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

STATE OF DELAWARE,	)	
	)	
v.	)	C.A. No. 0803028532
	)	
MATTHEW D. LANOUETTE,	)	
	)	
Defendant.	)	

Submitted: July 24, 2012
Decided: August 27, 2012

MEMORANDUM OPINION AND ORDER
DECISION AFTER TRIAL

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DAVIS, J.

Defendant Matthew D. Lanouette was arrested on March 22, 2008 and charged with the offenses of: (i) driving under the influence of alcohol (the "DUI Offense") in violation of Title 21, Section 4177 (a) of the Delaware Code of 1974, as amended; and, (ii) speeding in excess of 55 mph on a four lane or divided roadway (the "Speeding Offense") in violation of Title 21, Section 4169 of the Delaware Code of 1974, as amended. On April 4, 2012, counsel for Mr. Lanouette filed a motion to "Dismiss/Suppress to Suppress/Request for *DeBerry* Instruction" (the "Motion"). On April 25, 2012, the Court held an evidentiary hearing on the Motion and, at the end of the hearing, reserved decision on the Motion pending further briefing. The Court then proceeded on to, and completed the trial on the DUI Offense and the Speeding Offense (the April

25, 2012 hearing and trial will be collectively referred to herein as the "Trial"), reserving decision until completion of briefing on the Motion.

After a review of the record, and based upon the legal and factual determinations made during the hearing, the Court **DENIES** the Motion. In addition, the Court finds Mr. Lanouette **GUILTY** of the DUI Offense and the Speeding Offense.

BACKGROUND

A. General Information

Through the Motion, Mr. Lanouette seeks to have the Court suppress all evidence following his detention and seizure by Corporal Jandre B. Lafate of the Delaware State Police Department on March 22, 2008.[1] The Motion contends that the evidence should be suppressed and the case dismissed because the State failed to comply with its obligation to preserve evidence both under Rule 16 of the Court of Common Pleas Criminal Rules, and *Brady v. Maryland*, 373 U.S. 83 (1963) and *DeBerry v. State*, 457 A.2d 744 (Del. 1983).[2] In addition, the Motion appears to make a contention that Corporal Lafate lacked "reasonable or articulable suspicion that Mr. Lanouette committed any motor vehicle violation.[3] At the Trial, Mr. Lanouette also sought to suppress all evidence following his detention, contending that Corporal Lafate lacked probable cause to arrest Mr. Lanouette.[4]

The State filed an information charging Mr. Lanouette with the DUI Offense and the Speeding Offense on April 10, 2008. The Court scheduled case review on this criminal matter on August 6, 2008 but Mr. Lanouette failed to appear. The Court issued a *capias* which Mr.

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[1] *See* Motion at 1.
[2] *See id*. at 2.
[3] *See id*. at 2-3. During the Trial, Mr. Lanouette abandoned his argument that Officer Lafate lacked reasonable articulable suspicion to initiate the traffic stop. Transcript of Proceedings, dated April 25, 2012 at 14, 17-18. Hereinafter, references to the Transcript of Proceedings will be referred to as "Tr. at __." Mr. Lanouette confirmed this in the briefs subsequently filed with the Court.
[4] Tr. at 17.

Lanouette returned on June 29, 2011. The Court then held a new case review on July 27, 2011 and set the criminal matter for trial on October 24, 2011. Mr. Lanouette failed to show for trial on October 24, 2011. The Court issued another *capias* which was returned by Mr. Lanouette on February 21, 2012. Upon return of the *capias*, the Court rescheduled the trial for March 15, 2012. On March 15, 2012, the Court set a new trial date for April 25, 2012 in order to allow the State to produce certain discovery to Mr. Lanouette's counsel.

On April 25, 2012, the Court held an evidentiary hearing on the Motion and the Trial. At the hearing, the State called one witness – Corporal Lafate. Corporal Lafate was the officer that initially stopped Mr. Lanouette and made the arrest. After hearing his testimony, the Court finds Corporal Lafate to be a credible witness.

