst with regard to the test. In other words, Milligan only contests the admittance of the chain of custody information found within the Documents.

45 *Melendez–Diaz*, 557 U.S. at 308–09, 129 S.Ct. 2527.

46 *Martin*, 60 A.3d at 1101.

47 Appellant's Op. Br. at 10 ("[The] documents [were] used solely to prove the chain of custody in a criminal matter.").

48 *Demby*, 695 A.2d at 1129.

49 *Id.* at 1131 (citing *Tricoche v. State*, 525 A.2d 151, 153 (Del.1987)).

50 *Id.* at 1127.

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Disagreed With by State v. Michaels, N.J., August 6, 2014

60 A.3d 1100
Supreme Court of Delaware.

Larry MARTIN, Defendant Below, Appellant,
v.
STATE of Delaware, Plaintiff Below, Appellee.

No. 149, 2012.
Submitted: Nov. 19, 2012.
Decided: Feb. 4, 2013.

Synopsis

Background: Following denial of motion in limine, 2011 WL 7062499, defendant was convicted in the Superior Court, New Castle County, of driving while under influence or with prohibited drug content. Defendant appealed.

[Holding:] The Supreme Court, Steele, C.J., held that admission of blood analysis report prepared and certified by laboratory manager who did not perform or observe chemist's testing of defendant's blood sample violated defendant's right of confrontation.

Reversed and remanded.

West Headnotes (2)

III Criminal Law
Use of documentary evidence

Admission of blood analysis report prepared and certified by laboratory manager who did not perform or observe chemist's testing of defendant's blood sample, which report certified that defendant's blood tested positive for phencyclidine (PCP), violated defendant's right of confrontation, in trial for driving while under influence or with prohibited drug content; manager relied on chemist's batch reports, conclusions, and notes from testing of

defendant's blood in order to certify that defendant's blood contained PCP, chemist's statements were admitted for their truth, and chemist's statements were "testimonial," as they were functional equivalent of live testimony, such that defendant should have had opportunity to confront chemist who performed test in order to determine chemist's proficiency, care, and veracity. U.S.C.A. Const.Amend. 6.

8 Cases that cite this headnote

^[2] **Criminal Law**
Out-of-court statements and hearsay in general
Criminal Law
Availability of declarant

Testimonial statements against a defendant are inadmissible under the Sixth Amendment right of confrontation unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. U.S.C.A. Const.Amend. 6.

3 Cases that cite this headnote

Attorneys and Law Firms

*1100 Santino Ceccotti, Office of the Public Defender, Wilmington, Delaware for appellant.

*1101 Josette D. Manning and Sean P. Lugg (argued), Department of Justice, Wilmington, Delaware, for appellee.

Before STEELE, Chief Justice, HOLLAND, BERGER, JACOBS and RIDGELY, Justices constituting the Court en Banc.

Opinion

STEELE, Chief Justice.

In this appeal, we consider whether a Superior Court

judge's decision to admit a blood analysis report without the testing chemist's testimony violated Defendant–Appellant's Sixth Amendment confrontation rights. Here, the testifying laboratory manager who ultimately certified the report testified before the jury, but the manager neither observed nor performed the test. We hold that the absent analyst's testimonial representations were admitted for their truth on an issue central to the case, which violated the Defendant's right to confront the witnesses against him. Accordingly, we must reverse.

I. FACTUAL AND PROCEDURAL HISTORY

A. Facts

On January 8, 2011, Delaware State Police Trooper David Diana pulled over Defendant–Appellant Larry Martin for speeding and erratic driving. After administering field sobriety tests, Diana took Martin back to the troop in order to collect a blood sample. The State sent the blood sample to the toxicology lab at the Office of the Chief Medical Examiner (OCME) for drug testing.

Heather Wert, an OCME chemist, analyzed Martin's blood sample, but did not testify at Martin's jury trial. Instead, Jessica Smith, OCME's Chief Forensic Toxicologist and toxicology laboratory's manager, testified. Smith explained that the laboratory conducted an initial and confirmatory screening on Martin's blood sample. Wert performed both of those tests; an initial reviewer reviewed the results of both tests, and then Smith received the batch packets including the results from both tests for final certification and review. Smith testified that she did not observe Wert perform the analysis, but instead customarily relied on Wert to follow the standard operating procedure Smith develops and approves as laboratory manager. Smith detailed how Wert would have performed a confirmatory screening via gas chromatograph mass spectrometry.¹ Smith, after reviewing the results in the batch packet, prepared a written report certifying that Martin's blood tested positive for phencyclidine (PCP). The State entered Smith's certified report into evidence through her live testimony.

