

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE)
)
 Plaintiff,)
)
 v.) ID No.: 1804002756
)
)
 JAMES C. DRAKE,)
)
 Defendant.)
)
)

Submitted: November 2, 2018
Decided: December 21, 2018

*Upon Consideration of
Defendant's Motion to Suppress*
DENIED

ORDER

This 21st day of December 2018, upon consideration of Defendant's Motion to Suppress, it appears to the Court that:

1. Defendant James C. Drake is charged with Driving Under the Influence of Alcohol. He claims that he was arrested without probable cause in violation of the United States and Delaware Constitutions. He additionally seeks suppression of the evidence on grounds that the arresting officer failed to comply with the implied consent statute, 21 *Del. C.* § 2742(a). Finally, he argues that the search warrant for

his blood was issued without probable cause. The facts giving rise to these claims are as follows:

2. On April 6, 2018, at approximately 1:00 a.m., Newark Police Officer James Skinner (“Skinner”) observed the Defendant driving a vehicle on East Delaware Avenue with its headlights off. Skinner stopped the vehicle and upon contacting the Defendant, learned that he was unaware that his headlights were off. Defendant’s eyes were glassy and his speech was slurred. Skinner also noted a moderate odor of alcohol coming from Defendant’s breath as he spoke. Defendant explained that he had beer with dinner earlier that evening, then later amended his statement, claiming that he had recently used mouthwash.

3. At this point, whether the circumstances amount to probable cause to arrest for DUI is perhaps ambiguous.¹ But here, in addition to the usual improper driving, glassy eyes and odorous breath, when asked to perform standard field sobriety tests, the Defendant refused. At that point, he was arrested.

4. So what is the Court to make of the refusal to take field sobriety tests? The Court took additional briefing on that subject and is now satisfied that the refusal

¹ See e.g., *State v. Berry*, 2018 WL 2254263 (Del. Com. Pl. Apr. 20, 2018) (Defendant slurred his words and resisted arrest, but his behavior was not unusual; no probable cause.); *Rybicki v. State*, 119 A.3d 663, 671 (Del. 2015) (Defendant in a car accident, had an odor of alcohol, but did not slur his words; probable cause found); *Miller v. State*, 4 A.3d 371, 375 (Del. 2010) (Defendant had a strong odor of alcohol, glassy eyes, but was cooperative and spoke coherently; probable cause found).

may properly be considered in determining probable cause.² When adding the refusal to the other facts extant at the point of encounter with the Defendant, probable cause was indeed present and supported Defendant's arrest.

5. Incident to the Defendant's arrest, the Officer found numerous empty beer cans behind the passenger seat in Defendant's car.

6. All of these facts were presented to a magistrate who authorized a search warrant to draw a sample of Defendant's blood. The blood alcohol content was later determined to be 0.18%.

7. Defendant claims that his blood test results are inadmissible because the officer violated the implied consent statute in drawing blood, after he refused to have his blood drawn. 21 *Del. C.* § 2742(a) provides: "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

² See e.g., *Rybicki v. State*, 119 A.3d 663, 675 (Del. 2015) ([T]he refusal to submit to sobriety testing is admissible "for any relevant purpose."); *In re Higgins v. Shahan*, 1995 WL 108699 (Del. Super. Jan. 18, 1995) (The refusal to submit to field tests was considered in the officer's probable cause determination.); See also *State v. Taylor*, 648 So. 2d 701, 705 (Fla. 1995) ("We further hold that the refusal is probative of the issue of consciousness of guilt."); *Jones v. Commonwealth*, 688 S.E.2d 269, 272-73 (Va. 2010) ("[A] court may consider the driver's refusal to perform field sobriety tests when such refusal is accompanied by evidence of the driver's alcohol consumption..."); *In re English*, 2005 WL 1523548, at ¶1 (Wis. Ct. App. June 29, 2005) ("The law is well established that refusal to perform a sobriety test can indeed be used as a factor in assessing probable cause because it shows a guilty state of mind.").

Department.”³ The statute is silent as to the consequence of a chemical test given despite the direction that upon refusal it “shall not be given.”

8. 21 *Del. C.* § 2750 directly controls the admissibility of blood and chemical test results at trial and clarifies that a “violation” of the implied consent statute does not implicate the admissibility of the test results: “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 of this Title.”⁴

9. Finally, Defendant argues that the search warrant to draw his blood was issued without probable cause. Having reviewed the “four corners” of the search warrant and accompanying affidavit of probable cause, the Court disagrees and finds that probable cause was adequately stated in the warrant and affidavit.

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

IT IS SO ORDERED.



Charles E. Butler, Judge

³ 21 *Del. C.* § 2742(a).

⁴ 21 *Del. C.* § 2750(a); *Accord Seth v. State*, 592 A.2d 236, 444 (Del. 1991) (Section 2750 removes the “absolute bar” to admissibility of blood test results due to a defendant’s refusal to consent.); *State v. Durham*, 2017 WL 176395, at *2 (Del. Com. Pl. Jan. 17, 2017) (“Hence, a plain reading of § 2750 makes it clear that even if the officer administers the chemical test after the penalty provision is read and refused, blood results are admissible, as long as the officer does not violate search and seizure law under the Fourth Amendment.”).