

**IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE,

Plaintiff,

v.

TRACEY L. CARSON,

Defendant.

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Case No.: 1610008346

Submitted: December 8, 2017

Decided: January 31, 2018

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**MEMORANDUM OPINION AND ORDER  
ON DEFENDANT'S MOTION TO SUPPRESS**

**SMALLS, C.J.**

## FACTUAL AND PROCEDURAL HISTORY

On October 14, 2016, Tracey Carson (“Defendant”) was arrested for the offenses of Driving While Under the Influence of Alcohol, (DUI) in violation of 21 *Del. C.* §4177; Failure to Have Insurance, in violation of 21 *Del. C.* §2118(p)(1); and Driving a Motor Vehicle at a Slow Speed as to Impede the Flow of Traffic in violation of 21 *Del. C.* §4171(b).

The facts which gave rise to these proceedings indicate Defendant was driving home from work traveling northbound on Interstate 495 when she was struck from the rear by another vehicle. Cpl. Cassidy (“Cassidy”) from the Delaware State Police responded to the accident and attempted to make contact with Defendant. Cassidy stated he smelled a strong odor of alcohol coming from the Defendant, her eyes were glossy and blood shot, and her speech was slurred. As a result of the collision, Defendant was injured to the extent that she was required to be transported by ambulance to Christiana Hospital. After clearing the scene of the accident, Cassidy responded to the hospital to continue his DUI investigation. At the hospital, Cassidy obtained the Defendant’s blood by requesting her consent to take a sample which Defendant allegedly responded “okay.” Subsequently, Cassidy had blood drawn by a phlebotomist. Afterwards, Cassidy arrested Defendant and charged her with the above offenses.

On April 11, 2017, Defendant filed a Motion to Suppress. Defendant seeks to suppress her arrest, detention, and the blood test evidence on the basis that the police officer lacked probable cause to arrest, an absence of exigency to justify an exception to the warrant requirement in which a warrant was required to draw blood, and any consent by Defendant was not knowing and voluntary. Defendant avers that due to the severe injuries she

sustained as a result of the accident, she was unable to fully appreciate the nature of Cassidy's questioning, thus, it was impossible for her to make an informed consent, and voluntarily give such consent for Cassidy to take her blood.

On September 28, 2017, a hearing was held on Defendant's Motion to Suppress. During the Motion hearing, Cassidy testified on October 14, 2016, he was dispatched to an accident on Interstate 495 where both vehicles had sustained serious damage. Cassidy testified when he attempted to make contact with Defendant she was seated in the driver's seat of the vehicle that had been struck from the rear. He further testified that Defendant was extremely upset and crying. Defendant's responses to Cassidy's questions were difficult to comprehend and she repeatedly stated that "she was having a bad day." Cassidy testified he detected an odor of alcohol coming from the Defendant and her eyes appeared glossy and blood shot. Cassidy further testified that Defendant told him she works as a bartender and was coming from work. In addition, Cassidy testified it was his opinion that Defendant was under the influence of alcohol. He further testified he did not administer the standard field sobriety tests on Defendant due to her injuries and the dangerous area of Interstate 495.

At the scene of the accident, Paramedics placed Defendant in a neck and back brace and transported her to Christiana Hospital Emergency Room. Cassidy went to the hospital and was again unable to conduct any meaningful conversation with the Defendant. Cassidy testified he asked Defendant for her consent to draw blood to which she replied "what for?" Cassidy responded to Defendant, "to check if there is alcohol and or drugs in your system." Defendant alleges that after Cassidy told her the blood draw was for the purpose of a DUI investigation, she did not respond further. The State's reply brief argues Cassidy told the

Defendant the blood draw was “to check for drugs and alcohol” and the Defendant then responded “okay.”

