IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
Plaintiff,	)	
	)	
	)	
v.	)	**Case No.: 0911010282**
	)	
MATTHEW J. ZAMBANINI,	)	
	)	
Defendant.	)	
	)	

Date Submitted: October 3, 2012
Date Decided: October 17, 2012

MEMORANDUM OPINION
FOLLOWING TRIAL

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WELCH, J.

I. Introduction

Trial in the above captioned matter on Wednesday, October 3, 2012 in the New Castle County Courthouse. The Court, on February 22, 2012 rendered an opinion on Defendant's Motion to Suppress finding reasonable articulable suspicion for the date, time and place of the traffic stop in question in the charging documents. At trial, the Motion to Suppress was withdrawn by Stipulation and the matter proceeded to trial on the violation of 21 *Del.C.* §4177(a) on an impairment theory because the State did not timely produce the calibration records in order to introduce the Phlebotomist's Report.[1] The State previously entered a *nolle prosequi* on the Insurance Card, 21 *Del.C.* §2118(p) as well as a violation of 21 *Del.C.* §2108, an alleged violation of the registration card statute.

II. The Facts

At trial on October 3, 2012 New Castle County Police Officer Joann M. Smiley ("Officer Smiley") was resworn and testified.[2] The State began the sworn testimony of Officer Smiley when she stopped and returned to the 7-11 and observed the defendant on November 16, 2009. Officer Smiley testified she exited her patrol vehicle at the 7-11 on November 16, 2009 at approximately 2:00 pm and requested the defendant to produce his driver's license, registration and insurance card. Defendant offered a statement "I was working at Buffalo Wild Wings" tonight. Officer Smiley thereafter observed a strong odor of alcoholic beverages from the defendant's person, as well as "slurred speech". Defendant also appeared to be very "agitated". Defendant told Officer Smiley that he did not have his insurance card and registration, but did, in fact, produce his driver's license. Officer Smiley ordered the defendant to stay in his motor vehicle and not to use his cell phone. When a back-up police officer arrived, both officers

[1] *See State v. Stephen J. Desmond*, Court of Common Pleas, Case No.: 1009004655, (C.J. Smalls) (July 13, 2011).

observed the defendant exit his motor vehicle and began to smoke a cigarette. When the defendant was ordered back into his motor vehicle, he replied "Fuck you, you can't make me get off my phone." The defendant then refused to re-enter his motor vehicle. New orders and commands were made by Officer Smiley to re-enter his motor vehicle, and then subsequently followed by the defendant.

Some moments later, the defendant was requested to exit his motor vehicle. He "stumbled" when he exited the motor vehicle. The defendant then told Officer Smiley, "You think I'm drunk because I can't walk". When Officer Smiley walked with the defendant to the rear of his motor vehicle the defendant could not stand "free" and was placing his hands and body on the motor vehicle and leaning against the motor vehicle in order to maintain his balance. The defendant then told Officer Smiley, "I'll make sure you lose your fucking jobs." The defendant did not perform any field sobriety tests as Officer Smiley testified for safety reasons she did not administer any NHTSA Field Coordination Tests. Officer Smiley articulated she feared the defendant he would lose his balance because of his condition of leaning against a motor vehicle so no Field Coordination Tests, in fact, were administered.

While waiting for assisting law enforcement units, defendants fell asleep in Officer Smiley's patrol car.

Officer Smiley, on direct examination, testified that damage on the front side of the motor vehicle appeared to be "old damage".

When the defendant awoke, he told Officer Smiley, "you handcuffed me while I was walking."

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[2] Following the State's Opening Statement, at the request of the Attorney General, the Court incorporates by reference all the sworn findings of fact previously found in its February 22, 2012 Opinion up until the point of the stop of the defendant on the date, time and place in the charging documents as part of the trial record.

When the defendant and Officer Smiley arrived at the Troop, the defendant called all the police turn-key Officers "dumbasses" and threw his belt on the Troop floor. The defendant then took his shirt off and threw it on the Troop floor and refused to complete the pedigree documents.

On direct examination, Officer Smiley testified the defendant told her several times, "I'm not going to take any breath tests."