B. Procedural History

A grand jury indicted Martin on February 14, 2011, charging him (in pertinent part) with Driving a Vehicle While Under the Influence or with a Prohibited Drug Content. On December 8, 2011, Martin moved *in limine*

to exclude the State's proffered forensic reports in the absence of the testimony of the analyst who performed the tests. The trial judge denied the motion in a December 20, 2011 letter opinion.² A two-day jury trial began on *1102 January 12, 2012, and, on January 13, 2012, the jury found Martin guilty on all counts.

II. STANDARD OF REVIEW

We review *de novo* whether the trial judge's decision to deny the motion *in limine* violated Martin's right to confrontation under the Sixth Amendment of the United States Constitution and Article I, Section 7 of the Delaware Constitution.³

III. ANALYSIS

[1] [2] The Sixth Amendment to the United States Constitution, which applies to the states through the Fourteenth Amendment,⁴ provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.”⁵ In *Crawford v. Washington*, the U.S. Supreme Court held that the Confrontation Clause applies to witnesses who bear testimony against the accused.⁶ Thus, testimonial statements against a defendant are “inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination.”⁷

We recognize that substantial uncertainty exists about whether a particular statement is “testimonial” or otherwise triggers the Confrontation Clause. In *Crawford*, the U.S. Supreme Court identified the basic contours of “testimonial” statements:

Various formulations of this core class of “testimonial” statements exist: “ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,” “extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,” [and] “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”⁸

The U.S. Supreme Court again addressed the meaning of “testimonial” in *Melendez–Diaz v. Massachusetts*.⁹ In *Melendez–Diaz*, the prosecution introduced notarized “certificates of analysis” describing the results of forensic testing performed by Massachusetts State Laboratory Institute analysts.¹⁰ Because the fact at issue was whether the substance that the defendant possessed was cocaine, and the certificates stated that the substance was in fact cocaine, the Court held that the *1103 certificates were “functionally identical to live, in-court testimony, doing ‘precisely what a witness does on direct examination.’”¹¹ The Court held that the “affidavits were testimonial statements, and the analysts were ‘witnesses’ for the purposes of the Sixth Amendment.”¹²

The U.S. Supreme Court returned to the subject of the Confrontation Clause once again in *Bullcoming v. New Mexico*.¹³ In *Bullcoming*, the police arrested the defendant on charges of driving while intoxicated.¹⁴ In order to prove Bullcoming’s blood alcohol concentration at trial, the prosecution submitted a forensic laboratory report certifying Bullcoming’s blood alcohol concentration as a business record.¹⁵ Instead of calling the analyst who signed the certification, who was on unpaid leave for undisclosed reasons, the prosecution “called another analyst who was familiar with the laboratory’s testing procedures, but had neither participated in nor observed the test on Bullcoming’s blood sample.”¹⁶ The testifying analyst and the certifying analyst both worked for the New Mexico Department of Health’s Scientific Laboratory Division.¹⁷ The U.S. Supreme Court held that the testifying analyst in *Bullcoming* provided “surrogate testimony” and the accused had the right to confront the analyst who made the certification.¹⁸ The Court held that “the formalities attending the ‘report of blood alcohol analysis’ [were] more than adequate to qualify [the testing—certifying analyst’s] assertions as testimonial.”¹⁹

As part of its analysis in *Bullcoming*, the U.S. Supreme Court noted that the operation of a gas chromatograph machine requires “specialized knowledge and training” and that human error can occur at several points during the testing process.²⁰ Furthermore, the testifying analyst “could not convey what the [testing—certifying analyst] knew or observed about the events his certification concerned, *i.e.*, the particular test and testing process he employed. Nor could such surrogate testimony expose any lapses or lies on the certifying analyst’s part.”²¹ The U.S. Supreme Court noted that the testing—certifying analyst’s “testimony under oath would have enabled Bullcoming’s counsel to raise before a jury questions concerning [the analyst’s] proficiency, the care he took in performing his work, and his veracity.”²²