During cross-examination, Cassidy testified he did not attempt to remove Defendant from the vehicle due to the severe damage to the car and the visible injuries to Defendant’s face. Cassidy further testified it was clear to him that Defendant was severely injured. Defendant’s counsel asked Cassidy if he was aware that Defendant bit a hole through her mouth during the accident and asked Cassidy how he makes the distinction between an alcohol slurred speech and a person’s inability to speak due to severe injuries to the mouth and face.

Cassidy testified that his conversation with Defendant at the hospital was very brief and he did not take any notes. Accordingly, Defendant argues that Cassidy was required to document the alleged consent from Defendant to withdraw her blood using a standard consent form. Cassidy testified he is unaware of a standard form used by the Delaware State Police that document consent to blood withdraws. Defendants Opening Brief cites Cassidy’s police report stating “operator agreed to have her blood drawn.” Defendant asserts that at the time of this alleged consent, Defendant had been in a severe accident, sustained numerous injuries, is unable to communicate due to pain, crying, and also unable to sign her name on hospital documents.

On redirect, Cassidy testified that upon approaching Defendant’s vehicle, he immediately smelled alcohol and still smelled alcohol at the hospital. Cassidy testified that at the hospital, Defendant was conscious, alert and gave valid consent to withdraw her blood. Cassidy testified that if Defendant had not consented, he would have obtained a warrant.

The defense called Defendant's friend, John Veccione ("Veccione") to testify. Veccione testified he was shocked at Defendant's appearance at the hospital. Veccione testified Defendant was unable to talk and she continued going in and out of consciousness. Her eye was swollen passed her nose and she was covered in blood. Veccione further testified he was told by Doctors that Defendant broke her neck and they were worried because she kept flaring around the hospital bed. Veccione stated based on his observation of Defendant in the hospital, he was afraid she might die. Veccione testified he saw the police going in and out of Defendant's hospital room but did not observe any interaction between Cassidy and Defendant. Veccione testified that Defendant was hospitalized for two (2) weeks following the accident.

Lastly, Defendant testified she does not recall talking to Cassidy at the scene of the accident or at the hospital and only remembers waking up crying in a hospital room. Defendant testified her injuries from the accident included a fractured neck, hip, and ribs crushed pelvis, punctured lung, serious lacerations to her face and she bit her tongue such that she was unable to close her mouth to speak and her tongue was black for three (3) months. Due to the pain from her injuries, Defendant testified she was unable to remember any substantive conversation with anyone the night of the accident. Defendant further testified that every airbag in her vehicle deployed during the collision. On cross-examination Defendant testified that she is a bartender and the night of the accident, she may have had a drink earlier that day but any odor of alcohol would be from her tending bar.

At the conclusion of the Motion Hearing, I concluded the officer had probable cause to take Defendant into custody. The Court ordered supplemental briefing on the issue of

consent to draw blood. On October 27, 2017, Defendant filed her *Opening Brief in Support of Defendant's Motion to Suppress* ("Defendant's Brief"). Successively, on November 21, 2017, the State filed their *Brief in Opposition of Defendant's Motion to Suppress* ("States Reply"). This is the Court's Final Decision and Order on the Defendant's Motion to Suppress the blood draw.

### LEGAL STANDARD

On a motion to suppress, the State must establish, by a preponderance of the evidence, that Defendant's arrest was supported by probable cause.<sup>1</sup> To satisfy the probable cause standard for a DUI arrest, the state "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."<sup>2</sup> This totality consideration is based on "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."<sup>3</sup> "Law enforcement officers must demonstrate reasonable articulable suspicion by pointing to "specific and articulable facts, taken together with rational inferences from those facts, reasonably warrant the intrusion."<sup>4</sup> "The Court must examine the totality of circumstances surrounding the situation as viewed through the 'eyes of a reasonable trained police officer in the same manner or similar circumstances, combining the objective facts with such an officer's subjective interpretation to those facts' and determine reasonable articulable suspicion."<sup>5</sup> In reaching its decision, the Court must

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<sup>1</sup> *State v. Anderson*, 2010 WL 4056130, at \*3 (Del. Super. Oct. 14, 2010).

