EFiled: Oct 08 2014 01:14PM EDT
Filing ID 56165908
Case Number 332,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

HEATHER J. RYBICKI, Defendant-Below, Appellant, v. STATE OF DELAWARE, Plaintiff-Below, Appellee.	)))))))))))	No. 332, 2014 COURT BELOW: In the Superior Court of the State of Delaware, In and For New Castle County, I.D. 1306019828

APPELLANT'S OPENING BRIEF

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DATED: October 8, 2014

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NATURE OF THE PROCEEDINGS

On June 22, 2013, the defendant was arrested on charges of Driving Under the Influence of Alcohol, a third lifetime offense, and Failing to have an insurance card in her possession.

She was indicted on September 18, 2013 and arraigned on October 28, 2013, and at which time a plea of "not guilty" was entered on her behalf.

Motions to Suppress Evidence were filed on November 8, 2013 (A-7-9) attacking the constitutional legitimacy of the admissibility of the defendant's blood sample and on December 20, 2013 (A- 10-12) attacking the constitutionality of the initial arrest of the defendant.

Both Motions were denied . (A-2, 3, 35)

A Motion to Reargue was filed on January 17, 2014 (A- 13-21) and was denied on February 18, 2014. (A-3)

The State terminated the prosecution involving the Insurance Card issue. Trial by jury occurred on April 22, 2014 and on April 23, 2014. The Indictment charged Driving Under the Influence under two separate provisions of law, viz., pursuant to 21 Del.C.§4177(a)(1) (Driving While Impaired and pursuant to 21 Del.C. §4177(a)(5) (Having a Prohibited Blood Alcohol Content Within Four Hours of Driving). The Court did not include a verdict sheet requiring the jury to announce separate findings with regard

to the two different theories offered. An omnibus verdict of "guilty" was returned on April 23, 2014. Bail was immediately revoked notwithstanding the request of counsel to the contrary.

A Motion for New Trial was filed on April 23, 2014 (A-22-27), and the Court, apparently, without issuing any written ruling effected a de jure denial of the Motion by proceeding to sentencing on May 23, 2014.[1]

The defendant was sentenced to two years of Level 5 incarceration, suspended after 90 days, followed by varying periods of probation.

A timely appeal was docketed on or about June 20, 2014. This is the defendant's Opening Brief in support of her appeal.

[1] Since the Court did not issue a written Order denying the Motion for a New Trial, there is nothing available to identify the basis of the Court's denial of the Motion other than the obvious; viz., "The Court was not particularly impressed with the Motion.".

SUMMARY OF ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DENYING THE DEFENDANT'S MOTIONS TO SUPPRESS EVIDENCE WHETHER DECLINING TO INVALIDATE THE ARREST OR THE SEARCH WARRANT, OR BOTH.

II. THE DEFENDANT ASKS THE COURT TO DIRECT A VERDICT OF ACQUITTAL AFTER FINDING ERROR IN THE ADMISSIBILITY OF THE BLOOD ALCOHOL CONTENT WHILE RECOGNIZING THAT NO RATIONAL FINDER OF FACT COULD CONCLUDE GUILT BEYOND A REASONABLE DOUBT BASED UPON THE RECORD ABSENT THE BLOOD ALCOHOL CONTENT READING.

III. THE BREATH BLOOD ALCOHOL CONTENT EVIDENCE WAS IMPROPERLY ALLOWED INTO EVIDENCE IN LIGHT OF THE FAILURE OF THE STATE TO LAY A PROPER AND REQUIRED EVIDENTIARY FOUNDATION.

IV. THE JURY INSTRUCTIONS, AS RENDERED, WERE CONSTITUTIONALLY IMPERMISSIBLE.

STATEMENT OF FACTS

On June 22, 2013, John Klingler, a civilian motor vehicle operator, heard a loud noise and caused by the accident involving the defendant's vehicle. He had no knowledge regarding causation of the accident and merely saw the car in its final resting place in the area of Chestnut Hill Road and South College Avenue in Newark, Delaware. (T-19,20; A-38) [2] He contacted 911. He had limited contact with the defendant and described her as disoriented; i.e. "I guess almost like a shock type of – I could refer to, like after a motor vehicle accident something happens of that nature people tend to be – when I say 'disoriented', they're just kind of slow to react to the answers to your questions.". (T-25; A-39) As a volunteer fire person, he opined that the disorientation and slow reactions of the defendant were consistent with people involved in such accidents. (T-27; A-40)

Corporal Kendrick (hereinafter "Kendrick") was dispatched at approximately 12:47 a.m. on June 22nd. (T-30,31; A-40,41) He noted, and as he described it, that the defendant's car was "severely damaged" and motor oil had been spread onto the roadway near the final resting point of her vehicle. (T-34; A-41) Kendrick's car was equipped with a motor vehicle recorder, and the DVD capturing the, on the scene, interaction

[2] The designation "T" is the transcript of the trial conducted on April 22, 2014.

between the defendant and Kendrick was introduced as a State exhibit.[3] (T-22; A-38)