Justice Sotomayor, while joining *Bullcoming*’s majority opinion, wrote separately for two reasons: (1) to emphasize that she viewed the report as testimonial because its primary purpose was evidentiary, and (2) “to emphasize the limited reach of the Court’s opinion.”²³ Justice Sotomayor, in her concurrence, carefully distinguished at least two factual circumstances not present in *Bullcoming*. First, she noted that “this is not a case in which the *1104 person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue.”²⁴ She further clarified that “[i]t would be a different case if, for example, a supervisor who *observed* an analyst conducting a test testified about the results or a report about such results,” but that she “need not address what degree of involvement is sufficient because here [the testifying analyst] had no involvement whatsoever in the relevant test and report.”²⁵

Second, she noted that *Bullcoming* “is not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence.”²⁶ She further clarified that the Court “would face a different question if asked to determine the constitutionality of allowing an expert witness to discuss others’ testimonial statements if the testimonial statements were not themselves admitted as evidence.”²⁷

The U.S. Supreme Court attempted to further illuminate the contours of the Confrontation Clause in *Williams v. Illinois*, where the defendant was charged with, among other things, aggravated criminal sexual assault.²⁸ During the defendant’s bench trial, the prosecution called three experts to testify about two DNA profile reports, one produced by the State, and one produced by an outside laboratory, Cellmark.²⁹ Cellmark produced a DNA profile from the contents of the victim’s rape kit.³⁰ The State produced a DNA profile from the defendant’s blood sample collected during an unrelated August 2000 arrest.³¹ While two state forensic scientists testified about the state police lab tests, no one from the Cellmark lab testified.³² The third expert testified that, based on her comparison of the state DNA profile and the Cellmark DNA profile, the defendant could not be excluded as a match, and she also testified to the odds of the Cellmark DNA profile appearing in the general population.³³ “The Cellmark report itself was neither admitted into evidence nor shown to the factfinder,” the testifying expert neither quoted nor read from the report, and she did not identify the report as the source of any of her opinions.³⁴

The precise holding of *Williams* is less than clear (and not only to us).³⁵ Justice Alito, joined by Chief Justice Roberts

and Justices Kennedy and Breyer (the plurality), held that two independent bases *1105 supported their conclusion that the defendant's confrontation rights were not violated: (1) because an expert can express an opinion based on facts the expert assumes but does not know to be true, the expert's testimony that Cellmark's DNA profile was produced from the victim's rape kit was not offered to prove the truth of the matter asserted and did not fall within the Confrontation Clause's scope,³⁶ and (2) even if the Cellmark report had been admitted for its truth, it was not testimonial because the report "is very different from the sort of extrajudicial statements, such as affidavits, depositions, prior testimony, and confessions, that the Confrontation Clause was originally understood to reach," having been produced before a suspect was identified and for the purpose of finding an at-large, unknown rapist.³⁷ As part of its analysis of the first point, the *Williams* plurality emphasized that the case involved a *bench trial*: "[t]he dissent's argument would have force if petitioner had elected to have a jury trial" because "there would have been a danger of the jury's taking [the expert witness's] testimony as proof that the Cellmark profile was derived from the sample obtained from the" victim.³⁸

Justice Thomas did not join the *Williams* plurality, but rather wrote separately to concur only in the judgment, "solely because Cellmark's statements lacked the requisite formality and solemnity to be considered testimonial for purposes of the Confrontation Clause."³⁹ Otherwise, he shared "the dissent's view of the plurality's flawed analysis."⁴⁰ Justice Thomas explicitly stated "that Cellmark's statements were introduced for their truth,"⁴¹ directly disagreeing with the plurality's first basis for affirming. Justice Thomas also sharply criticized the plurality's alternative basis, the "new primary purpose test," and instead applied his own framework for analyzing whether a statement is testimonial.⁴²

Justice Kagan, joined by Justices Scalia, Ginsburg, and Sotomayor, dissented, concluding that admission of the substance of the Cellmark report violated the defendant's confrontation rights.⁴³ The dissent rejected the plurality's primary purpose test⁴⁴ and held that "the Cellmark report [wa]s a testimonial statement."⁴⁵ The dissent argued that when "the State elected to introduce the substance of Cellmark's report into evidence, the analyst who generated that report became a witness whom Williams had the right to confront."⁴⁶ The dissent concluded the Court's prior cases decided the issue:

Like the surrogate witness in *Bullcoming*, [the testifying analyst] could not convey what [the testing analyst] knew or observed about the events ..., i.e., the particular test and testing process *1106 he employed.

