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

VINCENT DORAN, Respondent Below- Appellant, v. MICHAEL D. SHAHAN, Director, State of Delaware, Division of Motor Vehicles, Department of Public Safety, Petitioner Below- Appellee.	)	C.A. No. 2002-04-377

Submitted: September 25, 2002

Decided: May 12, 2003

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FINAL ORDER AND OPINION

This is the Court's Final Order and Opinion in the above-captioned matter. Appellant, Vincent Doran ("Doran"), has appealed a written Decision of the Division of Motor Vehicles ("DMV"), dated April 10, 2002,

following an Administrative Hearing on March 19, 2002. The hearing resulted in a finding that probable cause existed to believe that Doran was driving a motor vehicle under the influence of alcohol in violation of 21 Del. C. § 4177. There was also a finding that, by a preponderance of the evidence, that Duran was driving under the influence.

On April 15, 2002, Doran filed an appeal of the decision of the Division of Motor Vehicles and briefing has been completed.

FACTS

On December 15, 2001, at 2345 hours, Delaware State Police Trooper Scott Slover ("Slover") received information regarding a motor vehicle accident. He responded to the parking lot of a McDonald's restaurant at 3014 New Castle Avenue, arriving at 0031 hours on December 16, 2001.

He contacted Doran, who stated he was driving through the parking lot at 2345 hours when the accident occurred. Slover noticed Doran's eyes were glassy and he had a strong odor of alcohol, although Doran stated he had not been drinking.

Trooper Slover asked Doran to perform field sobriety tests. When asked to recite the alphabet, A through Z, Doran recited A through W, then X and stopped. Trooper Slover rated the test a failure .

On the Walk and Turn test Doran stepped off the line on steps two and four during the first nine steps, and during the second nine steps, he stepped off the line on steps one and two, and missed heel to toe on steps seven, eight and nine. Trooper Slover rated the test a failure.

The one-legged stand test was performed. Doran held his arms at a 45 degree angle throughout the test and hopped. Trooper Slover rated the test a failure.

A Portable Breathalyzer Test was administered and Doran failed.

Doran refused an intoxilizer test and a blood test was administered. A Certificate of Analysis showed a blood\alcohol concentration of .14 when the sample was tested on December 19, 2001.

Standard and Scope of Review

The standard and scope of a review of an appeal from an administrative decision of the Division of Motor Vehicles to Court of Common Pleas "is limited to correcting errors of law and determining whether substantial evidence exists to support the findings of fact and conclusions of law." *Howard v. Voshell,* Del. Supr., 621 A.2d 804 (1992); *Eskridge v. Voshell,* Del. Supr., 593 A.2d 589 (1991). If substantial evidence exists in the record below this Court "may not re-weigh it and substitute its own judgment for the Division of Motor Vehicles." *Barnett v.*

Division of Motor Vehicles, Del. Super. 514 A.2d 145 (1986); *Janaman v. New Castle County Board of Adjustment,* Del. Super., 364 A.2d 1241, 1242, (1976). Case law also provides that "when the facts have been established, the hearing officer's evaluation of the legal significance may be scrutinized upon appeal." *Voshell v. Attix,* Del. Supr., 574 A.2d 264 (1990).

Discussion

As set forth in *Morris v. Shahan,* 1993 WL 141861, Del. Supr., (April 8, 1993), "[A]n order of revocation [by DMV] issued pursuant to 21 Del. C. §2742 is conditioned on a showing that (1) the police officer had probable cause to believe defendant was in violation of 21 Del. C. § 4177; and (2) that by a preponderance of the evidence, it appears that defendant was in violation of 21 Del. C. § 4177."

"A preponderance of evidence exists when the body of evidence supporting a conclusion is greater that the body of evidence that does not support the conclusion: (citations omitted). If the evidence is evenly balanced, the party seeking to present a preponderence of evidence has failed to meet its burden. *Voshell v. Attix,* Del. Supr., No. 435, 1989, Walsh, J. (March 21, 1990) ORDER at 5.

Appellant raises three (3) arguments in their Opening Brief. These arguments will be discussed in the order raised.

I. THE POLICE OFFICER DID NOT HAVE SUFFICIENT PROBABLE CAUSE TO BELIEVE THAT DORAN WAS UNDER THE INFLUENCE OF ALCOHOL.

Appellant cites many recent cases involving the issue of probable cause for driving under the influence. From these cases Appellant then creates a cumulative list of the various factors used in those cases to determine probable cause, and then points out the factors that were not apparent in the instant case. To do so ignores precedent in this State.

The proper test for probable cause is discussed in *State v. Maxwell,* Del. Supr. 624 A.2d 926 (1993). Probable cause requires that the arresting officer 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 the crime. Id. at 930.