When Kendrick first contacted the defendant, she was still seated in the driver's seat and did not complain of injury. (T-36; A- 42) He noted a strong odor of alcohol. (T-36; A- 42) He agreed with counsel that the intensity or strength of the odor of alcohol emitted from one's mouth does not correlate to the quantity of alcohol consumed. (T-76; A-47) The defendant was unable to explain what had caused this single-car accident although she had no difficulty explaining that she was en route from Newark, complying with his direction to depart her vehicle, avoiding an area of oil spill pointed out by Kendrick, relocating herself on a nearby sidewalk at his direction, or understanding other directions, by Kendrick, at the scene. (T-36, 37; A- 42)

Kendrick also noted, as an anomaly, one infers, that the defendant produced a Delaware identification card, after being asked for her operator's license, followed by the production of her Delaware driver's license. (T-38; A-42) When both forms of identification were marked and produced for his visual inspection, and when he was asked whether or not they were similar

[3] Since the Court will have the availability of the DVD for personal review, defense counsel will not be so patronizing as to inform the Court what it depicts because "Seeing is believing".

in appearance, he initially chose not to answer the question. (T-79; A-48) Upon prodding, he conceded that they did, in fact, resemble one another, and the only difference he could note was the presence of a described "yellow bar at the top". (T-79, 80; A-48) He did not indicate that she had any difficulty in understanding the questions he was posing. (T-86; A- 49) He asked her to get out of the car, and she complied. When he asked her to get out of the car, she asked him why, and he explained that he wanted to administer field sobriety tests, and at which point, "She did comply and she exited the vehicle.". (T-41; A-43) No difficulty was observed in the manner in which she departed her vehicle. He did not notice any balance difficulty in the way that she walked and specifically indicated that he observed no "staggering". (T-83; A-49) He acknowledged that he is trained to watch persons depart from their vehicle and to determine whether or not they seek support or are otherwise unsteady as they walk and saw nothing of the kind. (T-83; A- 49) After she got out of the car, he advised her about the oil on the roadway, and she understood what he said and avoided the area he indicated. (T-83; A-49) She did not lean against any objects including her car. (T-83; A-49) She did not demonstrate any swaying behavior or other balance instability as they stood talking to one another. (T-84; A-49) The only thing that she could not answer was how the accident occurred or what caused the

accident. (T-84; A-49) Of interest is the fact that there was no issue with regard to the clarity of her speech. (T-77; A-47)

He directed her to a sidewalk, and she went to that location although returning to her vehicle to get a garment because she was cold. (T-87, 88; A-50)

For reasons which are curious, at least, to counsel, no investigation was made to determine the possible impact of mechanical malfunction in causing the single-car accident. (T-75, 76; A-47)

She chose not to submit to any field sobriety tests. (T-50; A-45) The defendant chose not to submit to the intoxilyzer test.[4] (T-55; A-46)

A search warrant was obtained by Kendrick authorizing the seizure of the defendant's blood and a phlebotomist was contacted to respond to the Newark Police Department. (T-55, 56; A-46) Blood was drawn at 3:30 a.m., and notwithstanding the fact that Kendrick had obtained a search warrant, the phlebotomist explained what he intended to do with regard to the collection of her blood, and, "she was okay with it". (T-58; A-46)

Testimony disclosed the defendant's blood alcohol was measured at 0.18 grams per 100 milliliters of alcohol. (T-114; A-54)

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[4] Of interest, as will be developed appropriately, post, is the fact that there was absolutely no "meat on the bones" reflecting any information that would provide a context of the nature of communications between the two vis-à-vis field test, portable breath test and/or intoxilyzer refusals. (T-55; A-46)

The defendant identified herself as having a Bachelor's Degree and an Associates Degree with the Associates Degree being in Nursing. (T-135; A-57) She graduated from Delaware Technical and Community College in 2009. (T-135; A- She also had specific training, within the two months prior to the accident in question, as a phlebotomist. (T-146; A-59) She acknowledged that she had consumed alcohol, beginning between 7:30 p.m. and 8:00 p.m., and continuing over a four and one-half hour period of time, and after having consumed a full meal, she approximated that she consumed four containers of beer at a local bar.

In her trial testimony, she produced her telephone records which indicated that she was talking on her cell phone at the time of the accident. (T-141; A-58) She was unable to recall the events leading up to the accident, but explained that she had an area of soreness on her head which happened post collision or during the collision and which caused a slight concussion and which would account for her memory gap. (T-142, 143, 144; A-58,59) The defendant did not acknowledge being under the influence of alcohol or impaired by its ingestion.

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DENYING THE DEFENDANT'S MOTIONS TO SUPPRESS EVIDENCE WHETHER DECLINING TO INVALIDATE THE ARREST OR THE SEARCH WARRANT, OR BOTH.

A. Did the Trial Court commit reversible error by denying the Defendant's Motions to Suppress Evidence whether declining to invalidate the arrest or the search warrant, or both? (A-1-6)

The defendant preserves both arguments seeking suppression. (A-7-9, 10-12)

B. Standard and Scope of Review.

When the defendant is heard to attack the sufficiency of a search warrant, it is the defendant who must demonstrate that her Federal and/or State constitutional rights have been violated. State v. Adams, 13 A.3d 1162 (Del.Super.2008). This Court must, itself, conduct a review of the "four corners analysis" effected by the Trial Court. Id. It is a de novo review where, as here, the underlying facts are not in dispute, and the analysis to be made is whether or not the Trial Court, in its interpretation of the facts, "blew the call" in approving the legitimacy of the Affidavit vis-à-vis the establishment of probable cause. LeGrande v. State, 947 A.2d 1103 (Del.2008); Smith v. State, 887 A.2d 470 (Del.2005).