In addition to Corporal Lafate, the State introduced the following exhibits into evidence:

1. Delaware State Police Certificate of Proficiency of J'Andre B. Lafate relating to license to perform duties of an alcohol testing technician ("Ex. 1);

2. U.S. Department of Transportation – Transportation Safety Institute Certification of Corporal Jandre Lafate dated November 6, 1991 certifying competency to utilize the concepts taught regarding the Horizontal Gaze Nystagmus as endorsed by the National Highway Traffic & Safety Administration ("Ex. 2");

3. Delaware State Police Certificate of Proficiency of Jandre Lafate dated July 2, 1994 certifying successful completion of the course of instruction relating to operation of moving car and stationary Doppler Radar ("Ex. 3");

4. Certificate of Completion and Competency Doppler Radar Operation of Cpl./3 Jandre Lafate dated June 2, 2007 certifying successful completion of training course in the operation and installation of the STALKER Moving/Stationary Traffic Radar ("Ex. 4");

5. State of Delaware Uniform Traffic Complaint and Summons (Ticket No.: T090802831) issued to Matthew D. Lanouette dated March 22, 2008 ("Ex. 5");

6. Turning Fork Certificate of Accuracy relating to Tuning Fork Serial No. FA159231 dated September 30, 2007 ("Ex. 6");

7. Turning Fork Certificate of Accuracy relating to Tuning Fork Serial No. FA159231 dated September 24, 2008 ("Ex. 7");

8. Turning Fork Certificate of Accuracy relating to Tuning Fork Serial No. FB259256 dated September 30, 2007 ("Ex. 8");

9. Turning Fork Certificate of Accuracy relating to Tuning Fork Serial No. FB259256 dated September 24, 2008 ("Ex. 9");

10. CMI Intoxilyzer Model 5000EN Certification Sheet signed by David Sockrider dated February 29, 2008 ("Ex. 10");

11. CMI Intoxilyzer Model 5000EN Certification Sheet signed by David Sockrider dated April 18, 2008 ("Ex. 11"); and

12. Intoxilyzer Instrument Printer Card with subject test of Matthew Lanouette dated March 22, 2008.

Other than examination of Corporal Lafate, Mr. Lanouette did not present any additional testimonial or physical evidence at the Trial.

B. Facts Developed in Connection with the Motion and at Trial

The State called Corporal Lafate to testify in connection with the Motion and at Trial. Corporal Lafate is employed by the Delaware State Police Department. Corporal Lafate has been with the Delaware State Police Department for over 29 years. Corporal Lafate testified that during his time with the Delaware State Police Department he had received training on and been certified with respect to DUI investigation, NHTSA field testing and in the operation of radar in traffic speed enforcement.[5] Corporal Lafate also testified that he made approximately 150-200 driving under the influence investigations and/or arrests.[6]

On March 21, 2008, Corporal Lafate went on patrol. Prior to starting the patrol, Corporal Lafate powered on his front and rear radar units. Testimony at the Trial demonstrated that

[5] *See* Tr. at 19-22.
[6] Tr. at 30.

calibrations of these units were performed and all indications were that the units were operating properly both at the beginning and end of Corporal Lafate's patrol.[7]

Later during Corporal Lafate's patrol, which had now carried over to March 22, 2008, Corporal Lafate was travelling southbound on State Route 896 from Mansion House Road towards Denny Road.[8] Corporal Lafate noticed a few cars approaching his vehicle and noticed one particular vehicle closing on him at, what he felt, was an excessive rate of speed. Corporal Lafate activated his rear radar. According to the radar, the approaching vehicle was travelling at 77 m.p.h. Corporal Lafate testified that the posted speed limit at this location is 55 m.p.h.

As the vehicle neared Corporal Lafate's fully marked patrol car, the driver slowed down his speed and began to travel at the same speed as Corporal Lafate. Corporal Lafate eventually moved onto the right shoulder in order to allow the vehicle to pass him. Once that vehicle passed him, Corporal Lafate returned to the right hand lane of travel, activated his patrol vehicle's lights and initiated a traffic stop. Corporal Lafate stated that both vehicles moved onto the shoulder and drove for 30 seconds before the other vehicle finally came to a complete stop.

