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 REPLY BRIEF

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STATEMENT OF FACTS

The State offers an, understandably,[1] hyperbolic factual assertion; viz., "... her speech was slurred...". In fact, the actual testimony revealed Klinger to say, "There was... a little bit of slurred speech.". (emphasis supplied) Similarly, without any elaboration, the State posited the asserted fact that the defendant was "disoriented"[2] suggesting a prevailing condition rather than a very limited apparition. In fact, Klinger, an experienced emergency care provider, explained:

> "She was just disoriented on how she got there. She – when – 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)[3]

The State, conveniently, uses unclarified labels to its advantage; e.g. describing the defendant as "confused" when the witness, Kendrick, described that she was "confused of how (sic) she got into the lanes". (T-36, 37; A- 42)

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[1] Given the paucity of an evidentiary foundation supporting the contention of an extant probable cause, the need to exaggerate is apparent and understandable.

[2] Hardly shocking is the fact that she was "disoriented", as the term was defined by Klinger, in light of the fact that she had sustained a "slight concussion". (T-142; A-58)

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

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. Merits of Argument.

The State pays homage to the legal truism that the reviewing Court must afford deference to the finding of the issuing Magistrate. (St.'s.Ans.Br. at 7). That deference is a starting point rather than representing the "finish line" of the event. The Court must determine whether or not there is a "substantial basis" for the Magistrate's conclusion. State v. Wheeler, 2014 WL 4735126 (Del.Super.), citing State v. Holtom, 2011 WL 4638781 (Del.Super.). The reviewing Court must determine whether the decision rendered by the Magistrate "reflects a proper analysis of the totality of circumstances". State v. Sharpe, 2014 WL 3534945 (Del.Com.Pl.). Phrased somewhat differently, but renewing the same meaning are the words of the Superior Court in State v. Salasky, 2013 WL 5487363 (Del.Super.) reflecting that the Court must effect a "substantial basis" review in order to determine whether or not the Magistrate has conducted an "improper analysis". Finally, and most pointedly articulated, is the language of this Court in Acuri v. State, 49 A.3d 1127 (Del. 2012) which clearly sounds the clarion that this Court, while affording deference, "simply will not rubber

stamp" the Magistrate's or, in this case, the Magistrate's initial decision buttressed by the Superior Court's approval.[4]

[4] The defendant declines to make further comment on whether or not probable cause existed for the initial arrest based upon defense counsel's conclusion that all of the salient factors have been presented in the Opening Brief.

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. Merits of Argument.

As noted in the defendant's Opening Brief, Gordon v. State, 604 A.2d 1367 (Del. 1992), noted there had been several instances where the Supreme Court had addressed matters that were raised for the first time on appeal although declining to do so in that particular case. One of the cases cited, Robertson v. State, 596 A.2d 1345 (Del. 1991), was a case where the defendant had failed to mount a challenge to his initial detention, and the Court, without comment, nonetheless, considered the merits of the claim. In addition, the defendant was heard, for the first time on appeal, to object to remarks made by the Prosecution particularly in closing statement. The Robertson Court did note the controlling law regarding plain error, went on to consider the claim and, ultimately, reversed the conviction below.

In Davis v. State, 453 A.2d 802 (Del. 1982), the defendant had failed to object to the instructions when his request for an alibi instruction was denied. Without commenting upon the procedural defect, the Court considered it on its merits.

The Gordon case, supra, also cited the cases of Kornbluth v. State, 580 A.2d 556 (Del. 1990), Lively v. State, 427 A.2d 882 (Del. 1981) and Holden v. State, 305 A.2d 320 (Del. 1973) as further examples where merits of claim based upon a lack of sufficient evidence had been considered notwithstanding the claims had not been fairly presented to the Court below in a jury trial context.

The defendant submits that the demands of "fundamental fairness" would favor addressing the issue on the merits in this matter.

Stated differently, the defendant contends that given the erroneous inclusion of the blood alcohol evidence, when viewed in the context of the dearth of convictable evidence, that there is plain error depriving the defendant of the substantial right of requiring the State to prove the case beyond a reasonable doubt and which deprivation is clear from a fair reading of the transcript. Lowther v. State, 2014 WL 5794842 (Del.).

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. Merits of Argument.

Contrary to the State's assertion "for the first time on appeal" Rybicki made a specific challenge to the foundation presented by the State for the admission of blood results at trial, the record reflects there was a foundational objection found in the words, "I object on the grounds that the State has failed to lay a proper legal foundation for the introduction of blood test results.". (T-106; A-52) Defense counsel declined the Court's kind invitation to educate the prosecutor with regard to the legal requirements to set the fundamental foundational prerequisite for the introduction of a blood sample. (T-106, 107; A-52, 53) In defending a client, an attorney must not be placed in a position of "aiding the enemy" by offering valuable "intelligence information" which would permit the enemy to gain a foothold or other advantage. In fact, the Court was most considerate and understanding in offering the State another "bite out of the apple", so to speak, but the prosecutor was not up to the task. While the Court indicated the objection would be overruled because there was no basis for understanding it, counsel may safely assume that the Court is aware of pertinent legal requirements. For example, quite often a litigant will express

"Objection. Relevancy."! When the relevancy is patent, the Court does not expect a delineation of what is irrelevant and why it is irrelevant, but will simply offer the cursory "sustained"!