When, on the other hand, the attack is launched against the warrantless arrest of the defendant, it is the State who, necessarily, bears the burden of proof. Adams, supra.

C. Merits of Argument.

The defendant, through counsel, filed two separate, but clearly linked, Motions to Suppress Evidence, dated November 8, 2013 and December 19, 2013.[5] The initial Motion, the "warrant motion", challenged the propriety of the seizure of the defendant's blood while bottoming the attack solely on the insufficiency of the Affidavit of Probable Cause in that it failed to "make the case" for the establishment of probable cause. The second Motion, the "arrest motion", enlarged the scope of the attack by also alleging that the original arrest, which was warrantless, was made without there being probable cause, therefore, any information that was obtained after the initial arrest, but included in the Affidavit in support of the application for a search warrant, must be excised as "fruit of the poisonous tree".[6] Roy v. State, 62

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[5] The analytical process differs, however subtly, because the burden is on the State to demonstrate probable cause as challenged in the "arrest motion", but the burden falls upon the defendant in the attack of the Affidavit found in the "warrant motion".

[6] Of course, all of the facts that remained to the arresting officer, at the moment of arrest, would be included in the "totality of circumstances" analysis as opposed to, potentially, a more limited portrayal of facts if the author of the application chose not to include everything that entered into his determination of what he believed to be probable cause. In the instant case, the State was content to proceed sans Suppression Hearing, therefore, the underlying facts that the Trial Court considered in reviewing the arrest motion and in

A.3d 1183 (Del.2012). The timeline definition of probable cause rings true in that a Court must determine whether the arresting officer, and in the case of a review of a search warrant, the issuing Magistrate, possessed information which would warrant a reasonable man in believing that a crime had been committed and that there was a fair probability that evidence of that crime would likely be discovered. State v. Flonnory, 2013 WL 3327526 (Del.Super.) . In short, there must be a fair probability that criminal activity has occurred, and there must be a fair probability that evidence, in this case, is likely to be located as requested in the warrant, and that analysis takes place by using a totality of circumstances test as viewed by the hypothetical reasonable police officer and/or the hypothetical reasonable issuing Magistrate. Also see Miller v. State, 4 A.3d 371 (Del.2010).

Since the factual record is identical vis-à-vis the arrest issue and the warrant issue, the defendant will offer a "blended" analysis rather than replicating factual references, but being ever so mindful, that although the facts are identical, the burden falls upon the State to justify the legitimacy of the arrest and on the defendant to demonstrate the illegitimacy of the issuance of the warrant. Adams, supra. Cast in statutory terminology, the

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reviewing the warrant motion were identical except that the warrant analysis included the additive that the defendant refused the intoxilyzer since that event had not happened pre arrest. (A-28-30)

analysis must conclude that there was present at the time of arrest or at the time of the issuance of the warrant, or both, a fair probability that the defendant was "because of alcohol or drugs or a combination of both, less able than the person would ordinarily have been, either mentally or physically, to exercise clear judgment, sufficient for physical control or due care on the driving of a vehicle". 21 Del. C. §4177(c)(5). Admittedly, probable cause is "an elusive concept". Lefebvre v. State, 19 A.3d 287 (Del.2011). There must, however, be a "quantum of trustworthy factual information" sufficient to warrant a man of reasonable caution in believing that a Driving Under the Influence offense has been committed. State v. Maxwell, 624 A.2d 926, 931 (Del.1993).

Although it can be distracting to correlate the factual dynamics of other cases as guideposts for the determination that has to be made, such correlation does offer some guidance, however slight. In Lefebvre, there was a traffic offense that was committed, a strong odor of alcohol, a flushed face, bloodshot and glassy eyes, an admission of drinking one and one-half hours before the police contact, a flustered and argumentative demeanor and a remark offered, vis-à-vis one of the field sobriety tests, "I'm not that good

at this sober." and all of which were, in combination, acknowledged by defense counsel as having the "right stuff".[7]

Maxwell, supra, has been the bellwether relied upon the State for more than 20 years because the facts supporting probable cause were so limited yet success was achieved.. The defendant suggests that the lean facts in Maxwell represent the furthest reach of "judicial charity" in allowing the State to prop up an arrest based upon quite limited factual circumstances. Even those meager facts are thunderously more persuasive than what is found in the Affidavit at hand. In Maxwell, there, as is the case here, was an unexplained accident insofar as there had been no determination of the role, if any, of mechanical failure of the Maxwell vehicle before a single vehicle collision had occurred. Maxwell had admitted that he had consumed alcohol. Several empty containers with an alcohol-like odor were located near the accident site. Maxwell's eyes were described as "glassy". A civilian eyewitness described Maxwell as "dazed". The Maxwell vehicle, even though empty of human beings, provided a strong odor associated with the odor of alcohol. The chief investigating officer was assigned to a Unit primarily responsible for the investigation of automobile accidents involving serious injury or death and had specialized training in the area of accident

[7] This American classic phraseology reflects the difficulty in trying to mathematically or scientifically define "probable cause".

reconstruction with his resume indicating the investigation of more than 100 motor vehicle accidents related to driving under the influence of alcohol.