On cross-examination, Officer Smiley testified the defendant repeatedly stated "I'm not going to take any breath tests." When she saw the defendant exit the motor vehicle, she testified she observed balance issues by the defendant.

Also, on further cross-examination, Officer Smiley testified she was approximately one car length parked behind the defendant when he stumbled out of his car. Officer Smiley reiterated the damage to his motor vehicle was "old damage"

Officer Smiley testified that the defendant told her that his window would not roll down when she responded to his motor vehicle and she replied, "Okay, open the door". The defendant timely produced his driver's license without difficulty. Officer Smiley reiterated her testimony that the odor of alcoholic beverage from the defendant was "strong" and that defendant's speech was "slurred". Officer Smiley also testified on cross-examination the defendant was "agitated" and the defendant repeated stated "this is bullshit" "I didn't do anything wrong". Officer Smiley agreed that the defendant's demeanor during the whole proceeding was a "clearly agitated" demeanor because he felt he was improperly stopped by law enforcement. Officer Smiley testified further on cross-examination she did not offer the defendant a PBT and that there was no "erratic driving" involved by the defendant.

On re-direct examination, Officer Smiley testified that the defendant could not keep his balance while he was standing next to the motor vehicle. In her opinion defendant was

intoxicated. Officer Smiley testified she had previously had five (5) DUI arrests for the State of Delaware.

The defense put on its case-in-chief.

Matthew J. Zambanini ("defendant") was sworn and testified. He is 32 years old and is currently self-employed at Gladiator Wrestling in Bear, Delaware and works with 7-15 year olds. He was a State Wrestling Champ in 1995 and 1998 and had previous back surgery with his L-4 disc and lower back in John Hopkins in 1997 to resolve pain issues. He was employed at Buffalo Wild Wings the night in question and had worked a 12 hour shift. He does not recall all the facts from three (3) years ago, but claims he was "tired" when he left the establishment at 12:30 am because he worked a double shift for 12 hours. He was still in the restaurant uniform when he was stopped at the 7-11 by Officer Smiley and was on his feet for 12 ½ hours and claims he was tired.

The defendant further testified he has problems working a double shift because of a previous back injury. He was driving his Lexis when he was stopped at 7-11 and was "going home." He believes the officer did not have a reason to stop him on the date, time and place of the charging documents, but recalls the stop. He also stopped on the public road in question on the way home but does not recall the reason he stopped because it was three (3) years ago. He testified he clearly got agitated with the officer because of the traffic stop. He testified that two (2) other police officers appeared at the 7-11 and performed a drug search because some brown leaves were found in the back seat of his motor vehicle.

On cross-examination the defendant testified he was working actually on a Sunday, not a Monday at the football game at Buffalo Wild Wings restaurant and that 70 percent of the time his duties involved handling alcohol. He agreed on cross-examination that he cursed at the police officers and "made things worse" during the stop because he used profanity such as curse

words “fuck you”. He also testified he told the officer “you think I’m drunk because I can’t walk?” but that was actually related to his back injury, not because he was intoxicated. He also agreed he told the officer they would lose their “fucking jobs” and that he refused over and over again breath tests by telling the officers he would not take such a test. He also agreed he told the turn-key officers at the Troop “you are dumbasses.” He conceded he is facing significant penalties if he is convicted of a DUI offense.

The defense re-called Officer Smiley who told defense counsel that she was holding a tazor in her hand at the Troop when defendant objected to taking blood and there were approximately 2-3 other officers present when the phlebotomist was present.

III. The Law

Sec. 4177. Driving a vehicle while under the influence or with a prohibited alcohol content; evidence; arrests; and penalties

(a) No person shall drive a vehicle:

(1) When the person is under the influence of alcohol;

(2) When the person is under the influence of any drug;

(3) When the person is under the influence of a combination of alcohol and any drug;

(4) When the person's alcohol concentration is .08 or more; or

(5) When the person's alcohol concentration is, within 4 hours after the time of driving .08 or more. Notwithstanding any other provision of the law to the contrary, a person is guilty under this subsection, without regard to the person's alcohol concentration at the time of driving, if the person's alcohol concentration is, within 4 hours after the time of driving .08 or more and that alcohol concentration is the result of an amount of alcohol present in, or consumed by the person when that person was driving.