Nor could such surrogate testimony expose any lapses or lies on the testing analyst's part. Like the lawyers in *Melendez-Diaz* and *Bullcoming*, Williams's attorney could not ask questions about that analyst's proficiency, the care he took in performing his work, and his veracity. He could not probe whether the analyst had tested the wrong vial, inverted the labels on the samples, committed some more technical error, or simply made up the results.⁴⁷

The dissent also notes that "five Justices agree, in two opinions reciting the same reasons, that ... [the] statements about Cellmark's report went to its truth."⁴⁸

Justice Breyer, although he joined in the plurality opinion, concurred separately to note that neither the plurality, nor the dissent, nor any of the Court's earlier opinions squarely addressed the question of how the Confrontation Clause applies "to the panoply of crime laboratory reports and underlying technical statements written by (or otherwise made by) laboratory technicians."⁴⁹ In discussing the issue, Justice Breyer identified the question raised in this case: In a multitechnician scenario, "[w]ho should the prosecution have had to call to testify? Only the analyst who signed the report noting the match? What if the analyst ... knew nothing about either the laboratory's underlying procedures or the specific tests run in the particular case?"⁵⁰ Raising the possibility that it is unclear whether "all potentially involved laboratory technicians" might have to testify, Justice Breyer noted that "[s]ome or all of the words spoken or written by each technician out of court might well have constituted relevant statements offered for their truth and reasonably relied on by a supervisor or analyst writing the laboratory report."⁵¹

We believe the facts in the instant case fall most closely under *Bullcoming*. However, as Justice Breyer noted, *Bullcoming* does not precisely answer the question in our case. In this case, unlike in *Bullcoming*, the certifying analyst testified. However, she neither participated in nor observed the test on Martin's blood sample. She only reviewed the data and conclusions of the chemist who actually performed the test.

As Justice Breyer also noted, *Williams* does not directly address the multitechnician scenario either. *Williams* is distinguishable because it was a *bench trial*, unlike Martin's jury trial (a fact the plurality found critical). Although no one connected with the report at issue in *Williams* testified, in Martin's jury trial the testifying witness supervised the lab in question, reviewed earlier work, and signed the certifying report.

We hold that Wert's test results contained in the batch

report are testimonial. The U.S. Supreme Court in *Bullcoming* rejected the proposition that conclusions drawn from a gas chromatograph machine are mere transcriptions requiring no interpretation and no independent judgment.⁵² *1107 The Court held that “the analysts who write reports that the prosecution introduces must be made available for confrontation.”⁵³ We recognize that for the purpose of determining whether Wert’s batch reports are testimonial, the instant case falls somewhere between *Bullcoming* and *Williams*.

Bullcoming declares that the certifying witness must testify, but *Bullcoming* also seems to contemplate that the certifying witness must either observe or perform the test.⁵⁴ The majority in *Bullcoming* held that the testifying witness, although another state forensic scientist in the same laboratory division, was a “surrogate” because he could not convey what the testing-certifying analyst knew or observed about the particular test, the testing process, or any lapses or lies about the test process by the certifying analyst.⁵⁵ In Martin’s case, the certifying witness did testify, but she had no personal knowledge about the analyst’s (Wert’s) actions nor did she observe the particular test. She could only rely on Wert’s representations in the batch report.

In *Williams*, the Cellmark report “was neither admitted into evidence nor shown to the factfinder.”⁵⁶ The witness “did not quote or read from the report” and she did not “identify it as the source of any of the opinions she expressed.”⁵⁷ However, five U.S. Supreme Court Justices, in concurrence and dissent, found that the underlying report was admitted for the truth of the matter asserted.⁵⁸ As the dissent noted, when “the State elected to introduce the substance of Cellmark’s report into evidence [through the witness’s testimony], the analyst who generated that report became a witness whom [the defendant] had the right to confront.”⁵⁹

Wert’s batch reports were not submitted into evidence. However, Smith relied on Wert’s reports, conclusions, and notes in order to certify that Martin’s blood contained PCP.⁶⁰ We conclude that the State introduced the substance of Wert’s statements during Smith’s testimony. We further conclude that Wert’s representations and test results comprise the underlying conclusions supporting Smith’s report, which also was admitted into evidence. We rely on *Williams* to reach the conclusion that Wert’s representations and conclusions were admitted for their truth, particularly in light of the fact that this case was a jury trial.⁶¹