The defendant did comply with the requirement and spirit of D.R.E. 51. Specifically, defense counsel indicated that a foundational requirement had not been proven and declined to get more specific because to do so would be tantamount to "educating" the Prosecution so that the reframed question could be asked thus bringing defense counsel into the "enemy camp" at the expense of the legal interest of his client – a breach of ethics! Several Courts have commented that a requirement of specificity is met by pointing out that a proper foundation has not been made. Jennings v. State, 588 So.2d 540 (Ala.Cr.App. 1991); in accord Wyatt v. State, 620 So.2d 77 (Ala.Cr.App. 1992); New v. State, 760 P.2d 833 (Okla.Cr.App. 1988); City of Overland Park v. Cunningham, 861 P.2d 1316 (Kan.1993). The form of objection "insufficient foundation" is not tantamount to a general objection. Id. No less an authority than Professor McCormick has "weighed in" on this issue. Professor McCormick points out that the majority rule is that it is unnecessary to be anymore specific than, for example, "lack of authentication". He goes on to point out that if the objector identifies the specific deficiency in the foundation, he has, in effect, educated the

proponent of the evidence such that the proponent knows exactly how to cure the evidentiary defect. 1 McCormick On Evid. & 52 (7th Ed., 2013).

Professor McCormick does not stand alone since the premier authoritative publication on evidence admissibility agrees. See 1 Wigmore On Evidence, §18, p. 824 (Tillers Rev. 1983):

> "It is often also said that the purpose of a specific objection is to supply the opposing party with such information that he may intelligently argue the matter and cure any defect. This theory, however, is mere pretense and is not to be taken seriously since the objector is under no obligation to furnish any explanation whatever...".

A number of Delaware cases have identified the foundational requirements for the introduction of results from scientific instrumentalities; e.g., Clawson v. State, 867 A.2d 187 (Del.2005) [intoxilyzer]; State v. Moore, 307 A.2d 548 (Del.Super.1973) [intoxilyzer]; State v. Harper, 382 A.2d 263 (Del.Super.1978) [radar]; Newton v. State, 421 A.2d 920 (Del.Super.1980) [radar]; State v. Butcher, 1993 WL 1465514 (Del.Super.) [laser]; State v. Malloy, 1988 WL 40021 (Del.Super.) [intoxilyzer]; Santiago v. State, 510 A.2d 488 (Del.1986) [gas chromatograph]; Best v. State, 328 A.2d 141 (Del.1974) [intoxilyzer]; State v. Moffitt, 100 A.2d 778 (Del.Super.1953) [radar]. Of particular significance is Hunter v. State, 55 A.3d 360 (Del. 2012) where this Court, in the context of blood sample

collection, stressed the necessity for compliance with requisite scientific standards.

The State responds by citing a Court of Common Pleas decision, Durbin v. Shahan, 2001 WL 34075378 (Del.Com.Pl. 2001), (St.'s.Ans.Br. 18) which was a decision determining the absence of legal error in an Administrative Hearing. The Court noted that strict Rules of Evidence do not apply at such Hearing unlike the Superior Court process where compliance is required. The citation of the case is of no assistance to the State for that reason if not for others as well.

To accept the State's defense to the foundational insufficiency which is that it is not necessary, in matters of scientific evidence introduction, to demonstrate that appropriate procedures to insure the integrity of the results are met is to proffer the absurd! There is no presumption, vis-à-vis the establishment of the foundation for the proper care and maintenance of instruments of science, that allows the State to rely upon, "Well he's a police officer and we can assume everything was done properly.".

A foundation was not established. The oversight on the part of the prosecutor is not an excuse, and the temporarily lack of realization on the part of the Trial Court as to what was foundationally required does not

obviate the fact that the proper foundation was not put in place and that a critical piece of evidence was introduced sans that requirement.