The factual "low bar" that was offered by Maxwell, supra, even as low as it is, was not met so as to permit a finding of probable cause in the instant case:

1. It was a one-vehicle accident.
2. The vehicle had traveled across a grass embankment, from an adjacent parking lot, struck a curb and came to rest on South College Avenue while being positioned perpendicular to the travel flow permitted on the roadway.
3. The defendant was the driver of the vehicle.
4. Upon contact, an odor of alcoholic beverages emanated from her breath.
5. The defendant refused all field sobriety tests.
6. The defendant refused a portable breath test.

That is the factual landscape that has to be analyzed in the framework of the "totality of circumstances" legal standard to determine if Kendrick was justified, legally, in placing the defendant under arrest. (T-42, 43, 44, 47, 48, 49, 50; A-43, 44, 45)

Interestingly, a case which sets out the burden on the State is State v. Adams, supra, which, coincidentally, involves two challenged Fourth Amendment violations with the first being the street arrest of Adams and the second being a challenge to the search warrant that was brought about as a result of the initial arrest. The Superior Court declared:

> "... The State has the burden of proving the propriety of that arrest and seizure.".

The State has failed to discharge in the instant case which is proof by a preponderance of the evidence. State v. Miliany-Ojeda, 2004 WL 343965 (Del.Super.)[8]

Has the State even come close? The defendant's answer is as predictable as it is lamentable; i.e. "NO WAY"!

Boiled down to essentials, what an advocate has on the "pro" side advocating that this sparsity of information "fills the bill" is that an accident which was otherwise unexplained, and which involved a single vehicle, and where the operator had an odor of alcohol coming from her breath when coupled with a refusal, without any explanation being offered one way or the other, to hold one leg in the air for 30 seconds, walk heel-to-toe and stand with one's head still while following an object with one's eyes, when viewed

[8] Of course, that very familiar term has been "defined to mean the side on which 'the greater weight of the evidence' is found". (citation omitted). Taylor v. State, 2000 WL 313501 (Del.).

in totality, made it a fair probability that the individual was driving under the influence as that term has been defined.

On the "con" side, where a leap in logic was not required. The totality of circumstances included the unspoken and uncommented upon as much as it did what was commented upon so the following reasonable inferences were to be gleaned:

1. There was no indication of the time of day of the accident.
2. There was no indication of the traffic conditions.
3. There was no indication of the road conditions.
4. There was no indication of the weather conditions.
5. There was no indication of the cause of the accident and whether it was situational; e.g., the proverbial deer who seems to emerge from wooded areas when drivers are charged with Driving Under the Influence of Alcohol in single-vehicle accidents.
6. There was no indication what role, if any, mechanical failure of the brakes, steering mechanism, engine failure, or tire failings were involved.
7. There were no eyewitnesses who described the speed of the vehicle and, of course, no accident reconstruction may have indicated the

same.

8. There was no indication of the speed limit of the roadway.
9. There was no indication of the extent of damage so that one may have inferred high speed or other acts of unsafe driving.
10. There was no indication of mental abnormality on the part of the defendant.
11. There was no indication of the strength of the odor of alcohol associated with the defendant.
12. There was no indication of an acknowledgement of the consumption of alcohol by the defendant.
13. There was no indication of the condition of the eyes of the defendant – a telltale sign of alcohol impairment according to the typical police officer-witness in a Driving Under the Influence trial.
14. There was no indication of any unusual actions demonstrated by the defendant.
15. There was no indication of speech abnormality such as mumbled, slurred, confused or any of the normal potpourri of descriptions testified to by police officers in Driving Under the Influence cases.

16. There was no indication of any demeanor behavioral changes that often are apparent when alcohol has played a role in an accident.

17. There was no indication that the defendant experienced any balance abnormality as she departed from a sitting position from within her vehicle to a standing position outside her vehicle.

18. There was no indication of any balance difficulties.

19. There was no indication of any alcohol containers being found in or about the vehicle.

20. There was no indication of any alcohol odor emanating from the vehicle to suggest she had consumed alcohol in the vehicle.

21. There was no indication of anything to support even the barest of suspicions that she was impaired by drugs notwithstanding the sworn assertion by Kendrick.

22. There was no indication of the context of the statement, "Ms. Rybicki refused all field sobriety tests…". It is pure speculation whether she said, "I'm too smart to do that" or "I have a bad back" – remarkably different circumstances that would warrant different responses on the part of a reasonable woman.

23. There was no indication of exactly what "all field sobriety tests" means. Does it include the alphabet recitation and the counting

backwards? Does it include the finger-counting or the thumb as applied to the tip of each finger in a set sequence while a set counting sequence must be followed? Does it include HGN? The mere statement without there being anything to allow a reasonable person to interpret makes the stated representation meaningless.

To permit this minimalistic effort, if it be termed that, to survive a probable cause analysis and the Court rule in favor of the State is to emasculate the concept of probable cause so that the protection of the Fourth Amendment evaporates in 2014.

Turning now to the issue of the issuing Magistrate declaring a finding of probable cause, the path of analysis is anything but laborious. One additional fact was stated in the Affidavit that happened post arrest, and that was the defendant's refusal to submit to an intoxilyzer without a context being offered.