Appellant's approach, as stated, seems to suggest a reverse or negative totality of all possible circumstances test by process of elimination.

Here, there is a motor vehicle accident, a strong odor of alcohol, glassy eyes, a failed Alphabet Recital, a failed Walk and Turn test, a failed One Legged Stand Test, and a failed Portable Breathalyzer Test. After reviewing the field tests administered, the Court is satisfied that the Hearing Officer's evaluation of Doran's performance was given proper significance,

and that Doran did fail all of the field tests, considering the NHTSA standards for the Walk and Turn and One Legged Stand tests.

Appellant raises the issue that no evidence appeared in the record that concludes or alleges that Appellant caused the accident involved in the instant case. This argument ignores caselaw in Delaware establishing that the possibility that there may be a hypothetically innocent explanation for each of several facts revealed during the course of an investigation does not preclude a determination that probable cause exists for an arrest. *State v. Maxwell,* Del. Supr., 624 A.2d 929-30 (1993).

Appellant raises the issue that testimony did not establish in detail what particular instructions Trooper Slover gave prior to each field test. In fact, instructions were given for the Alphabet Test (Transcript, page 5). A reference was made to the instructions for the Walk and Turn Test, "He stated to me that he understood the instructions." (T-5)

Appellant's counsel (note: not Appellant's present counsel) made only one reference to field test instructions: Q: "Okay, now, the test you gave him, I guess you explained to him carefully beforehand how to do this test, correct?" A: "That's correct." (T-10) Subsequently, Appellant's counsel made no legal argument regarding the issue at the hearing.

The standard and scope of a review of an appeal from an administrative decision of the Division of Motor Vehicles to Court of Common Please "is limited to correcting errors of law and determining whether substantial evidence exists to support the findings of fact and conclusions of law." *Howard v. Voshell,* Del. Supr., 621 A.2d 804 (1992). *Eskridge v. Voshell,* Del. Supr., 593 A.2d 589 (1991). If substantial evidence exists in the record below this Court "may not re-weigh it and substitute its own judgment for the Division of Motor Vehicles." *Barnett v. Division of Motor Vehicles,* Del. Super. 514 A.2d 145 (1986); *Janaman v. New Castle County Board of Adjustment,* Del. Super., 364 A.2d 1241, 1242, (1976).

Appellant has not submitted any authority establishing how much detailed instruction must be given as a matter of law. It remains to be determined then, only whether substantial evidence exists to support the findings of fact. *Howard v. Voshell,* Id.

The issue the Court must address is whether probable cause exists to arrest Doran for driving under the influence of alcohol pursuant to 21 Del. C. § 4177(a). "Probable cause exists where the 'the facts and circumstances within their [the officers'] knowledge in which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of

reasonable caution in the belief that' an offense has been or is being committed." *Brineger v. United States,* 338 U.S. at 175-76, 69 S.Ct. at 1310-11 (quoting *Carroll v. United States,* 267 U.S. 132, 162, 45 S.Ct. 280, 288 69 L.Ed. 543 (1925).

As set forth in *State v. Maxwell,* Del. Supr., 624 A.2d 926, 929-30 (1993). " A police officer has probable cause to believe a defendant has violated 21 Del. C. § 4177 . . . 'when the officer possess' information which warrant a reasonable man in believing that' [such] a crime has been committed." *Clendaniel v. Voshell,* Del. Supr., 562 A.2d 1167, 1170 (1989). "A finding of probable cause does not require the police officer to uncover information sufficient to prove a suspect's guilt beyond a reasonable doubt or even that the guilty is more likely than not (citations omitted). ". . . the possibility there may be a hypothetically innocent explanation of each of several facts revealed during the course of an investigation does not preclude a determination of probable cause exists for arrest." *State v. Maxwell,* 624, A.2d at 929.

In *Spinks v. State,* Del. Supr., 571 A.2d 788 (1988) the Delaware Supreme Court defined probable cause is defined as follows:

> Under Delaware law, a police officer is authorized to make a warrantless arrest and search when he has probable cause to believe that a crime or a violation of the

> Motor Vehicle Code has been committed. 21 Del. C. § 701; *Garner v. State,* Del. Supr., 301 A.2d 908, 910 (1973). Probable cause is an elusive concept, which is not subject to precise definition. It lies, 'somewhere between suspicion and sufficient evidence to convict' and exist when the facts and circumstances within the officer's knowledge are sufficient in themselves to warrant a man of reasonable caution and belief that an offense has been or is being committed.
> (Emphasis supplied)

State v. Cochran, Del. Supr., 372 A.2d 193, 195 (1977). [1]

Based upon the totality of circumstances in this record as previously referenced it is clear that probable cause existed for Trooper Slover to