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

A. Merits of Argument.

A fundamental notion of Due Process of Law is that the defendant is entitled to a "fair trial" where neither the defendant nor the State has the advantage of an evidentiary "boost" from the impartial Court. Cast in other terms, the State is not in any way relieved of its burden of having to prove all of the elements of the crime beyond a reasonable doubt. Using the metaphor of the world of hockey, the State received an "assist" when the Court announced to the jury that the State did not have to offer one iota of proof that the gas chromatograph was a reliable instrument in measuring the blood alcohol content of the defendant's blood. The "edge" afforded the State, could not be any clearer than the words that were used to instruct the jury:

> "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.". (emphasis supplied) (T2-25; A-61)[5]

There is a certain amount of irony in realizing that someone who is being prosecuted for a speeding offense and which punishment can only result in a fine can require the State to prove the proper calibration of the

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

instrument. Moffitt, supra at 8, but, as is the case here, where liberty and felony status are at stake, the Court offers a judicial "helping hand". The Court, in crafting instructions, should "walk a middle course and avoid arguing the case for either side in the instructions". State v. Huffey, 838 N.W.2d 869 (Ala.App. 2013).

The defendant recognizes that the Trial Court, as part of its gate-keeping function pursuant to D.R.E. 702, determines that there is a level of reliability that must exist before expert testimony can be brought before the jury. See State v. McMullen, 900 A.2d 103 (Del.Super. 2006). Acting as a "gatekeeper" is far different than acting as a "sportscaster" in telling the jury what they are seeing. In that latter role, the "gatekeeper" has become a commentator which violates a basic tenet of the Delaware Constitution; viz., "Folks, trust me, this device really works. You can bank on it.". However one wants to parse it, the message is the same, and that is the judge has offered his or her view as to a vital component of the State's proof, and that view is unconstitutionally expressed. Del.C.Ann.Const. 4 & 19.

The defendant recognizes this Court's decision of Mullin v. State, 2006 WL 2506358 (Del.), vis-à-vis the intoxilyzer.[6] The defendant also

[6] The General Assembly clearly mandated the evidentiary admissibility of an intoxilyzer test refusal, as contradistinguished from field sobriety tests refusal, in the statute, 21 Del.C. §2749. Also see State v. Lynch, 274 A.2d 443 (Del.Super.1971).

recognizes that the decision in Mullin was premised solely on whether or not, in the context of the intoxilyzer, and with language extremely similar to what is present here, the instruction represented a comment on the evidence. The defendant notes that this Court has never reviewed the efficacy of this supportive instruction through the filter of a Due Process analysis where the integrity or fairness of the trial process is compromised. See Taylor v. State, 32 A.3d 374 (Del. 2011) (decided in the context of a challenge to an anti-sympathy instruction in the context of a violation of Due Process).

Of greater concern to the defendant was that portion of the instruction that highlighted and gave undue emphasis to an evidentiary missile in the State's depleted arsenal of attack; i.e. the consciousness of guilt instruction. Ironically, the Trial Court expressed concern regarding submitting to the State's insistence that a "consciousness of guilt" instruction be given after defense counsel had indicated the undue emphasis impact as well as the judicial vouching that is inherent in such an instruction, and the Court's concern was expressed in the words:

> "Well, we do a lot. We shouldn't, but we do... , but we do pick out all kinds of pieces of evidence and instruct the jury on it specially... The question is whether this falls into the type of evidence for which an instruction should be given.". (A-60)

The Court then fell victim to the unsupported contention of the prosecutor:

> "Your Honor, this instruction or similar instruction has been used by this Court in prior cases. I do know that... But I do know that it has been used and they haven't been reversed for that basis, Your Honor.".[7] (T2-9, 12; AR-1, 2)

Once again, and after relying upon a prosecutor's wild, unsubstantiated assertions, the Court continued while evidencing timidity as shown by the words:

> "First of all, even though its been used by this Court, do you know whether the Supreme Court has blessed this or not?".[8] (T2-11; AR-2)

Notwithstanding a lack of any information suggesting approval by this Court of such an instruction, the Court continued:

> "... I don't like a number of instructions we have which, contrary to the Delaware Constitution, pull out individual pieces of evidence and say, 'Jury, you must consider this evidence... so I don't like any of those instructions, and I've said that repeatedly, but I have been overruled by the Supreme Court...' The Supreme Court has not only allowed, but compelled commentary on certain types of evidence, and I believe based upon the case law, that refusal is one of those.".[9]

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[7] In fact, a review of the 79 reported cases spanning Courts from the Court of Common Pleas to the Supreme Court indicates there has never been a suggestion that such an instruction has ever been given nor that it was ever an issue in the context of a potential reversal.

[8] Interestingly, even though defense counsel articulated the precise opposite view of the prosecutor, and notwithstanding having about 35 years more experience in the practice of criminal law, and with his words, "... I don't know of any case law in Delaware that supports the giving of this particular instruction.", the Court chose to accept the prosecutor's "two cents worth".

[9] It is difficult to bridge the gap of logic where the Court asks, "... [D]o you know whether the Supreme Court has blessed this or not?" and the prosecutor admitted she did not know with "... The Supreme Court has not only allowed but compelled commentary

(T2-13, 14; AR-2, 3)

The defendant exposes two separate errors, made by the Court, in finally deciding to give the instruction and either of which represent an abuse of discretion.