Turning to whether the statements were testimonial, we rely on *Bullcoming* to reach the conclusion that Wert’s

underlying statements and representations in the batch report are testimonial.⁶² “A document *1108 created solely for an ‘evidentiary purpose,’ *Melendez–Diaz* clarified, made in aid of a police investigation, ranks as testimonial.”⁶³ Smith’s report and testimony essentially conclude that Wert’s test proved Martin’s blood contained PCP. Although Smith generated the report and signed it, she prepared her conclusions by relying on Wert’s test results and Wert’s representations in the batch report. The U.S. Supreme Court has held that interpreting the results of a gas chromatograph machine involves more than evaluating a machine-generated number.⁶⁴ As the majority in *Bullcoming* stated, “[t]hese representations, relating to past events and human actions not revealed in raw, machine-produced data, are meet for cross-examination.”⁶⁵ An analyst’s certified report is “functionally identical to live, in-court testimony, doing ‘precisely what a witness does on direct examination.’”⁶⁶ As the majority in *Bullcoming* noted, a proper witness would be able to testify to her “proficiency, the care [s]he took in performing h[er] work, and h[er] veracity,” and be subject to cross examination about any of her lapses or lies concerning the testing process.⁶⁷ Here, the State produced the note-taking laboratory supervisor, Smith, who certified the unsworn hearsay testimony of the testing analyst, Wert, instead of having the testing analyst certify the report and be available for cross examination. The U.S. Supreme Court in *Davis v. Washington* made clear that that the Confrontation Clause does not tolerate this kind of evasion.⁶⁸

Because we hold that Wert’s statements were both testimonial and admitted for the truth of the matter, this is one of the *1109 factual circumstances, identified by Justice Sotomayor in her concurrence in *Bullcoming*, as: “a case in which an expert witness was asked for h[er] independent opinion about underlying testimonial reports that were not themselves admitted into evidence.”⁶⁹ As Justice Sotomayor noted, “determin[ing] the constitutionality of allowing an expert witness to discuss others’ testimonial statements if the testimonial statements were not themselves admitted as evidence” is not the question the U.S. Supreme Court faced in *Bullcoming*.⁷⁰ Here, unlike the testifying analyst in *Bullcoming*, Smith supervised the laboratory and signed the certification on the report submitted into evidence. However, like the testifying analyst in *Bullcoming*, Smith merely reviewed Wert’s data and representations about the test, while having knowledge of the laboratory’s standard operating procedures, without observing or performing the test herself. Particularly here where the State presented critical evidence to a jury, the defendant had a right guaranteed by the Sixth Amendment to confront the analyst who performed the test in order to

determine her proficiency, care, and veracity.⁷¹

The U.S. Supreme Court very clearly held in *Bullcoming* that the defendant must be able to confront the certifying analyst when her report is submitted into evidence.⁷² We now hold that the defendant has the right to confront the testing analyst as well, where the certifying and testing analyst are not the same person and the certifying analyst does not observe the testing process.⁷³ While this may be a burden on prosecutors, the Constitution demands it.⁷⁴ Because there was no evidence that Wert was unavailable or that the defendant had the opportunity to cross examine her prior to trial, the trial judge erred by denying the motion *in limine*. Because we find the results of the test and the representations concerning the testing process were not merely cumulative evidence, but the principal factor in Martin's conviction, the error is not harmless.⁷⁵

Footnotes

- 1 According to Smith, if Wert properly follows the established protocol, she first notes the samples that are flagged in the laboratory's spreadsheet for confirmatory testing for phencyclidine (PCP). Wert then generates a chain of custody worksheet, retrieves the batch of samples, performs the extractions, places the final products into the machine, allows the machine to run, and processes the data. Finally, Wert prints out the data for all of the samples into a batch report.
- 2 *State v. Martin*, 2011 WL 7062499 (Del.Super. Dec. 20, 2011).
- 3 *Hall v. State*, 788 A.2d 118, 123 (Del.2001) (citing *Warren v. State*, 774 A.2d 246, 251 (Del.2001)). Martin does not argue that the Delaware Constitution affords greater protection than the Sixth Amendment to the U.S. Constitution. Therefore, we limit our analysis to the U.S. Constitution. See *Stafford v. State*, 59 A.3d 1223, 1231 (Del.2012) (citations omitted).
- 4 *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009) (citing *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965)).
- 5 U.S. Const. amend. VI.
- 6 *Crawford v. Washington*, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (citation omitted).
- 7 *Melendez-Diaz*, 557 U.S. at 309, 129 S.Ct. 2527 (citing *Crawford*, 541 U.S. at 54, 124 S.Ct. 1354).
- 8 *Crawford*, 541 U.S. at 51–52, 124 S.Ct. 1354 (citations omitted).
- 9 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009).
- 10 *Id.* at 308–09, 129 S.Ct. 2527.
- 11 *Id.* at 310–11, 129 S.Ct. 2527 (quoting *Davis v. Washington*, 547 U.S. 813, 830, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) (emphasis omitted)).
- 12 *Id.* at 311, 129 S.Ct. 2527.
- 13 *Bullcoming v. New Mexico*, — U.S. —, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011).