Without commenting upon the nuanced difference, if any, by refusing field sobriety tests of unknown ilk compared with refusing to submit to a chemical test burnishes the bumbled probable cause effort or, contrarily, adds nothing more than was already evidenced by the refusal to submit to field sobriety tests and the portable breath test, suffice it to say that even the most inexperienced jurist, acting as a Magistrate, possessed of a basic fund

of knowledge regarding probable cause, would immediately ask the question, "Corporal, I've just read all this, but when did all this happen?".[9]

Nothing within the "four corners of the Affidavit" offers a clue as to when the driving took place and which was absolutely necessary in order to provide a "substantial" basis to believe that the evidence of alcohol would be likely to be found in the defendant's circulatory system after the seizure was approved. The temporal factor is, indeed, a hallmark of probable cause. Sisson v. State, 903 A.2d 288 (Del.2006), "[p]robable cause must be based on current information... for stale information will not support a finding of probable cause". (citation omitted).

Finally, the defendant would have the Court note that had there been a Suppression Hearing, per se, rather than a waiver of such by the parties, the Court would have been asked to effect a reverse-Franks analysis and re-sculpting of the Affidavit to include all material and central facts directed to the issue of probable cause. See Rivera v. State, 7 A.3d 961 (Del.2010). The defendant would have been in a position to urge the Court, as a matter of law, to consider the dearth of information included in the Affidavit, and which should, it is argued, have been included; viz., the unaffected speech

[9] Of course, counsel is using hyperbole and would not suggest it appropriate that the independent Magistrate sits down over coffee with the applicant police officer and arrange for them to "Let's put our heads together and get this right.".

pattern of the defendant, the lack of any unusual condition of her eyes or face, the lack of any unusual demeanor or other unusual condition associated with impaired behavior. Even without being able to muster legal authority requiring the Court to conduct the analysis, nonetheless, the Court can, and, it is argued, "should" take note of the absence of these very basic factors be alluded to in the Affidavit under attack as part of the probable cause analysis.

II. THE DEFENDANT ASKS THE COURT TO DIRECT A VERDICT OF ACQUITTAL AFTER FINDING ERROR IN THE ADMISSIBILITY OF THE BLOOD ALCOHOL CONTENT WHILE RECOGNIZING THAT NO RATIONAL FINDER OF FACT COULD CONCLUDE GUILT BEYOND A REASONABLE DOUBT BASED UPON THE RECORD ABSENT THE BLOOD ALCOHOL CONTENT READING.

A. Should this Court direct a verdict of acquittal after finding error in the admissibility of the blood alcohol content while recognizing that no rational Finder of Fact could conclude guilt beyond a reasonable doubt based upon the record absent the blood alcohol content reading?

Defense counsel chose not to fashion an argument asking a Trial Court to declare herself to be mistaken in her suppression ruling and, based upon that assumption, determine the sufficiency of the evidence absence any consideration of the blood alcohol content and did not, therefore, preserve the issue for appeal.

B. Standard and Scope of Review.

When a defendant appeals on the basis that there was insufficient evidence to justify a finding of guilt, the Court will utilize a de novo review to determine whether any rational Trier of Fact, viewing the evidence in a light most favorable to the State, could find the defendant guilty beyond a reasonable doubt. Farmer v. State, 844 A.2d 397, 300 (Del.2000). Where, however, the defendant failed to make application by means of a Motion for

a Directed Verdict or for a Judgment of Acquittal notwithstanding the verdict, the Court's analysis will consist of a determination of whether or not there is plain error. Wright v. State, 25 A.3d 747 (Del.2011); Swan v. State, 820 A.2d 342, 358 (Del.2003); Verden v. State, 604 A.2d 1367, 1368 (Del.1992).

C. Merits of Argument.

The defendant incorporates by reference the Statement of Facts and Argument I in support of his contention that no rational juror could conclude that the statutory definition of "under the influence" has been met beyond a reasonable doubt. Although quite confident that the Court will register agreement with the defendant's position in this regard, the defendant also notes the "legal additive" of the MVR which further buttresses the inevitability of acquittal had there not been an improper blood alcohol reading presented into evidence.

The Court did not submit a verdict sheet that required the jury to indicate upon which basis a finding of guilt was made given the State's two different prosecution links. Consequently, there is no way of knowing the "breakdown" except to say that it is absolutely positive, without fail, that there would have been 12 unanimous votes vis-à-vis the prohibited alcohol content within four hours, and it is only a matter of conjecture whether or

not the State's alternative theory would have survived. Two things are clear, and that is that the jury was "infected" by what is now, hopefully, being labeled as "reversible error" and which evidence the jury could not have possibly ignored in reaching its decision. Secondly, it is crystal clear that the remaining flotsam and jetsam of the State's sinking ship could not have possibly supported a verdict of guilt when viewed by rational jurors.

The defendant, defense counsel, accepts the burden, as he must, of demonstrating plain error in demonstrating actual prejudice which must be apparent from the face of the record. Defense counsel would ask the Court to consider the spirit of the remarks made in Gordon v. State, 604 A.2d 1367 (Del.1992) and consider that a beacon to adopt in this particular case. Gordon cites several cases where the Court has, albeit "few and far between", at times, considered the merits of a claim of insufficient evidence which has not been fairly presented to the Court Below in a jury trial. For example, in Robertson v. State, 506 A.2d 1345 (Del.1991), the Court, without comment, considered a claim of insufficient evidence which had not been broached at the trial level.