<sup>2</sup> *Lefebvre v. State*, 19 A.3d 287, 293 (Del. 2011).

<sup>3</sup> *State v. Cardona*, 2008 WL 5206771, at \*3 (Del. Super. Dec. 3, 2008) (quoting *State v. Maxwell*, 624 A.2d 926, 928 (Del. 1993)).

<sup>4</sup> *State v. Kane*, No. 1210019022, 2014 WL 12684290, at \*4 (Del. Com. Pl. Feb. 12, 2014); *See Woody v. State*, 765 A.2d 1257, 1262-64 (Del. 2000).

<sup>5</sup> *Id.*

analyze the facts based upon what the arresting officer knew at the time the decision was made to take the Defendant into custody. These factors here include the Defendant being involved in a motor vehicle accident, there was a “strong” odor of alcohol emanating from the defendant's person, she had glossy eyes, and her speech was slurred. Therefore, clearly the officer had sufficient facts to take Defendant into custody.

Where the State seeks to rely on the alcohol contents of the Defendant’s blood, the State must establish that a warrant was obtained to draw blood, there were exigent circumstances causing an exception to the warrant requirement, or the Defendant voluntarily gave consent for the blood extraction. The State has the burden to establish the basis which it relies.<sup>6</sup> The Fourth Amendment of the United States Constitution and Delaware Constitution protects individuals against “unreasonable searches and seizures.”<sup>7</sup> The State has the burden to prove by a preponderance of the evidence, that a warrantless search or seizure is not in violation of the Fourth Amendment.<sup>8</sup> “A compelled physical intrusion beneath the skin to obtain a blood sample for use as evidence in a criminal investigation is considered a search.”<sup>9</sup> “A warrantless search is deemed *per se* unreasonable unless that search falls within a recognized exception.”<sup>10</sup>

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<sup>6</sup> *State v. Smallwood*, 2012 WL 4788248, at \*3 (Del. Com. Pl. May 16, 2012).

<sup>7</sup> U.S. CONST. amend. IV; Del. CONST. art. I § 6.

<sup>8</sup> *Hunter v. State*, 783A.2d 558, 560 (Del. 2001) (See *McAllister v. State*, Del.Super., No. 222, 2000, Holland, J. (July 31, 2001) (ORDER); see also *Floudiotis v. State*, 726 A.2d 1196 (Del. 1999); *Mason v. State*, 534 A.2d 242 (Del. 1987); *State v. Prouse*, 382 A.2d 1359 (Del. 1978); *Young v. State*, 339 A.2d 723 (Del. 1975).

<sup>9</sup> *State v. Mauk*, 2014 WL 4942177, at \*6 (Del. Super. Sept. 29, 2014) (citing *Missouri v. McNeely*, 133 S.Ct. 1555, 1558 (2013)).

<sup>10</sup> *Higgins v. State*, 89 A.3d 477, at \*2 (Del. 2014) (TABLE) (citing *McNeely*, 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)).

One recognized exception to the warrant requirement is a search conducted pursuant to a person's voluntary consent.<sup>11</sup> To be deemed voluntary, consent must be knowing and intelligent, and may not be the product of coercion by threat or force.<sup>12</sup> In order to determine whether a defendant gave consent voluntarily, the Court must examine "the totality of the circumstances surrounding the consent" including: (1) the defendant's knowledge of his constitutional right to refuse to consent; (2) the defendant's age, intelligence, education, and language ability; (3) the degree to which the defendant cooperates with the police officer; and (4) the length of the detention and the nature of questioning, including the use of physical punishment or other coercive police behavior."<sup>13</sup> In this case, the Court must further determine whether Defendant's medical condition affected her ability to make an informed voluntary decision.