***1110 IV. CONCLUSION**

The judgment of the Superior Court is REVERSED and the action is REMANDED for proceedings consistent with this opinion.

All Citations

60 A.3d 1100

14 *Id.* at 2709.

15 *Id.* at 2712.

16 *Id.* at 2709.

17 *Id.* at 2710, 2712.

18 *Id.* at 2710.

19 *Id.* at 2717.

20 *Id.* at 2711.

21 *Id.* at 2715 (footnote omitted).

22 *Id.* at 2715 n. 7.

23 *Id.* at 2719 (Sotomayor, J., concurring).

24 *Id.* at 2722.

25 *Id.* (emphasis added).

26 *Id.*

27 *Id.*

28 *Williams v. Illinois*, — U.S. —, 132 S.Ct. 2221, 2229, 183 L.Ed.2d 89 (2012) (plurality opinion).

29 *Id.* at 2227, 2229.

30 *Id.* at 2227, 2229–30.

31 *Id.* at 2227, 2229.

32 *Id.* at 2227.

33 *Id.* at 2230.

34 *Id.*

35 See, e.g., *People v. Lopez*, 55 Cal.4th 569, 147 Cal.Rptr.3d 559, 286 P.3d 469, 483 (2012) (Liu, J., dissenting) (citing *Williams*, —U.S. —, 132 S.Ct. 2221, 183 L.Ed.2d 89) (“The nine separate opinions offered by this court in the three confrontation clause cases decided today reflect the muddled state of current doctrine concerning the Sixth

Amendment right of criminal defendants to confront the state's witnesses against them. The United States Supreme Court's most recent decision in this area produced no authoritative guidance beyond the result reached on the particular facts of that case.”).

36 *Williams*, 132 S.Ct. at 2228 (plurality opinion).

37 *Id.*

38 *Id.* at 2236.

39 *Id.* at 2255 (Thomas, J., concurring) (emphasis added) (citation omitted) (internal quotation marks omitted).

40 *Id.*

41 *Id.* at 2262, 2261–64.

42 *Id.* at 2255.

43 *Id.* at 2265 (Kagan, J., dissenting).

44 *Id.* at 2273.

45 *Id.*

46 *Id.* at 2268 (quoting *Bullcoming v. New Mexico*, —U.S. —, 131 S.Ct. 2705, 2716, 180 L.Ed.2d 610 (2011)) (internal quotation marks omitted).

47 *Id.* at 2267. The dissent later identified some of the most important questions a defendant would want to ask an analyst: “How much experience do you have? Have you ever made mistakes in the past? Did you test the right sample? Use the right procedures? Contaminate the sample in any way?” *Id.* at 2275.

48 *Id.* at 2268 (citation omitted).

49 *Id.* at 2244, 2244–45 (Breyer, J., concurring).

50 *Id.* at 2247.

51 *Id.*

52 *Bullcoming v. New Mexico*, — U.S. —, 131 S.Ct. 2705, 2714–15, 180 L.Ed.2d 610 (2011).

53 *Id.* at 2715.

54 *Id.* at 2715–16.

55 *Id.* at 2715 (citations omitted).

56 *Williams*, 132 S.Ct. at 2230.

57 *Id.*

58 *Id.* at 2256 (Thomas, J., concurring); *id.* at 2268 (Kagan, J., dissenting).

59 *Id.* at 2268 (Kagan, J., dissenting) (quoting *Bullcoming*, 131 S.Ct. at 2716) (internal quotation marks omitted).