(b) In a prosecution for a violation of subsection (a) of this section:

(1) Except as provided in paragraph (b)(3)b. of this section, the fact that any person charged with violating this

section is, or has been, legally entitled to use alcohol or a drug shall not constitute a defense.

(2) a. No person shall be guilty under subsection (a)(5) of this section when the person has not consumed alcohol prior to or during driving but has only consumed alcohol after the person has ceased driving and only such consumption after driving caused the person to have an alcohol concentration of .08 or more within 4 hours after the time of driving.

b. No person shall be guilty under subsection (a)(5) of this section when the person's alcohol concentration was .08 or more at the time of testing only as a result of the consumption of a sufficient quantity of alcohol that occurred after the person ceased driving and before any sampling which raised the person's alcohol concentration to .08 or more within 4 hours after the time of driving.

(3) The charging document may allege a violation of subsection (a) without specifying any particular subparagraph of subsection (a) and the prosecution may seek conviction under any of the subparagraphs of subsection (a).

(c) For purposes of subchapter III of Chapter 27 of this title, this section and §4177B of this title, the following definitions shall apply:

(1) "Alcohol concentration of .08 or more" shall mean:

a. An amount of alcohol in a sample of a person's blood equivalent to .08 or more grams of alcohol per hundred milliliters of blood; or

b. 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.

(2) "Chemical test" or "test" shall include any form or method of analysis of a person's blood, breath or urine for the purposes of determining alcohol concentration or the presence of drugs which is approved for use by the Forensic Sciences Laboratory, Office of the Chief Medical Examiner, the Delaware State Police Crime Laboratory, any state or federal law enforcement agency, or any hospital or medical laboratory. It shall not, however, include a preliminary screening test of breath performed in order to estimate the alcohol concentration of a person at the scene of a stop or other initial encounter between an officer and the person.

(3) "Drive" shall include driving, operating, or having actual physical control of a vehicle.

(4) "Vehicle" shall include any vehicle as defined in §101(80) of this title, any off-highway vehicle as defined in §101(39) of this title and any moped as defined in §101(31) of this title.

(5) "While under the influence" shall mean that the person is, 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 physical control, or due care in the driving of a vehicle.

(6) "Alcohol concentration of .16 or more" shall mean:

a. An amount of alcohol in a sample of a person's blood equivalent to .16 or more grams of alcohol per hundred milliliters of blood; or

b. An amount of alcohol in a sample of a person's breath equivalent to 20 or more grams per two hundred ten liters of breath.

(7) "Drug" shall include any substance or preparation defined as such by Title 11 or Title 16 or which has been placed in the schedules of controlled substances pursuant to Chapter 47 of Title 16. "Drug" shall also include any substance or preparation having the property of releasing vapors or fumes which may be used for the purpose of producing a condition of intoxication, inebriation, exhilaration, stupefaction or lethargy or for the purpose of dulling the brain or nervous system.

(d) Whoever is convicted of a violation of subsection (a) of this section shall:

(1) For the first offense, be fined not less than $230 nor more than $1,150 or imprisoned not more than 6 months or both, and shall be required to complete an alcohol evaluation and a course of instruction and/or rehabilitation program pursuant to § 4177D of this title, which may include confinement for a period not to exceed 6 months, and pay a fee not to exceed the maximum fine. Any period of imprisonment imposed under this paragraph may be suspended.

(2) For a second offense, be fined not less than $575 nor more than $2,300 and imprisoned not less than 60 days nor more than 18 months. The minimum sentence for a person sentenced under this paragraph may not be suspended.

(3) For a third offense, be guilty of a class G felony, be fined not less than $1,000 nor more than $3,000 and imprisoned not less than 1 year nor more than 2 years. The provisions of §4205(b)(7) or §4217 of Title 11 or any other statute to the contrary notwithstanding, the first 3 months of the sentence shall not be suspended, but shall be served at Level V and shall not be subject to any early release, furlough or reduction of any kind. No conviction for violation of this section for which a sentence is imposed pursuant to this paragraph shall be considered a predicate felony conviction for sentencing pursuant to §4214 of Title 11. No offense for which sentencing pursuant to this paragraph is applicable shall be considered an underlying felony for a murder in the first degree charge pursuant to §636(a)(2) of Title 11.