## DISCUSSION

First, the Defendant argues the law requires the State to obtain a search warrant before drawing Defendant's blood during the DUI investigation. Defendant relies on *Missouri v. McNeely*<sup>14</sup> which states that "in order to draw blood from a suspect in a DUI investigation, a valid search warrant must be procured"<sup>15</sup>, and a "warrantless search of the person is reasonable only if it falls within a recognized exception..."<sup>16</sup> The *McNeely* Court found that if a warrant for blood draw can reasonably be obtained, then the Fourth

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<sup>11</sup> *Id.* (citing *Cooke*, 977 A.2d at 854 (citing *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973))).

<sup>12</sup> *Mauk*, 2014 WL 4942177, at \*5 (citing *Higgins*, 89 A.3d at \*2 (internal quotations omitted)).

<sup>13</sup> *Cooke*, 977 A.2d at 855.

<sup>14</sup> 133 S. Ct. 1552 (2013).

<sup>15</sup> *Id.* at 1552.

<sup>16</sup> *Id.* at 1554.



Amendment requires it.<sup>17</sup> The *McNeely* Court also held “that in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute exigency in every case sufficient to justify taking blood alcohol without a warrant.”<sup>18</sup>

Defendant argues that there was no recognized exception to the warrant requirement in this case and the Defendant did not give consent to draw blood and as such, the blood draw taken by Cassidy is unlawful.

The State argues that consent is a recognized exception to the warrant requirement in a DUI investigation and Cassidy had valid consent from Defendant to draw her blood. Furthermore, the State asserts the facts in *McNeely* do not address consent, but rather deal with former practice of blood draw without a warrant and without consent.<sup>19</sup>

However, Defendant argues that under the totality of the circumstances, the court cannot find that she gave valid consent for Cassidy to draw her blood. Defendant relies on *Higgins v. State* which held “the totality of the circumstances surrounding the consent includes; (1) knowledge of the constitutional right to refuse consent; (2) age, intelligence, education, and language ability; (3) the degree 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.”<sup>20</sup> The State bears the burden of showing that consent was voluntarily given.<sup>21</sup>

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<sup>17</sup> *Id* at 1555.

<sup>18</sup> *Id* at 1552.

<sup>19</sup> State’s brief, pg. 5.

<sup>20</sup> *Higgins* at \*2 citing *Cooke v. State*, 977 A.2d 803, 855 (Del.2009).

<sup>21</sup> *Higgins* at \*2 citing *Schneckloth* at \*222.

In the Higgins case, the defendant originally refused to allow the officer to take his blood while at the hospital. The officer then allegedly told Higgins that he could lose his license for one (1) year if he refused, and that he was lucky he did not hit a kid.<sup>22</sup> According to the officer's testimony, Higgins ultimately stated, "Fine, I'll give blood."<sup>23</sup> Since this was Higgins third DUI arrest, the Court found this consent voluntary under the totality of the circumstances. Furthermore, the Court found the officer warning Higgins that refusal would result in loss of license was not coercive because loss of license is a consequence that the police are permitted to inform DUI suspects under 21 *Del. C* § 2742(a).<sup>24</sup> Moreover, the officer's discussions with Higgins did not include any threats. The Fourth Amendment does not forbid a law enforcement officer from attempting to persuade an individual to consent to a search.<sup>25</sup>

The State argues that in *Higgins*, the Court stated "[t]o be deemed 'voluntary,' consent need not be 'knowing and intelligent.'"<sup>26</sup> In addition, the State relies on *Flonnory v. State* where the Delaware Supreme Court conducted a similar Fourth Amendment analysis and determined that "consent may be expressed or implied, but this waiver of the Fourth Amendment rights need not be knowing and intelligent."<sup>27</sup> The State contends that Defendant failed to provide evidence that Cassidy coerced or forced Defendant to consent to the blood draw and the record supports a valid warrant exception of consent in this case.

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<sup>22</sup> *Higgins* at \*1; citing Appellant's Appendix at A16.