III. THE BREATH BLOOD ALCOHOL CONTENT EVIDENCE WAS IMPROPERLY ALLOWED INTO EVIDENCE IN LIGHT OF THE FAILURE OF THE STATE TO LAY A PROPER AND REQUIRED EVIDENTIARY FOUNDATION.

A. Was the breath blood alcohol content evidence improperly allowed into evidence in light of the failure of the State to lay a proper and required evidentiary foundation? (T-114; A-54)

B. Standard and Scope of Review.

The appropriate standard of review utilized by this Court in reviewing the propriety of the Trial Court's permitting evidence to be brought before the jury in the face of an objection is an abuse of discretion standard. McNally v. State, 980 A.2d 364 (Del.2009). When the proffer was made by the State to introduce the blood alcohol content results, the defendant objected on the ground that the State had failed to lay a proper evidentiary foundation. (T-106, 107, 108, 109; A-52, 53)

C. Merits of Argument.

It is axiomatic that before the results of scientific testing are admissible in evidence a proper evidentiary foundation must be established by a preponderance of the evidence. Zimmerman v. State, 693 A.2d 311 (Del.1997); State v. Newton, 421 A.2d 920 (Del.1980). With these clarion fundamentals in mind, a review of the trial transcript offers a clear perspective of the "lean" underpinnings of the State's shaky foundation:

a. The needle and test tubes were provided to the phlebotomist, Moore, from a Newark police kit. (T- 4, 7; A-36,37) The sole reference to the description of the needle was "the needle". (T-7, 8; A- The sole reference to the device used to collect and store the defendant's blood was referred to as the "tube". (T-7-9; A-37) as the "tube".

Clearly, the testimony of the phlebotomist offered absolutely no insight as to the sterility of the collection needle or the blood storage tube.

Kendrick's testimony was equally unavailing as a source of foundation creation.

1. The source of the blood kit was the evidence room of the Newark police station which is where it was retrieved by Kendrick. (T-56; A-46)

2. In describing the contents of the kit, the expertise, rather "lack thereof", of Kendrick was found in the language "It has, I guess..." as he goes on to recite its contents, or, more aptly put, his "guess" as to the contents as iodine, a non-alcohol wipe, a needle to draw the blood and a tube with a little white substance in the tube and seals. (Emphasis supplied) (T-56, 57; A-46)

3. Equally concerning was the description offered by Kendrick as to

what he found upon, presumably unsealing, and opening the kit and which is best exposed by reference to his specific language:

> "What is taken out, I guess, the needle, also the tube and then, also, the iodine pack, and, I guess, there's also forms to be filled out at the time by myself and this was given – everything that was in the kit was given to Pat Moore.". (emphasis supplied) (T-57; A-46)

Metaphorically, and using football while recognizing the season is here, the clock is winding down, the State has failed to score and has not even crossed the 50-yard line in presenting the requisite foundational requirements of sterile instruments being utilized when the last witness "stepped up to the plate" [metaphorically using a baseball phrase since baseball season lingers for several more weeks] in the form of a Delaware State Police employee, Julie Willey. If success was to be achieved in establishing what had been, up to that point, the illusive foundation, it fell on her shoulders to "punch the ball over the goal line" and into the end zone. She didn't come close!

She identified herself as a longtime employee of the Delaware State Police. (T-91, 114; A-51,54) While she did indicate that she was responsible for providing criminalistic supplies for distribution to State Police Officers state-wide, she offered no information regarding the source of the criminalistic supplies (assuming a blood kit falls within that designation

albeit that can only be gathered on an "educated guess") utilized by the Newark Police Department.[10]

Never did the State address a single inquiry as to a critical foundational issue which was absolutely required before admissibility of the blood test results could be granted; viz., the use of sterile instruments for collection and storage.

Willey clearly stated the danger of an inflated blood alcohol content being rendered if blood was collected in a non-aseptic environment.[11] (T-122, 123; A -55, 56)

Kendrick's "guesses" do not satisfy the fundamentals of Delaware evidentiary law vis-à-vis reliability foundation for evidence admissibility. It is the State that has that burden. Hammond v. State, 569 A.2d 81 (Del.1989); Clawson v. State, 867 A.2d 187 (Del.2005).

Considered in the context of blood analyses, it is fundamental that the State must demonstrate the instruments utilized in the collection, packaging and ultimate testing are sterile. People v. Coronado, 2012 WL 470188 (Mich.App.). In State v. Jordan, 181 S.W.3d 588 (Mo. App. 2005), the

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[10] Of course, the defendant anticipates that the State will be able to offer Kendrick's "guesses" as providing appropriate scientific reliability of the requirement of sterility.

[11] Concededly, counsel was required to search the definition of "aseptic" and learned that it describes a circumstance that is "free from germs" and which, obviously, is the condition sought to be obtained by the requirement of using sterile instruments so as to safeguard the constitution of the sample of blood. See www.Miriam-Webster.com.

