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: February 17, 2012
Date Decided: February 22, 2012

MEMORANDUM OPINION ON DEFENDANT'S MOTION TO SUPPRESS

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WELCH, J.

A hearing on Defendant's Motion to Suppress was held before this Court in the above captioned matter on January 4, 2012 in the Court of Common Pleas, New Castle County, State of Delaware. The defendant was charged with a violation of 21 *Del.C.* §2118(p), 21 *Del.C.* §2108 and 21 *Del.C.* §4177(a) by Informations filed with the Clerk of the Court by the Attorney General.

Following the hearing, a briefing schedule was issued and has now been completed. This is the Court's Final Decision on Defendant's Motion to Suppress. Defendant argues, *inter alia*, that the state lacked reasonable articulable suspicion to stop or detain him on the date, time, and place in the charging documents.

I. The Facts

At the suppression hearing, New Castle County Police Officer Joann M. Smiley ("Officer Smiley") was sworn and testified. Officer Smiley has been employed for five (5) years and is a patrol officer with the New Castle County Police, Officer Smiley is charged with monitoring criminal activity and issuing traffic citations in New Castle County. She has been certified the Delaware State Police Academy for both DUI investigations, the Horizontal Gaze Nastagnus Test (2007) and Officer Smiley is also NHTSA certified and trained on the Intoxilizer 5000.

On November 16, 2009 at 2:00 a.m., Officer Smiley was performing her duties at Route 40, near Glasgow Apartments traveling eastbound on Route 40 in New Castle County. The weather conditions were "clear". Officer Smiley testified she was traveling Route 40 eastbound, is a two lane highway with a shoulder on the right side.

Officer Smiley was located near Glasgow Apartments which is a "residential/commercial" area.

Officer Smiley's attention was drawn at that time to a white Lexus located on the right shoulder of Route 40 which appeared to be disabled. The white Lexus had pulled over to the shoulder with its right blinker on and Officer Smiley noticed the tag number of the motor vehicle. Officer Smiley stopped behind the motor vehicle which was operated by the defendant.[1] Officer Smiley testified she was approximately two (2) car lengths behind the defendant on the shoulder in her marked patrol vehicle when the defendant promptly left the shoulder and traveled onto Route 40. At that time the defendant drove off and proceed to the left lane of Route 40 with his right turn signal activated.[2] Officer Smiley testified that she never lost sight of the defendant's white Lexus and continued to follow the motor vehicle which subsequently veered into the right lane and then pulled into a 7-11 convenience store at Porter Road and Route 40. Officer Smiley testified she observed defendant for a quarter of a mile and noticed front end damage on the front quarter panel of the defendant's motor vehicle which she testified appeared to be as a result of a car accident.

After the defendant entered the 7-11, the defendant opened the car door and "stumbled" out of his motor vehicle. Officer Smiley testified she was located

[1] At that point she did not activate her emergency lights.
[2] As the State argued at Page 4 of its Answering Memorandum "under these facts, defendant violated §4155 Of Title 11 of the Delaware Code, Failure to Signal."

approximately fifty (50) yards away in her patrol vehicle at a traffic light at Porter Road and Route 40. Officer Smiley observed the defendant walk into the 7-11 and the defendant left his side-driver's door open. Officer Smiley then pulled into the 7-11 behind the defendant and called RECOM.

The defendant exited the 7-11 after a few minutes and Officer Smiley observed him stumbling as he returned to his motor vehicle. The defendant then began to drive his motor vehicle away after he entered his motor vehicle. Officer Smiley testified she therefore activated her overhead lights. Officer Smiley got directly behind the defendant's motor vehicle after he had already started to drive his motor vehicle. She was two car lengths behind him. Officer Smiley promptly notified RECOM of her location.