<sup>23</sup> *Id.*

<sup>24</sup> Del. Code Ann. tit. 21, § 2742 (West); Revocation; notice; hearing.

<sup>25</sup> *Higgins* at \*3; See *Schneekloth*, 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)).

<sup>26</sup> *Higgins* at \*2; citing *Cooke*, 977 A.2d at 855; See also *Schneekloth*, 412 U.S. at 241.

<sup>27</sup> *Flonnory v. State*, 109 A.3d 1060, 1063 (Del. 2015) quoting *Cooke* at 855.

Due to her physical condition and severe painful injuries, the Defendant argues the Court must determine if she had the mental capacity to appreciate her circumstances at the time she was asked to give consent to have her blood drawn. The Defendant relies on *State v. Dempsey*, which held a defendant's response of "I don't care" to a request to a blood draw, without a signed form and lack of additional questioning by the officer, to ensure a clear and unmistakable consent to the procedure, "caused an easy case to become difficult."<sup>28</sup> In that case, Dempsey was impaired, exhausted, despondent, in a difficult situation and resigned to simply do whatever was necessary to get through the evening. The court found Dempsey did not "freely, intelligently, and unequivocally, waive his constitutional right."<sup>29</sup>

The State distinguishes *Dempsey* in that the "I don't care" response showed indecisiveness and equivocation that should have prompted further police inquiry. In the case at hand, the State provided testimony from Cassidy that Defendant gave clear and unmistakable consent as she asked "what the blood draw was for" and Cassidy responded "to check for drugs and alcohol," to which Defendant allegedly responded "okay."<sup>30</sup>

However, under the totality of the circumstances standard, the Defendant argues Cassidy should have applied for a warrant to draw Defendant's blood. Defendant points to the fact that she was involved in a major accident and sustained severe injuries to her face and torso. Defendant testified she has no recollection of speaking with Cassidy, including consenting to withdraw her blood. Thus, the question is whether the Defendant's comment

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<sup>28</sup> *State v. Dempsey*, ID No.:121201170, at \*3, Del.Super., Carpenter, J. (August 30, 2013).

<sup>29</sup> *Id* at 4.

<sup>30</sup> State's Brief at 6.

comes within the Superior Court decision which held that consent must be “‘unequivocal and specific’ and ‘freely and intelligently’ given.”<sup>31</sup>

Cassidy testified he was not aware of a consent form when drawing blood for DUI purposes. Cassidy further testified Defendant was unable to sign any form at the hospital, which is reflected in his report where Defendant was supposed to sign, Cassidy wrote, “unable to sign.” In addition, the State did not provide an exigent circumstance where there was no time to obtain a warrant.

It is clear from the facts that Defendant suffered severe injuries which readily apparent, should have put the officer on notice that her cognitive ability was impaired. This is supported by the testimony that Defendant’s language was impaired, she has no recollection of the interaction with the officer, and she was hospitalized for several weeks. Thus, I fail to see how under these conditions, Defendant would be able to make a voluntary and informed decision to consent to have her blood drawn. Under the totality of the circumstances, I conclude that the State’s reliance on a brief conversation with a severely injured person who lacks capacity to sign a police form as a basis for valid consent is not sufficient.

## **CONCLUSION**


During the suppression hearing I found probable cause for the Defendants arrest. On the issue of the blood extraction, I find there was not valid consent given by Defendant, therefore, the officer was required to obtain a warrant. Thus, I cannot find that Defendant freely and intelligently in an unequivocal manner, waived a constitutional right.

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<sup>31</sup> *State v. Winn*, 2006 WL 2052678, at \*4 (Del. Super. Ct. July 3, 2006).

ACCORDIGLY, the Motion to Suppress the blood draw and subsequent analysis is  
**GRANTED.**

**IT IS SO ORDERED.**



Alex J. Smalls,  
Chief Judge