(4) For a fourth or subsequent offense occurring any time after 3 prior offenses, be guilty of a class E felony, be fined not less than $2,000 nor more than $6,000 and imprisoned not less than 2 years nor more than 5 years. The provisions of §4205(b)(5) or §4217 of Title 11 or any other statute to the contrary notwithstanding, the first 6 months of the sentence shall not be suspended, but shall be served at Level V and shall not be subject to any early release, furlough or reduction of any kind. No conviction for violation of this section for which a sentence is imposed pursuant to this paragraph shall be considered a predicate felony conviction for sentencing pursuant to §4214 of Title 11. No offense for which sentencing pursuant to this paragraph is applicable shall be considered any underlying felony for a murder in the first degree charge pursuant to §636(a)(2) of Title 11.

(5) The provisions of paragraphs (3) and (4) of this subsection and the provisions of subdivision (e)(2) of §4177B of this title notwithstanding, the Attorney General may move the sentencing court to apply the provisions of paragraph (3) of this subsection to any person who would otherwise be subject to a conviction and sentencing pursuant to paragraph (4) of this subsection.

(6) In addition to the penalties otherwise authorized by this subsection, any person convicted of a violation of subsection (a) of this section, committed while a person who has not yet reached the person's 17th birthday is on or within the vehicle shall:

a. For the first offense, be fined an additional minimum of $230 and not more than an additional $1,150 and

sentenced to perform a minimum of 40 hours of community service in a program benefiting children.

b. For each subsequent like offense, be fined an additional minimum of $575 and not more than an additional $2,300 and sentenced to perform a minimum of 80 hours of community service in a program benefiting children.

(g) For purposes of a conviction premised upon subsection (a) of this section, or any proceeding pursuant to this Code in which an issue is whether a person was driving a vehicle while under the influence, evidence establishing the presence and concentration of alcohol or drugs in the person's blood, breath or urine shall be relevant and admissible. Such evidence may include the results from tests of samples of the person's blood, breath or urine taken within 4 hours after the time of driving or at some later time. In any proceeding, the resulting alcohol or drug concentration reported when a test, as defined in subsection (c)(2) of this section, is performed shall be deemed to be the actual alcohol or drug concentration in the person's blood, breath or urine without regard to any margin of error or tolerance factor inherent in such tests.

(1) Evidence obtained through a preliminary screening test of a person's breath in order to estimate the alcohol concentration of the person at the scene of a stop or other initial encounter between a law enforcement officer and the person shall be admissible in any proceeding to determine whether probable cause existed to believe that a violation of this Code has occurred. However, such evidence may only be admissible in proceedings for the determination of guilt when evidence or argument by the defendant is admitted or made relating to the alcohol concentration of the person at the time of driving.

Case law provides that the element of driving may be proven beyond a reasonable doubt by circumstantial evidence. *Coxe v. State,* Del. Supr., 281 A.2d 606 (1971); *Lewis v. State,* Del. Supr., 626 A.2d 1350 (1993) Subsections (a) and (b) [of Sec. 4177] must be read together and defendant must "be found, beyond a reasonable doubt, to have operated a vehicle while under the influence of alcohol." 21 *Del. C.* §4177(a); 11 *Del. C.* §301.

By established case law and by statute, the State is required to prove each element of the instant charges beyond a reasonable doubt. 11 Del. C. § 301. *United States ex rel. Crosby v. Delaware,* 346 F. Supp. 213 (D. Del. 1972). A reasonable doubt is "not meant to be a vague, whimsical or merely possible doubt, but such a doubt as intelligent, reasonable, and impartial persons honestly entertain after a careful examination and conscientious consideration of the evidence." *State v. Matuschefske,* Del. Super., 215 A.2d 443 (1965). 11 *Del. C.* §301.

The State also has the burden of proof beyond a reasonable doubt that jurisdiction and venue has been proven as elements of the offense. 11 Del. C. § 232. *James v. State,* Del. Supr., 377 A.2d 15 (1977). *Thornton v. State,* Del. Supr., 405 A.2d 126 (1979).