On cross-examination Officer Smiley testified she has had five prior (5) DUI stops during her duration as a New Castle County Police Officer. According to Officer Smiley, there was no other traffic on the Route 40 on the date of the charging documents. Officer Smiley testified she did not know how long the defendant was located on the shoulder of the roadway on Route 40.[3] While the defendant pulled back onto the roadway, Officer Smiley observed no unusual swerving or speeding and at that point she decided not to stop the defendant. Officer Smiley reaffirmed his testimony that she traveled behind the defendant until he exited his motor vehicle at

[3] Officer Smith testified she does not recall if defendant used his turn signal when he left the shoulder and traveled onto Route 40.

the 7-11 for approximately ¼ of a mile. Officer Smiley also noted that when defendant left the shoulder and got into the left lane, defendant's right turn signal remained activated. At that time defendant maintained his lane or had maintained correct speed; when she observed the defendant at the 7-11 she was approximately fifty (50) yards away on Route 40.

Officer Smiley indicated there are two (2) entrances into the 7-11 parking lot. The defendant actually pulled into the parking lot from Route 40 and shut his car down "properly". Officer Smiley testified that she believed the defendant "stumbled" when he exited his motor vehicle. Officer Smiley re-iterated her testimony; she never lost sight of him up until that point. Officer Smiley conceded that it is not a motor vehicle violation to leave the door open when the engine is turned off. She is not aware of a single motor vehicle offense at this point. Officer Smiley testified she did not know if 7-11 sold alcohol, but there was no alcohol on defendant's person when he entered the 7-11. Officer smiley testified she was located on the roadway when she saw the defendant "stumbling" in the parking lot approximately fifty (50) yards away.

Officer Smiley testified on re-direct that when the defendant walked into the store she was suspicious that defendant would be a possible DUI because he got out of his car and stumbled and then walked into the 7-11.

II. <u>The Law</u>

In a Motion to Suppress the State bears the burden of establishing the challenge search or seizure comported with the rights guaranteed by the United States

Constitution, the Delaware Constitution, and Delaware Statutory Law. The burden of proof on a Motion to Suppress is by a preponderance of evidence.[4]

In *State v. Robert S. Edwards*, 2002 Del. C.P. LEXIS 28, Clark, Judge (May 31, 2002) this Court applied the following standard to similar facts as follows:

> A police officer may detain an individual for investigatory purposes for a limited scope, but only if the detention is supported by a reasonable and articulable suspicion of criminal activity. *Jones v. State, 745 A.2d 856 (Del. 1999),* (citing *Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868,* (1968)). A determination of reasonable and articulable suspicion must be evaluated by the totality of the circumstances as viewed through the eyes of a reasonable, trained police officer under the same or similar circumstances, combining objective facts with the officer's subjective interpretation of them. Id. The Delaware Supreme Court defines reasonable and articulable suspicion as an officer's ability to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. *Id.* In the absence of reasonable and articulable suspicion of wrongdoing, detention is not authorized. *(Emphasis supplied).*
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> * * *

In *State of Delaware v. John C. Dinan*, 1998 Del. C.P. LEXIS 31, (Welch, J. Oct. 15, 1998), this Court applied a "similar standard" for a motor vehicle stop by a police officer:

> As stated in *State v. Arterbridge, 1995 Del. Super. LEXIS 587, 1995 W.L. 790965* (December 7, 1995), the law with regard to "reasonable articulable suspicion" provides as follows:

[4] *See State v. Tieman,* 2008 WL 5160100, at 4 (Del.Comm.Pl. July 10, 2008); *Hunter v. State*, 783 A.2d 558, 560 (Del. 2001).

The Fourth Amendment in Article 1, Sec. 6 of the Delaware Constitution protecting individual's right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; Del. Const. Art. I §6. Accordingly, a police officer must justify any "seizure" of a citizen. The level of justification required varies with the magnitude of the intrusion to the citizen. See, *U.S. v. Hernandez, 854 F.2d 295, 297 (8th Cir. 1988).* Not every contact between a citizen and a police officer, however, involves a "seizure" of a personal under the Fourth Amendment. See, *Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868, n16 (1968);* see also, *Thompson v. State, Ark. Supr., 303 Ark. 407, 797 S.W.2d 450, 451 (1990). . . .*