Corporal Lafate got out of his patrol car and made contact with the driver of the other vehicle. The driver of that vehicle was Mr. Lanouette.[9] Mr. Lanouette was the sole occupant in his vehicle. Corporal Lafate asked Mr. Lanouette to produce his license, registration and proof of insurance. Mr. Lanouette produced these papers. At this point in time and at a distance of approximately two feet, Corporal Lafate detected a moderate odor of alcohol on Mr. Lanouette's breath.[10] Corporal Lafate also noted that Mr. Lanouette's eyes were bloodshot and glassy.[11] After being asked, Mr. Lanouette told Corporal Lafate that he was coming from McGlynn's and

[7] *See* Tr. at 44-53. *See also* Exs. 5-9.
[8] Tr. at 23.
[9] Tr. at 26.
[10] Tr. at 28.
[11] *Id.*

that he had consumed three 24 ounce beers while at McGlynn's.[12] During the Trial, Corporal Lafate testified that Mr. Lanouette's speech was "fairly good," his demeanor was polite and he was cooperative.[13]

Corporal Lafate now requested that Mr. Lanouette perform a pre-exit test -- the alphabet test.[14] Corporal Lafate asked Mr. Lanouette if he was familiar with the alphabet. Mr. Lanouette confirmed that he was and then Corporal Lafate had Mr. Lanouette recite the alphabet from A to Z. Mr. Lanouette attempted to complete the test two times.[15] The first time, Mr. Lanouette started with the letter A and went through the letter V and then repeated Q-R-S-T. Upon making that mistake, Mr. Lanouette stopped and stated "I'm nervous as shit."[16] The second time, Mr. Lanouette started with the letter A and went through to the letter Z but omitted the letter U during the recital.[17]

Next, Corporal Lafate testified that he had Mr. Lanouette perform a series of additional field tests. The first test was the Horizontal Gaze Nystagmus Test (the "HGN Test").[18] During this test, Corporal Lafate stated that Mr. Lanouette exhibited four of six clues.[19] Corporal Lafate testified that pursuant to NHTSA research, exhibiting four or more clues on the HGN Test indicates impairment.[20] Corporal Lafate had Mr. Lanouette perform the walk and turn test.[21] On this test, Mr. Lanouette performed well and exhibited only one of eight clues.[22] Mr. Lanouette

[12] Tr. at 29.
[13] Tr. at 32.
[14] Tr. at 29.
[15] Tr. at 29-30.
[16] Tr. at 30.
[17] *Id.*
[18] Corporal Lafate testified at the Trial as to NHTSA guidelines for administering the HGN test. Tr. at 33-34.
[19] Tr. at 34-35.
[20] Tr. at 35.
[21] Tr. at 35-37.
[22] Tr. at 37.

then performed the one legged stand test and exhibit two of four clues on this test.[23] For this test, Corporal Lafate testified that exhibiting two of four clues indicate impairment.[24] Finally, Corporal Lafate had Mr. Lanouette do a finger to nose test.[25] According to Corporal Lafate, Mr. Lanouette failed to follow Corporal Lafate's instructions with respect to this test and also failed to complete the test properly.[26]

At this point during the traffic stop, Corporal Lafate took Mr. Lanouette into custody for suspicion of driving under the influence.[27] Corporal Lafate testified that based on the odor of alcohol, Mr. Lanouette's admission to drinking, Mr. Lanouette's bloodshot and glassy eyes, the speeding and Mr. Lanouette's performance on the various tests, Corporal Lafate felt Mr. Lanouette had been driving while under the influence of alcohol. Corporal Lafate therefore placed Mr. Lanouette into custody and transported him back to Troop 9 of the Delaware State Police Department.

After arriving at Troop 9, Corporal Lafate administered an intoxilyzer test on Mr. Lanouette after a twenty minute observation period and after determining the intoxilyzer was operating properly.[28] The result of the intoxilyzer test was that Mr. Lanouette had a blood alcohol level of .124.[29] Corporal Lafate testified that this .124 result exceeded the legal blood alcohol limit of .08. Corporal Lafate then charged Mr. Lanouette with the DUI Offense and the Speeding Offense.[30]

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[23] Tr. at 37-38.
[24] Tr. at 38.
[25] Tr. at 38-40.
[26] Tr. at 40.
[27] Tr. at 58.
[28] *See* Tr. 94-95.
[29] Ex. 12.
[30] During the Trial, the State also admitted into evidence Exs. 10 and 11 – certification sheets signed by State Chemist David Sockrider. The State introduced those exhibits through Corporal Lafate under Evidence Rule 803(6). These exhibits indicate that State Chemist Sockrider certified the relevant intoxilyzer machine as "working properly and accurately" on February 29, 2008 and April 18, 2008. *See* Tr. at 94; Exs. 10, 11.