The Court as trier of fact is the sole judge of the credibility of each fact witness.

If the Court finds the evidence presented to be in conflict, it is the Court's duty to reconcile these conflicts, if reasonably possible, so as to make one harmonious story of it all.

If the Court cannot do this, the Court must give credit to that portion of the testimony which, in the Court's judgment, is most worthy of credit and disregard any portion of the testimony which in the Court's judgment is unworthy of credit.

In doing so, the Court takes into consideration the demeanor of the witness, their apparent fairness in giving their testimony, their opportunities in hearing and knowing the facts about which they testified, and any bias or interest that they may have concerning the nature of the case.

IV. Discussion.

The Court must note that the State has proceeded on an impairment theory in this trial as no chemical test or blood test was presented for the Court to review. The State argues that neither the BAC or blood results should be considered by the Court and that sufficient evidence exists in the record that the defendant was driving impaired in violation of 21 *Del.C.* §4177(a)

beyond a reasonable doubt, 11 *Del.C.* §301. *See also, State v. Matushefke,* 215 A.2d 443, 1965 (Del.Super.)

The State further argues that the Court should consider that both elements of 21 *Del.C.* §4177(a) have been proven in the trial record beyond a reasonable doubt. First, that the defendant drove a motor vehicle on or about the time and place charged in the Information; and second that the defendant was under the influence while he drove the motor vehicle. *See Lewis v. State*, 626 A.2d 1350, 1355 (Del. 1993); *State v. Baker*, 720 A.2d 1139, 1142 (Del. 1998).

As this Court has ruled in *State v. Brian S. Singleton*, 2008 WL 5160110 (Del.Com.Pl., Welch, J.) "…'[t]he evidence proffered "must show that the person has consumed a sufficient amount of alcohol to cause the driver to be less able to exercise the judgment and control that a reasonably careful person in full possession of his or her faculties would exercise under like circumstances." *See e.g., Lewis v. State,* 626 A.2d 1350 at 1355.

The State argues in its closing statement that the Court should adopt, as it has done in the trial record, the facts outlined in its previous opinion finding reasonable articulable suspicion, including that the defendant drove off and proceeded to the left lane on route 40 with his right turn signal activated. The Court also found in that opinion that defendant entered the 7-11, the defendant opened the car door and "stumbled" out of his motor vehicle and then left the driver's side door open. The Court also found at page 4 of that Opinion that defendant exited the 7-11 after a few minutes and Officer Smiley observed him stumbling as he returned to his motor vehicle as well as turned his wipers on when it was not, in fact, necessary because it was not raining.

At trial the State argues these facts, as well at the time Officer Smiley stopped defendant there was "a strong odor of alcohol", that the defendant's speech was "slurred" and that defendant was "quickly agitated" and couldn't locate his license and registration. The State also

argues the defendant did not follow the lawful commands of the police officer to remain in his vehicle and then exited his motor vehicle and talked on his cell phone and then smoked a cigarette. Defendant also used profanity, including "fuck you" and "you can't make me not use my cell phone". The State also argues that the defendant made an admission that, "You think I'm drunk because I can't walk" and that the defendant told the officers that they lose their "fucking jobs".

More significantly, the State proffers that when the defendant was on the back of the Officer Smiley's patrol vehicle, he was leaning on the motor vehicle and could not keep his balance. The State asserts Officer Smiley felt that there was significant reasons for safety purposes not to administer NHTSA Field Coordination Tests because of the defendant's inability to maintain his balance at the rear of Officer Smiley's patrol car.

The State also argues that defendants repeated and continuous statements to Officer Smiley that he would refuse to allow an administration of a breath tests should be considered consciousness of guilt.[3] Although Officer Smiley never attempted to administer a PBT, the State argues his continuous statements the he would refuse the administration of a breath test constitutes such consciousness he was driving under the influence in violation of 21 *Del.C.* §4177(a).

At the Troop, the State points out defendant threw his belt and called all the pedigree officers "dumbasses" and also fell asleep in the back of Officer Smiley's patrol vehicle while he was at the scene. Defendant also took off his shirt, as well as his belt and threw it on the floor at the Troop. The State argues defendant's entire demeanor during the night in question on November 16, 2009 was the state of mind of an intoxicated person.