The first is that it represents an implicit comment on the evidence expressing the judge's view of what is important to consider. The second, and even more dangerous, is the undue emphasis that is provided in a critical area and in the face of the State having an otherwise weak case.

The defendant acknowledges that this Court has held, apparently without any restriction on the underlying factual dynamics of any particular case, that post-crime activity which can be said to reflect a consciousness of guilt are admissible in evidence. Church v. State, 2010 WL 5342963 (Del.) Even accepting that, perhaps, overstated, proposition as a matter of law, and which allows counsel to make appropriate arguments urging that proposition, when that admissibility becomes enunciated and elevated as a "rule of law" in the form of a specific jury instruction, the invitation is extended for the jury to consider the instruction as an expression of the judge's view. Garden v. State, 815 A.2d 327, 341 (Del. 2003) proposed that

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on certain types of evidence, and I believe, based upon the case law, that refusal is one of those." (emphasis supplied) (T2-15; A-3) The reality is there is no case law discussing a consciousness of guilt instruction in a jury trial based upon refusal of tests.

a proposition; viz., in the instant case, that a test refusal is tantamount to a consciousness of guilt of being under the influence of an intoxicant, the recognition of relevancy ascends to the "level of a rule of law which implies a degree of certainty that... comes 'perilously close to a comment on the evidence contrary to the constitutional restriction'...".

Regardless of whether or not the Court subscribes to the defendant's contention that, in this case, the Court has commented on the evidence twofold: Providing the jury with the Court's opinion that chromatography is reliable and field tests and intoxilyzer refusal reflect, "Hell no! I'm not doing any of those tests because you'll know I'm drunk!". The undue emphasis necessarily resulting from this particular instruction disrupts fairness in its favoring the State's cause.

Several cases have been quite specific in their indication that jury instructions should not be given regarding consciousness of guilt albeit the parties are free to argue such. Hamm v. State, 826 N.E.2d 640 (Ind.App. 2013) [Error to give instruction in a driving under the influence prosecution.]; Dill v. State, 741 N.E.2d 1230, 1232 (Ind.App. 2001) [An instruction which highlights a portion of the evidence should not be given.]; Cox v. State, 512 N.E.2d 1099, 1101 (1987) [No instruction should single out certain portions of the evidence.]; State v. Sorrenson, 455 P.2d 981

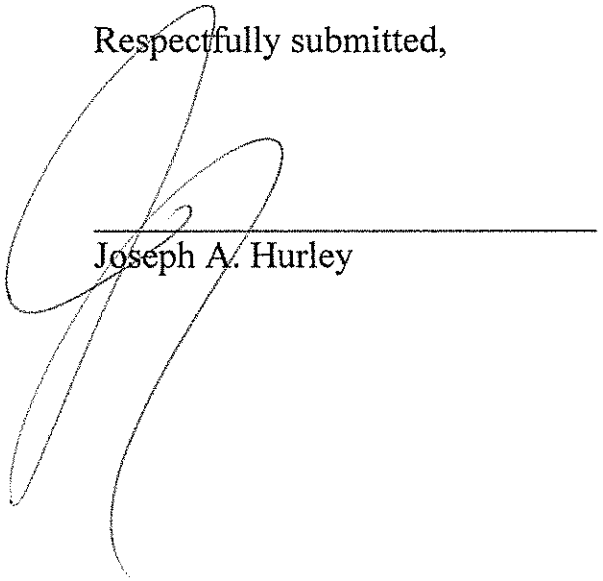
(Ariz.1969); Commonwealth v. Thomas, 54 A.3d 332 (Pa. 2012)[The inference is "more properly one of argument".]' Bartlett v. State, 270 S.W.3d 147 (Tex.Cr.App. 2008), noting that the instruction "needlessly calls its attention to that particular evidence to the degradation of other evidence in the case".

Finally, one of the better expositions of the inherent risks to such an instruction is found in Hess v. State, 224 S.W.3d 511 (Tex.Cr.App. 2007) and where the Court noted that giving a consciousness of guilt instruction does not clarify the law in any way, is wholly unnecessary and highlights a particular portion of the evidence; i.e. "singles out a particular piece of evidence... Tends to emphasize by repetition or recapitulation... 'obliquely or indirectly' conveys some [judicial] opinion on the weight of the evidence by singling out that evidence and inviting the jury to pay particular attention to it. See People v. Garcia, 169 P.3d 223 (Colo.App. 2007), citing a Colorado Supreme Court case; People v. Larson, 572 P.2d 815, 817 (Colo. 1977), "Generally, flight instructions are not favored because they put undue emphasis on only one portion of the evidence.".

CONCLUSION

Based upon all of the foregoing, the defendant maintains that reversal is required in this appeal.

Respectfully submitted,



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