60 Smith testified that Wert makes notations on checklists about the procedures she followed, processes the data the machine generates, tells the machine to print, and generates a batch packet with the results. *State v. Martin*, Cr. ID No. 1101005435, at 101–03, 115–16 (Del.Super. Jan. 12, 2012) (TRANSCRIPT).

61 See *supra* notes 38, 58 and accompanying text.

62 While we rely primarily on *Bullcoming*, it seems that a majority of the U.S. Supreme Court would come to that conclusion as well under *Williams*, albeit through different rationales. *Williams* does not clearly address the issue of whether the statements are testimonial. The plurality's primary purpose test would likely fail because Wert ran the test in order to create evidence for use at trial that Martin's blood contained PCP, which would make the statements testimonial under that theory. See *Williams*, 132 S.Ct. at 2243 (plurality opinion). However, the five other Justices sharply criticized that approach. See *supra* notes 42, 44 and accompanying text. The *Williams* dissent would likely find these statements testimonial as well. See *supra* notes 46–47 and accompanying text (discussing what questions the defendant should be able to ask the witness). Justice Thomas would likely not find the statements formal enough to be testimonial. *Williams*, 132 S.Ct. at 2260 (Thomas, J., concurring).

63 *Bullcoming v. New Mexico*, — U.S. —, 131 S.Ct. 2705, 2716, 180 L.Ed.2d 610 (2011) (citing *Melendez–Diaz v. Massachusetts*, 557 U.S. 305, 311, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009)).

64 *Id.* at 2710–11, 2715. For example, as indicated by Smith's testimony, absence of a notation in the batch report indicates the testing analyst observed nothing abnormal about the test, *assuming* the analyst followed the laboratory's operating protocols about notations. *State v. Martin*, Cr. ID No. 1101005435, at 101–03 (Del.Super. Jan. 12, 2012) (TRANSCRIPT).

65 *Bullcoming*, 131 S.Ct. at 2714 (addressing similar silence in a "remarks" section of a forensic report).

66 *Melendez–Diaz v. Massachusetts*, 557 U.S. 305, 310–11, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009) (quoting *Davis v. Washington*, 547 U.S. 813, 830, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) (emphasis omitted)).

67 *Bullcoming*, 131 S.Ct. at 2715 n. 7, 2715.

68 *Davis v. Washington*, 547 U.S. 813, 826, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) ("In any event, we do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman recite the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition."); see also *Bullcoming*, 131 S.Ct. at 2715 (citing *Melendez–Diaz*, 557 U.S. at 334, 129 S.Ct. 2527 (Kennedy, J., dissenting) ("The Court made clear in *Davis* that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second.")).

69 *Bullcoming*, 131 S.Ct. at 2722 (Sotomayor, J., concurring).

70 *Id.*

71 See *id.* at 2715 n. 7 (majority opinion).

72 *Id.* at 2715 (citation omitted).

- 73 The Court of Appeals of Maryland, in a 2011 opinion that the U.S. Supreme Court vacated and remanded for consideration in light of *Williams*, came to a similar conclusion that the testifying analyst must at least observe the test underlying his report. See *Derr v. State*, 422 Md. 211, 29 A.3d 533, 559 (2011), *vacated*, — U.S. —, 133 S.Ct. 63, 183 L.Ed.2d 700 (2012), *remanded to No. 6* (2010 Term) (oral argument held on January 4, 2013). We have considered *Williams* and reach a similar conclusion to the Court of Appeals of Maryland.
- 74 One solution to the inconvenience of having two state chemists testify would be to have the testing analyst prepare and certify her own report. It is also possible that defendants may stipulate to the contents of a report or the testimony of the chemist, thus negating the need for the chemist to be cross examined. See Brief of Law Professors as *Amici Curiae* in Support of Petitioner at 10–13, *Melendez–Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009) (No. 07–591). While the constitutionality of the statute is not at issue in this case, we note the General Assembly may have in place a notice-and-demand statute that might permit defendants to waive their confrontation rights if they do not object to notice that the prosecution intends to enter a forensic report in a timely fashion. See 10 *Del. C.* §§ 4330–4332; see also Brief of Law Professors, *supra*, at 13–15. U.S. Supreme Court Justices have mentioned these types of statutes approvingly. See *Bullcoming*, 131 S.Ct. at 2718 (Part IV of the Court’s opinion, in which Justices Sotomayor, Kagan, and Thomas did not join).
- 75 *Sanabria v. State*, 974 A.2d 107, 120 (Del.2009).