[3] *See, Church v. State,* 11 A.3d 226, (Del.Supr.).

The defense argues that this is a clear case of defendant being a jerk, but not one who should be convicted of a violation of 21 *Del.C.* §4177 for driving his motor vehicle under the influence. The defense further argues that defendant answered all Officer Smiley's lawful questions and there was no erratic driving other than the lane change violation on the date in question. The defense therefore argues under the totality of circumstances this was not a DUI charge proven beyond a reasonable doubt, 11 *Del.C.* §34 and the defendant was "simply tired" as he had worked all day for 12 ½ hours. The defense testifies leaving an open door in the motor vehicle and turning on his wipers should be deemed insignificant finds by the Court.

V. Opinion and Order

The Court has scrutinized the entire record, under the totality of circumstances presented both at the suppression hearing where the Court found reasonable articulable suspicion at trial. The Court finds the State has met its burden of proof beyond a reasonable doubt, 11 *Del.C.* §301 that the defendant was driving under the influence. 21 *Del.C.* §4177(a), 11 *Del.C.* §301. The Court finds the defendant's entire conduct on the date, time and place in the charging documents is that of a driver that was clearly impaired and under the influence of alcohol in violation of 21 *Del.C.* §4177(b).

The Court finds, as the State argued in closing that a rational person would have let the police officers do their jobs in question and not exhibit the type of conduct which proves the defendant was driving his motor vehicle under the influence of alcohol. 21 *Del.C.* §4177(a). As case law indicates, a chemical or phlebotomist test is not necessary in order to find the defendant guilty of driving under the influence.[4]

[4] *See e.g. Marvin J. Bennefield v. State*, 2006 WL 258306 (Del.Supr.)(Jan. 4, 2006); *State v. Singleton, 2008 WL* 5161040 (Del.Comm.Pl.)(Sept. 4, 2008).

As Justice Holland ruled in *Church*, "…[t]he mere fact that evidence offered against an accused might be said prejudicial in the sense that it tends to incriminate him is no reason for rejection in a criminal prosecution."[5] As Justice Holland further noted, "…[s]ubject to well-defined rules of evidence, it is proper in a criminal case to show defendant's conduct, demeanor, and statements, whether oral or written, his attitude and relations toward the crime, if there was one. These are circumstances that may be shown."[6] Besides, in the instant case defendant's "strong odor of alcoholic beverages" at the scene; his "slurring words"; his "inability to safely hold his balance" while in the back of Officer Smiley's patrol car; changing lanes in his motor vehicle in violation of 21 *Del.C.* §4155 on a public highway, the defendant's stumbling out of the motor vehicle in order to go into 7-11; the fact the defendant did make, by his own admissions, and offered the statement "You think I'm drunk because I can't walk" to Officer Smiley. The defendant's continuous use of profanity towards the officers and threats they would lose their jobs; his conduct at the Troop; as well as using curse language, and his continuous statements he would refuse a breath test by a totality of circumstances, all of which the Court finds is consciousness and evidence of guilt beyond a reasonable doubt that he was driving under the influence in violation of 21 *Del.C.* §4177(a).

As the Superior Court ruled in *Bennefield*, "It is unnecessary that the defendant be 'drunk' or 'intoxicated' to be found guilty of driving under the influence."[7] "Nor is it required that the impaired ability to drive be demonstrated by particular acts of unsafe driving."[8]

Defendant's conduct in the instant trial indicates he drove his motor vehicle under the influence as defined by the DUI statute, 21 *Del.C.* §4177(a) beyond a reasonable doubt.

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[5] *Church at 3.*
[6] *Church at 4.*
[7] *See, State v. Bennefield*, 2006 WL258306 (Del.Super. 2006).
[8] *Id.*

The Court Clerk is to reschedule this matter for sentencing at the earliest convenience of counsel of record.

IT IS SO ORDERED this 17th day of October, 2012.

John K. Welch, Judge

/jb

cc: Ms. Diane Healy, Judicial Case Manager, Criminal Scheduling