C. The MVR Video Tape

Corporal Lafate's patrol car had a video recorder.[31] Corporal Lafate testified that the video recorder is activated one of two ways: automatically when the overhead (or emergency) lights of the patrol vehicle are turned on, or remotely (manually) by the officer.[32] Corporal Lafate testified that a MVR video tape is placed and locked in the vehicle by a shift commander and/or sergeant of the Delaware State Police Department.[33] The trooper has no access to the MVR video tape while it is in the patrol car.[34] The MVR video tape remains in the patrol car until it records fully through to the end.[35] At that point, the trooper notifies a shift commander and/or sergeant who removes the MVR video tape, puts the MVR video tape in the evidence locker and then places a new MVR video tape in the patrol car.[36] If the MVR video tape has recorded certain types of incidents, like a DUI arrest, the MVR video tape is retained as evidence until there is no longer a need for the tape.[37] If there is no specific reason to retain the MVR video tape, the MVR video tape is placed back into use – in the words of Corporal Lafate, "recycled" -- and new incidents necessarily will be recorded over prior incidences.[38] Corporal Lafate testified that while on patrol and using the video recorder, the trooper will not know if there is an error or an issue with that recorder.[39]

On the night in question, Corporal Lafate stated that the video recorder activated when he turned on his overhead lights, pulled in behind Mr. Lanouette's vehicle and initiated the traffic

[31] Tr. at 24.
[32] Tr. at 25.
[33] Tr. at 24.
[34] Tr. at 25.
[35] *Id.*
[36] Tr. at 24.
[37] Tr. at 56.
[38] Tr. at 54.
[39] Tr. at 25.

stop for the speeding.[40] Corporal Lafate testified that he believed the traffic stop of Mr. Lanouette had been fully recorded on the MVR video tape kept in his patrol car. Corporal Lafate testified that the video recorder would not have recorded the Speeding Offense as that offense purportedly occurred behind the patrol car and the video recorder only records events occurring in front of the patrol car.[41]

The video recorder did not record the full stop of Mr. Lanouette. Instead, the MVR video tape briefly shows Corporal Lafate pulling behind Mr. Lanouette's GMC Sierra pickup truck and then abruptly shifts to subsequent stops made by Corporal Lafate on his next shift.[42] Corporal Lafate testified that all events of the traffic stop should have been recorded by the video recorder if there had not been a malfunction with the MVR video tape.[43] Upon questioning, Corporal Lafate testified that if the entire event were recorded, the audio of the system would have recorded his conversations with Mr. Lanouette and, based on the positioning of the patrol car and Mr. Lanouette's vehicle, all of the post-exit testing (HGN test, walk and turn test, one legged stand test and the finger to nose test) would have been recorded.[44]

Corporal Lafate testified that he had not seen the MVR video tape of the event prior to the Trial.[45] Corporal Lafate does not know why the MVR video tape starts with him pulling over Mr. Lanouette and then immediately stops recording. Corporal Lafate believed the video recorder was operating correctly on March 21-22, 2008.[46] While Corporal Lafate has no specific knowledge as to why the video recorder did not record the entire traffic stop with Mr. Lanouette, Corporal Lafate is aware that there have been other MVR video tape incidences due to the fact

[40] Tr. at 54.
[41] Tr. at 70.
[42] Tr. at 77.
[43] Tr. at 80.
[44] Tr. at 79-81.
[45] Tr. at 54.
[46] Tr. at 57.

that the MVR video tapes are recycled on a regular basis.[47] No evidence was produced at the Trial that showed Corporal Lafate, or anyone else, had purposely taped over or otherwise manipulated the MVR video tape.

ANALYSIS

A. The Court Does Not Find The State Breached A Duty To Preserve Evidence

Mr. Lanouette contends that the State had a duty to preserve the MVR video tape and breached that duty because the MVR video tape does not fully record Mr. Lanouette's traffic stop on March 22, 2008. As such, Mr. Lanouette argues the Court should dismiss the DUI Offense or, alternatively, give itself a *Deberry* instruction.