Missouri Court of Appeals reiterated the caveat that the proponent seeking to prove blood alcohol content must meet all foundational prerequisites for its admission. The Court went on to indicate one of the foundational blocks was "that a sterile needle was used". Furthermore, another foundational block was noted as the requirement "that a sterile container was used". In accord, Duncan v. City of Cedar Rapids, 560 N.W. 2d 320 (Iowa 1997). An opinion authored by the Maine Supreme Court parallels, factually to some degree, the context of the admissibility issue before the Trial Court. Specifically, the procedure in the state of Maine was that a blood kit that was used, as a standard blood kit in Maine, bore a manufacture's certificate indicating that the contents of the kit were not adulterated and, as the Court noted, that certification satisfied a prima facie foundational basis for admissibility. The problem arose because the blood collector utilized a syringe from a hospital emergency room where there was no such certification in place. The Court determined that deficit was fatal to admissibility such that the blood test results were improperly admitted, and the case was reversed.

Unlike Delaware, many states have specific administrative and/or statutory regulations that set forensic blood collection standards that must be followed. See Forensic Submission Guideline #2 as an exemplar. (A-31-33)

IV. THE JURY INSTRUCTIONS, AS RENDERED, WERE CONSTITUTIONALLY IMPERMISSIBLE.

A. Were the jury instructions, as rendered, constitutionally Impermissible? (T2-25, 26; A-61, 62) [12]

The defendant preserved this issue as appropriate for appeal. (T2-3, 4; A-60)

B. Standard and Scope of Review.

The alleged violation of a constitutional right requires a de novo review. Cook v. State, 97 A.3d 513 (Del.2014).

C. Merits of Argument.

The defendant acknowledges that in Mullin v. State, 907 A.2d 146 (Del.2006), and in the context of the Intoxilyzer 5000, an instruction that read, in part:

> "In this case, the State presented the results of a test that uses a scientifically sound method of measuring the alcohol content of a person's blood. The State is not required to prove the underlying scientific reliability of the method used...".

There is absolutely no recorded case precedent, in Delaware, where that language was utilized with regard to gas chromatography. Although Delaware recognized the efficacy of that procedure in evaluating blood alcohol content, no Delaware case has provided the "Good Housekeeping

[12] The designation "T2" is the transcript of jury instructions, dated April 23, 2014.

Seal of Approval" by elevating that scientific procedure such that the State does not have to prove the reliability of the procedure. See Santiago v. State, 510 A.2d 488 (Del.1986). In fact, the instruction contravenes Delaware law, aside from being a comment on the evidence, because the State is required to prove the underlying scientific reliability of virtually every forensic testing device utilized in the Criminal Justice System other than the intoxilyzer and radar. See State v. Butcher, 1993 WL 1465514 (Del.), [Laser reliability]; Santiago, supra, [Gas chromatograph where the Courts expressly indicated that an appropriate foundation must be laid, and although it took Judicial notice – an evidentiary function, it did not elevate an item evidence to be certified and approved, as a matter of law, by a Court instruction.]; State v. Harper, 382 A.2d 263 (Del.Super.1978), [K55 radar]; Newton v. State, supra, [K55 radar]. Delaware law requires the proponent to prove an adequate evidentiary foundation before admissibility is gained. Clawson, supra; Hammond v. State, 569 A.2d 81 (Del.1989).[13]

A second impermissible jury instruction was given and which is found in the language:

> "... [T]he State contends that the defendant ... evidence of refusal of standardized tests is admissible in a DUI case as a

[13] The Trial Court has a responsibility to insure that scientific testimony is reliable, but has no responsibility to declare that fact to the jury, rather it is a gate-keeping function that requires Judicial involvement. Rodriguez v. State, 30 A.3d 764 (Del.2011); Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S.Ct. 2786 (1993).

> circumstance that may or may not show consciousness of guilt...".

The defendant acknowledges that the State is free to argue that proposition as is the State free to argue the reliability of gas chromatograph. What has occurred in this case is that the instruction has given "unfair and undue emphasis" on a significant evidentiary piece of the State's evidentiary chess set; i.e. blood test results and field test refusal. In Floray v. State, 720 A.2d 1132 (Del.1998), this Court held:

> "We recognize the possibility that placing too much emphasis on specific evidence could, in some circumstances mislead a jury.".

The danger that lurked in the courtroom where the Trial Court validated gas chromatograph which, incidentally, had not been challenged, with a single word, during cross-examination, was reflected in a discussion found in Paul v. State, 473 A.2d 352 (Del.1984).

The defendant contends that the "scientific reliability" portion of the instruction was erroneous as representing a comment on the evidence and providing undue emphasis, and the "consciousness of guilt" aspect was erroneous because of placing undue emphasis on the "State's spin" on evidence which it was free to argue, but not permitted to receive the endorsement of the Trial Court. The mere mention of that one evidentiary