[1] Other examples of sufficient finding of probable cause were set forth in *Higgins v. Shahan,* 1995 Del. Super. Lexis 64, Lee, J. (January 18, 1995) as follows:

> . . . These facts support a determination of probable cause to have arrested appellant for violating 21 Del. C. § 4177(a). See *State v. Maxwell,* 624 A.2d at 931 (accident, strong odor of alcohol, defendant driver's admission to drinking, and defendant's dazed appearance provided probable cause); *Glass v. State,* Del. Supr., No. 5, 1988, Walsh, J. (June 13, 1988) (accident, odor of alcohol on defendant's breath, and defendant's confused and disoriented state were sufficient to establish probable cause); *Spinks v. State,* Del. Supr., No. 481, 1988, Christie, C.J. (January 17, 1990) (accident, defendant's deliberate, unnatural movements, defendant's smell of alcohol, and his wandering into the roadway twice were sufficient to establish probable cause); *State v. Otto,* Del. Super., C.A. No. IK-93-04-0109, Steele, R.J. (November 12, 1993) (accident, defendant's smelling of alcohol, defendant's slurred speech and bloodshot eyes, and his admission of having visited a bar established probable cause); *State v. Gunter,* Del. Super., Crim. Action No. S93-02-0485A, Lee, J. (May 28, 1993) (accident, defendant's admission he was the driver, the odor of alcohol emanating from defendant, an open beer container in the disabled car, defendant's glassy, bloodshot eyes, and defendant's unsteady walk were sufficient to establish probable cause).

conclude under Delaware law that defendant was under the influence of alochol.

II. THERE WAS AN INSUFFICIENT FOUNDATION FOR THE ADMISSION OF THE BLOOD TEST RESULTS

The statutory requirements for the acceptance into evidence of the results of a blood test are found in 21 Del. C. § 4177(h)(1) and (2). *Durbin v. Shahan,* Court of Common Pleas, C.A. No. 2001-08-064, Welch, J. (December 20, 2001). Judge Welch found that:

> "The statue, 21 Del. C. § 4177(h)(1) supplants the Business Records Rule DRE 803(3) and does not require a specific foundation requirement that Mark's identify the State Chemist's signature. Simply put, 21 Del. C. § 4177(h)(1) requires a report signed by the State Chemist.

Id. at 9.

In this case, Officer Slover introduced into evidence, without objection by Doran's attorney, a report signed by the State Chemist indicating that the result of the blood test was .14. Although Appellant argues in his opening brief that the record does not establish certain facts, the Court is persuaded by the State's argument that the facts are part of the Certificate and therefore, part of the record. See 21 Del. C. § 4177(h)(1) and (2).

III. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A FINDING BY A PREPONDERENCE OF THE EVIDENCE THAT APPELLANT VIOLATED 21 Del. C. § 4177

In order to sustain the revocation of Appellant's driver's license or privaledges the State must prove a violation of 21 Del. C. § 4177 by a preponderance of the evidence. A preponderance of the evidence exists when "the body of evidence supporting a conclusion is greater than the body of evidence that does not support the conclusion." *Eskridge v. Voshell*, Del. Supr., 593 A.2d 589 (1991). "If the evidence is evenly balanced, the party seeking to prevent a preponderance of evidence has failed to meet its burden. *Voshell v. Attix,* Del. Supr., 574, A.2d 264 (1990).

Clearly, the administrative record supports the finding that Appellant had a blood alcohol content of .14. The State points out pursuant to the applicable statute, 21 Del. C. § 2742(f)(2), which states in relevant portion the following:

> "For purposes of the subsection an alcohol concentration of .10 or more pursuant to testing provided for in this section or subsection 4177 of this title or a positive indication of the presence of drugs, shall be conclusive evidence of said violation.

Putting aside the above findings of fact regarding Trooper Slover's personal observations and the Appellant's failed field tests, the BAC result of .14 is dispositive. Taken collectively, this Court finds a preponderance of evidence exists in the record to find a violation of 21 Del. C. § 4177(a).

CONCLUSION

This Court is satisfied that there is substantial evidence in the record to support a finding of probable cause to believe that the defendant was in violation of 21 Del. C. § 4177. There is also substantial evidence in the record to support a finding by a preponderance of the evidence that the defendant was driving while intoxicated in violation of 21 Del. C. § 4177. In addition to the defendant's physical appearance, and failed performance on each filed test, the hearing officer expressly found that the defendant's blood alcohol concentration was .14 percent.

Finally, after reviewing the administrative proceedings below, this Court also finds no error of law.

NOW, THEREFORE, it is ORDERED that the decision of the Division of Motor Vehicles is hereby AFFIRMED.

IT IS SO ORDERED.

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Joseph F. Flickinger III
Associate Judge