In reviewing a claim that the State lost or destroyed exculpatory evidence, the Court must consider (i) whether the requested material would have been subject to disclosure under Criminal Rule 16 or *Brady v. Maryland*;[48] (ii) if so, whether the government had a duty to preserve the material; and (iii) if so, whether the State breached that duty and what consequences should flow from that breach.[49] The consequences of the breach are determined in accordance with a three part test, which considers:

(i) the degree of negligence or bad faith involved;

(ii) the importance of the missing evidence considering the probative value and reliability of the secondary or substitute evidence that remains available; and

(iii) the sufficiency of the other evidence produced at trial.[50]

If, under that analysis, the State fails to preserve evidence that is material to the defense, the defendant is entitled to a missing evidence instruction.[51] Where the State does not act

[47] Tr. at 54 and 56.
[48] 373 U.S. 83 (1963) (requiring prosecution to turn over potentially exculpatory evidence to the defendant upon request).
[49] *Wainer v. State*, 869 A.2d 328, 2005 WL 535010, at *2 (Del. Feb. 15, 2005) (TABLE); *DeLoach v. State*, Case No. 1104015991PLA, slip op. at 8-9 (Del. Super. July 16, 2012).
[50] *McCrey v. State*, 941 A.2d 1019, 2008 WL 187947, at *2 (Del. Jan. 3, 2008) (TABLE); *DeLoach*, slip op. at 9.

negligently or in bad faith, however, and the missing evidence does not substantially prejudice the defendant's case, a *Deberry* instruction is not necessary.[52]

This case is strikingly similar to a case recently decided by this Court and affirmed by the Superior Court.[53] In *DeLoach v. State*, Delaware State Police troopers involved in a DUI investigation sought to make a MVR video tape. The testimony at trial demonstrated that the MVR unit in the trooper's patrol car malfunctioned – the MVR video tape was activated but only static and some background noises were recorded. The Superior Court held that a *Deberry* instruction, or other discovery sanctions, was not appropriate in such circumstances.[54] First, the Superior Court concluded that a *Deberry* instruction was not necessary as the State has no duty to create video tape recordings of traffic stops and, therefore, no duty to preserve such evidence the State fails to collect.[55] Second, assuming that there was a duty to videotape the traffic stop, the Superior Court held that the malfunctioning of a video recording device does not constitute the type of conduct that warrants a *Deberry* instruction or other form of discovery sanction.[56] The Superior Court's analysis and holding in *DeLoach* is not only instructive here, it is binding on this Court.

Using *DeLoach*, the Court holds that Mr. Lanouette is not entitled to a *Deberry* instruction or any other form of discovery sanction. Here, there is no evidence of bad faith or negligence on the part of Corporal Lafate or the State with respect to the MVR video tape of Mr. Lanouette's traffic stop. Instead, the evidence provides that Corporal Lafate thought the video recording device in his vehicle recorded the traffic stop on the MVR video tape. Corporal Lafate

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[51] *Id*.
[52] *McCrey*, at *3; *DeLoach*, slip op. at 9; *see also Lunnon v. State*, 710 A.2d 197, 200-01 (Del. 1998).
[53] *DeLoach v. State*, Case No. 1104015991PLA (Del. Super. July 16, 2012).
[54] *DeLoach*, slip op. at 10-11.
[55] *Id*.
[56] *Id*. at 11.

only found out much later that the MVR video tape did not record properly. Moreover, the evidence shows that the MVR video tape was retained by the State and provided to Mr. Lanouette during discovery. The Court finds that this is a case of a malfunctioning MVR video tape and not a situation where the State, even if it had a duty to, negligently or in bad faith failed to collect and retain important and potentially exculpatory evidence. As such, the Court finds no basis for giving exculpatory effect to the MVR video tape or to impose any other discovery sanction against the State.

B. Corporal Lafate Had Reasonable Articulable Suspicion To Stop Mr. Lanouette.

The Motion contends that Corporal Lafate did not have reasonable articulable suspicion to stop Mr. Lanouette. Mr. Lanouette seemed to have conceded this argument during the Trial.[57] In briefing, Mr. Lanouette confirmed that he no longer was contending that Corporal Lafate did not have reasonable articulable suspicion for making the traffic stop on March 22, 2008.

C. Corporal Lafate Had Probable Cause To Detain – And Subsequently Arrest -- Mr. Lanouette For The DUI Offense.

The Motion argues that Corporal Lafate lacked probable cause to take Mr. Lanouette into custody for the DUI Offense and transport him to the police station for further testing. Mr. Lanouette makes two arguments to support this claim. First, Mr. Lanouette argues that if *Deberry* applies then the State cannot carry its burden as the presumption that the MVR video tape would provide exculpatory evidence outweighs the evidence provided by the State at the Trial. Second, Mr. Lanouette argues that, even if *Deberry* does not apply, the State did not provide enough evidence to carry its burden to demonstrate that probable cause existed for the detention and subsequent arrest of Mr. Lanouette. Given the Court's ruling above, Mr. Lanouette's first argument fails. The Court addresses the second argument below.