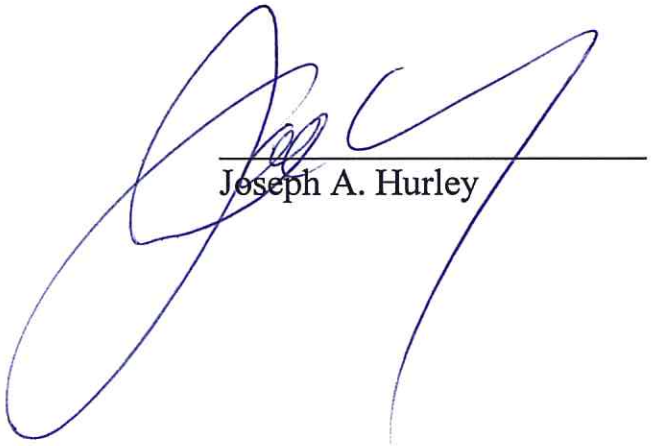
"arrow in the State's quiver" offers undue emphasis. QUERY: Would the Court have, at defense urging, instructed:

> "You have heard that the defendant did not exhibit any defective speech pattern nor exhibited any balance or stability difficulties. Such evidence may be interpreted as proof that the defendant was not impaired. Ultimately, it is for the jury to decide the significance of those facts…"?

CONCLUSION

Based upon all of the foregoing , the defendant maintains that refersal is required and that a directed verdict acquitting the defendant be entered.

Respectfully submitted,



Joseph A. Hurley

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE

VS.

HEATHER J RYBICKI

Alias: No Aliases

DOB: 01/30/1975
SBI: 00307785

CASE NUMBER:
1306019828

CRIMINAL ACTION NUMBER:
IN13-07-0316
DUI ALCOHOL-3RD(F)

COMMITMENT
Nolle Prosequi on all remaining charges in this case

SENTENCE ORDER

NOW THIS 23RD DAY OF MAY, 2014, IT IS THE ORDER OF THE COURT THAT:

The defendant is adjudged guilty of the offense(s) charged. The defendant is to pay the costs of prosecution and all statutory surcharges.

AS TO IN13-07-0316- : NON-TIS
DUI ALCOHOL-3RD

The defendant is to pay a fine in the amount of $2000.00 of which $2000.00 is suspended (see attachment).

Effective April 23, 2014 the defendant is sentenced as follows:

- The defendant is placed in the custody of the Department of Correction for 2 year(s) at supervision level 5 with credit for 1 day(s) previously served

- Suspended after 3 month(s) at supervision level 5

- For 1 year(s) 6 month(s) supervision level 4 HOME CONFINEMENT

- Suspended after 6 month(s) at supervision level 4 HOME CONFINEMENT

- For 1 year(s) supervision level 3

- Hold at supervision level 3

STATE OF DELAWARE
VS.
HEATHER J RYBICKI
DOB: 01/30/1975
SBI: 00307785

- Until space is available at supervision level 4 **HOME CONFINEMENT**

The first 3 MONTHS of this sentence is a mandatory term of incarceration pursuant to DE21417700a1FG .

SPECIAL CONDITIONS BY ORDER

STATE OF DELAWARE
VS.
HEATHER J RYBICKI
DOB: 01/30/1975
SBI: 00307785

CASE NUMBER:
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Pursuant to 29 Del.C. 4713(b)(2), the defendant having been convicted of a Title 11 felony, it is a condition of the defendant's probation that the defendant shall provide a DNA sample at the time of the first meeting with the defendant's probation officer. See statute.

Not drive a motor vehicle during the probationary period.

Obtain and remain gainfully employed.

The defendant shall pay any monetary assessments ordered during the period of probation pursuant to a schedule of payments which the probation officer will establish.

Defendant shall receive mental health evaluation and comply with all recommendations for counseling and treatment deemed appropriate.

Have no drugs/alcohol during period of sentence unless medically prescribed.

Defendant shall be evaluated for substance abuse and follow recommendation for treatment, counseling and screening.

Take all medications as prescribed.

NOTES

Zero tolerance for drugs and alcohol unless medically prescribed.

Zero tolerance for driving without proper license and insurance.

JUDGE MARY M JOHNSTON

FINANCIAL SUMMARY

STATE OF DELAWARE
VS.
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SENTENCE CONTINUED:

TOTAL DRUG DIVERSION FEE ORDERED	
TOTAL CIVIL PENALTY ORDERED	
TOTAL DRUG REHAB. TREAT. ED. ORDERED	300.00
TOTAL EXTRADITION ORDERED	
TOTAL FINE AMOUNT ORDERED	.00
FORENSIC FINE ORDERED	
RESTITUTION ORDERED	
SHERIFF, NCCO ORDERED	255.00
SHERIFF, KENT ORDERED	
SHERIFF, SUSSEX ORDERED	
PUBLIC DEF, FEE ORDERED	
PROSECUTION FEE ORDERED	100.00
VICTIM'S COM ORDERED	360.00
VIDEOPHONE FEE ORDERED	1.00
DELJIS FEE ORDERED	1.00
SECURITY FEE ORDERED	10.00
TRANSPORTATION SURCHARGE ORDERED	1000.00
FUND TO COMBAT VIOLENT CRIMES FEE	15.00
SENIOR TRUST FUND FEE	
TOTAL	2,042.00

SURCHARGES

STATE OF DELAWARE
VS.
HEATHER J RYBICKI
DOB: 01/30/1975
SBI: 00307785

CASE NUMBER:
1306019828

CRIM ACTION #	DESCRIPTION	AMOUNT
IN13-07-0316	DRTE	300.00
IN13-07-0316	TRANSPORTATION	1000.00
IN13-07-0316	VCF	360.00