[57] Tr. at 14, 17-18.

A traffic stop constitutes a seizure for Fourth Amendment purposes and is subject to constitutional limitations.[58] The State bears the burden of showing that the "stop and any subsequent police investigation were reasonable in the circumstances."[59] First, the stop must be supported by reasonable articulable suspicion that a crime has occurred, is occurring, or is about to occur.[60] Second, the stop and ensuing inquiry must be reasonably related in scope to the reason for initially stopping the car.[61] "[A]ny investigation of the vehicle or its occupants beyond that required to complete the purpose of the traffic stop constitutes a separate seizure that must be supported by additional facts sufficient to justify the additional intrusion."[62] A seizure becomes an arrest when, in view of the surrounding circumstances, the officers conduct would communicate "to a reasonable person that he was not at liberty to ignore the police presence and go about his business."[63]

In Delaware, a person operating a motor vehicle on a roadway is "deemed by statute 'to have given consent to chemical tests, including a test of the breath to determine the presence of alcohol or drugs.'"[64] Because such testing constitutes a search, a police officer must have probable cause to believe a person was driving under the influence of drugs or alcohol before requiring the person to submit to chemical testing.[65] An officer has probable cause when the officer has information which would warrant a reasonable man in believing that a crime has occurred.[66]

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[58] *Whren v. United States*, 517 U.S. 806, 809 (1996).
[59] *Terry v. Ohio*, 392 U.S. 1, 29 (1968).
[60] *Delaware v. Prouse*, 440 U.S. 648, 663 (1979).
[61] *Jenkins v. State*, 970 A.2d 154, 158 (Del. 2009) (citing *Caldwell v. State*, 780 A.2d 1037 (Del. 2001)).
[62] *Id.*
[63] *Jones v. State*, 745 A.2d 856, 862 (Del. 1999).
[64] *Lefebvre v. State*, 19 A.3d 287, 292 (Del. 2011) (quoting from *Bease v. State*, 884 A.2d 495, 497-98 (Del. 2005)).
[65] *Id.*
[66] *State v. Trager*, 2006 WL 2194764 (Del Super. 2006) (citing *State v. Maxwell*, 624 A.2d 926 (Del. 1993)).

The Supreme Court, most recently in *Lefebvre v. State*, described probable cause as "'an elusive concept which…lies somewhere between suspicion and sufficient evidence to convict.'" In a driving under the influence situation, probable cause to arrest exists when an officer possesses "'information which would warrant a reasonable man in believing that [such] a crime ha[s] been committed.'"[67] To meet this standard, 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. That hypothetically innocent explanations may exist for facts learned during an investigation does not preclude a finding of probable cause. What is required is that the arresting police officer possess a 'quantum of trustworthy factual information' sufficient to warrant a man of reasonable caution in believing a DUI offense has been committed.[68]

No precise formula exists for determining probable cause. Instead, Delaware courts have defined and refined, through a variety of factual contexts, the boundaries of what constitutes probable cause for a DUI offense.[69] As no precise formula exists, the Supreme Court in *Lefebvre* is clearly directing trial courts to use, as guidance, other decisions on probable cause and the factual contexts in those cases when determining whether probable cause existed to arrest for a DUI offense in the trial court's case.[70]

Mr. Lanouette was initially stopped by Corporal Lafate for speeding. The initial stop was justified because Corporal Lafate, utilizing the radar system in his patrol car, determined that Mr. Lanouette was travelling at a speed of 77 m.p.h. on a road with a posted speed limit of 55 m.p.h. After making contact with Mr. Lanouette, Corporal Lafate detected a moderate odor of alcohol. Corporal Lafate also testified that Mr. Lanouette's eyes appeared bloodshot and glassy.

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[67] *Lefebvre*, 19 A.3d at 292 (quoting from *Clendaniel v. Voshell*, 562 A.2d 1167, 1170 (Del. 1989)).
[68] *Id.* at 292-93 (quoting from *State v. Maxwell*, 624 A.2d 926, 929 and 930 (Del. 1993)).
[69] *Id.* at 293.
[70] *Id.*(reviewing the facts used in the probable cause analysis in *Esham v. Voshell*, 1987 WL 8277 (Del. Super. Ct. Mar. 2, 1987), *Bease v. State*, 884 A.2d 495 (Del. 2005), *Perrera v. State*, 2004 WL 1535815 (Del. June 25, 2004)

Mr. Lanouette told Corporal Lafate that he was coming from McGlynn's and that he had consumed three 24 ounce beers.

Corporal Lafate testified that Mr. Lanouette's performance on certain field tests indicated that Mr. Lanouette was driving while impaired – the alphabet test,[71] the HGN test, the one legged stand test and the finger to nose test. Corporal Lafate also testified that Mr. Lanouette performed well on the walk and turn test, was cooperative, produced without difficulty his license, registration and proof of insurance and did not seem to slur when responding to questions.

Mr. Lanouette argues that the results of the HGN test should be disregarded as not having been performed in strict accordance with NHTSA standards. Here, Mr. Lanouette contends that Corporal Lafate failed to properly determine onset of nystagmus at 45 degrees in accordance with NHTSA standards. Mr. Lanouette contends that this is a "requirement" set by NHTSA and that the Court should therefore ignore, or significantly discount, the results of these tests in determining whether probable cause existed in this case.

While the Court recognizes that there may be deficiencies in the way Corporal Lafate either performed the tests or recalled in his testimony how the tests were performed, the Court finds that these deficiencies are not enough to disqualify the tests' results from consideration in the probable cause determination. As the Chief Judge of this Court has previously stated, "no Court in this jurisdiction ha[s] concluded that a failure to strictly comply with NHTSA invalidates the test."[72] Instead, the Court is to consider the deficiencies when giving weight and

[71] The parties expend a good amount of briefing on whether the Court should consider a "memory" type test like the alphabet test. The Superior Court addressed this issue in *State v. Ministero*, Case No. 0306011221 WCC, slip op., at 8-11 (Del. Super. Sept. 21, 2006). In that case, the Superior Court held that " a defendant's performance on "memory" type tests [like the counting and alphabet tests] are factors an officer may use to determine whether probable cause exists to arrest an intoxicated person, just like the officer's observations of the defendant's driving or his personal appearance." *Id.* at 9.

[72] Transcript of Nonjury Trial of April 14, 2010 in *State v. Iyer*, Case No. 0904004949, at 103-04 (Del. Comm. Pl. April 14, 2010) (decision reversed on other grounds in *State v. Iyer*, 2011 WL 976480 (Del. Super. Feb. 23, 2011).

value to the tests performed.[73] Here, the Court does not find the deficiencies significant enough to disqualify the HGN test entirely. In fact, Corporal Lafate admitted to slight variations but also testified that he went 45 degrees as trained.[74]

Given all of this, the Court holds that the State has presented facts that suggest, when those facts are viewed under the totality of the circumstances, there is a fair probability that Mr. Lanouette committed the DUI Offense. In this case Mr. Lanouette was cooperative and responsive to questioning during the traffic stop and had no trouble providing his license and other vehicle information. Corporal Lafate also testified that he did not notice any slurring by Mr. Lanouette when he responded to questions. There is also a moving motor vehicle violation (the Speeding Offense), moderate odor of alcohol detected by Corporal Lafate, bloodshot and glassy eyes, admission to drinking, and indications of impairment through the results of the HGN test and the one legged stand test. With all these facts, the Court finds that Corporal Lafate possessed that quantum of trustworthy factual information sufficient to warrant him in believing that Mr. Lanouette committed the DUI Offense. Accordingly, Corporal Lafate's detention of Mr. Lanouette for the DUI Offense is supported by probable cause.[75]

[73] *Id.*
[74] Tr. at 73-74.
[75] As suggested by the Supreme Court in *Lefebvre*, this Court reviewed other decisions involving probable cause and a DUI offense. In doing so, this Court believes that the decision here lies within the boundaries of what constitutes probable cause for a DUI offense. *See, e.g.*, *Lefebvre v. State*, 19 A.3d 287 (Del. 2011) (probable cause where passed field tests but moving violation, strong odor of alcohol, slurred speech and admission to drinking about an hour and a half before the traffic stop); *Bease v. State*, 884 A.2d 495 (Del. 2005) (probable cause where failure on alphabet test, traffic violation, odor of alcohol, rapid speech, admission to drinking, bloodshot and glassy eyes); *Maxwell v. State*, 624 A.2d 926 (Del. 1993) (probable cause where accident, odor of alcohol at scene of accident and several containers of beer in vehicle and no field tests); *State v. Iyer*, 2011 WL 976480 (Del. Super. Feb. 23, 2011) (probable cause where no admissible field tests, overturned sedan, moderate odor of alcohol, watery, glassy and "maybe a little bit bloodshot" eyes and admission of drinking); *Blossom v. Shahan*, 2006 WL 1791211 (Del. Com. Pl. 2006) (probable cause where flushed complexion, glassy eyes, awkward behavior and admission to drinking).

D. The State Carried Its Burden Of Proof That Mr. Lanouette Is Guilty Of The Speeding Offense.

The State charged Mr. Lanouette with speeding under 21 *Del. C.* § 4169. Before the Court can find a defendant guilty of speeding, the State must prove beyond a reasonable doubt that (i) the defendant was operating a motor vehicle at the time charged and (ii) that the defendant exceeded the speed limit (either as posted or statutorily set forth in 21 *Del. C.* § 4169(a) and (b)).[76] It is permissible for the State to enforce speed restrictions by the use of radar devices. However, where an officer uses a radar unit to measure the speed of a vehicle, the State must establish that (i) the officer operating the unit is qualified by appropriate training and experience to operate such a device and (ii) the radar device used to measure the speed was working properly on the date it was used to measure the speed of the defendant.[77]

The Court finds the State proved beyond a reasonable doubt that Mr. Lanouette is guilty of the Speeding Offense. Corporal Lafate utilized a radar device in determining the speed at which Mr. Lanouette was driving on March 22, 2008 – 77 m.p.h. in a 55 m.p.h. posted speed zone. Corporal Lafate is trained and certified in the operation of his patrol car's radar units.[78] Testimony at the Trial demonstrated that the radar units were properly functioning on Corporal Lafate's March 21-22, 2008 shift.[79] Accordingly, the Court finds Mr. Lanouette guilty of speeding under 21 Del. C. § 2169 by driving 77 m.p.h. in a posted 55 m.p.h. zone.

E. The State Carried Its Burden Of Proof That Mr. Lanouette Is Guilty Of The DUI Offense.

The State charged Mr. Lanouette with driving a vehicle while under the influence of alcohol in violation of 21 *Del. C.* §4177 (a). Before the Court can find a defendant guilty

[76] 21 *Del. C.* § 4169(a) and (b).
[77] *State v. Moffitt*, 100 A.2d 778, 779-80 (Del. Super. 1953).
[78] *See* Exs. 3 and 4.
[79] *See* Tr. at 44-53. *See also* Exs. 5-9.

violating 21 *Del. C.* § 4177, the State is required to prove the following two elements beyond a reasonable doubt: first, that the defendant drove a motor vehicle at or about the time and place charged; and second, that the defendant was under the influence of alcohol while he drove the motor vehicle.[80] In this case, the State is seeking to have Mr. Lanouette found guilty under 21 *Del. C.* § 4177(a)(4) – no person shall drive a vehicle when the person's alcohol concentration is .08 or more. For purposes of 21 *Del. C.* § 4177(a)(4), alcohol concentration of .08 or more means an "amount of alcohol in a sample of a person's breath equivalent to .08 or more grams per two hundred ten liters of breath."[81]

The Court finds that the State proved beyond a reasonable doubt that Mr. Lanouette is guilty of the DUI Offense. Corporal Lafate utilized an intoxilyzer device to measure Mr. Lanouette's blood alcohol concentration. Corporal Lafate testified that the intoxilyzer device was operating properly and that he followed standard operating procedures before administering the test.[82] Mr. Lanouette's test recorded a blood alcohol content of .124.[83] Accordingly, the Court finds Mr. Lanouette guilty of driving under the influence in violation of 21 *Del. C.* § 4177(a)(4).

CONCLUSION

For the reasons stated in this opinion, the Court holds that the stop and detention of Mr. Lanouette for the DUI Offense was supported by probable cause. The Motion is, therefore, **DENIED**.

[80] *Lewis*, 626 A.2d at 1355.
[81] 21 *Del. C.* § 4177(c)(2).
[82] *See* Tr. at 90-99; Exs. 10, 11.
[83] Ex. 12.

For the reasons stated in this opinion and decision after the Trial, the State has met its burden on each and every element of the charged offenses. Therefore, the Court finds Mr. Lanouette **GUILTY** of both the DUI Offense and the Speeding Offense.

The Clerk of the Court shall set this matter for sentencing.

IT IS SO ORDERED.

Eric M. Davis

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Eric M. Davis
Judge