There are three categories of police-citizen encounters. See, *Hernandez, 854 F.2d 295 at 297.* First, the least intrusive encounter occurs when a police officer simply approaches an individual and asks him or her to answer questions. This type of police-citizen confrontation does not constitute a seizure. *Robertson v. State, Del. Supr., 596 A.2d 1345, 1351 (1991)* (citing *Florida v. Bostick, 501 U.S. 429, 434, 115 L. Ed. 2d 389, 111 S. Ct. 2382 (1991); Hernandez, 854 F.2d 295 at 297.* Second, a limited intrusion occurs [like the facts of this case] when a police officer restrains an individual for a short period of time. This *Terry* stop encounter constitutes a seizure and requires that the officer have an "articulable suspicion" that the person has committed or is about to commit a crime. *Hernandez, 854 F.2d at 297.* Third, the most intrusive encounter occurs when a police officer actually arrests a person for a commission of a crime. Only "probable cause" justifies a full scale arrest. Id. n2. (emphasis supplied)

As stated in *Arterbridge*, "stopping an automobile falls under the second category and therefore requires that the officer have a reasonable articulable suspicion to do so." *Delaware v. Prouse, 440 U.S. 648, 59 L. Ed. 2d 660, 99 S. Ct. 1391 (1979).* Initially in this matter the Court, as it did in *Arterbridge*, must determine whether the police officer had a

> reasonable articulable suspicion to stop the defendant's vehicle on March 24, 1998. There was clearly a "seizure" because under the facts of this case, Officer Huber restricted the liberty by a show of authority by turning on his overhead lights, siren and beeping his horn when following the defendant. *Terry, 392 U.S. at 20 n.16.* This police contact "conveyed to a reasonable person that he or she is not free to leave." *United States v. Mendenhall, 446 U.S. 544, 545, 64 L. Ed. 2d 497, 100 S. Ct. 1870 (1980); Florida v. Royer, 460 U.S. 491, 502, 75 L. Ed. 2d 229, 103 S. Ct. 1319 (1983).* The Court must make this decision objectively by viewing the "totality of circumstances surrounding the incident at that time." *Mendenhall, 446 U.S. 544 at 545.*
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> *** * ***

As stated in *State v. Harmon*, 2001 Del. Super., LEXIS 338, Bradley, J., August 22, 2001, the following standard applies:

> …The quantum of evidence required for reasonable articulable suspicion is less than that of probable cause. *Downs v. State, Del. Supr., 570 A.2d 1142, 1145 (1990).* The former requires that an objective standard be met: "would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief that the action taken was appropriate?" *Terry v. Ohio, 392 U.S. 1, 21, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968)* (internal quotations omitted). If Harmon had not actually violated any statutes, this reasonable suspicion standard would be the appropriate one to have used. However, Harmon was charged with violating *21 Del. C.* §4114(a), and this violation provided the officer with probable cause to make the stop. *See, State v. Walker, 1991 Del. Super. LEXIS 104,* Del. Super., Cr. A. No. IK90-08-0001, Steele, J. (Mar. 18, 1991) (Order) (holding that changing lanes without a signaling is a violation of *21 Del. C. §4155* which created probable cause for the officer to stop the vehicle.); and *State v. Huss, 1993 Del. Super. LEXIS 481,* *6-7, Del. Super., Cr. A. No. N93-04-0294AC, 0295AC, Gebelein, J. (Oct. 8, 1993) (stating, "clearly then, if probable cause

> exists to arrest, this provides more than the reasonable suspicion necessary to stop the vehicle."). *See also, Eskridge v. Voshell, Del. Supr., 593 A.2d 589 (1991)* (ORDER); *Austin v. Division of Motor Vehicles, 1992 Del. Super. LEXIS 10,* Del. Super., C.A. No. 91A-08-2, Goldstein, J. (Jan. 9, 1992) (Op. and Order); *State v. Lahman, 1995 Del. Super. LEXIS 611,* Del. Super., Cr. I.D. No. 9410011118, Cooch, J. (Jan. 31, 1995) (Mem. Op.); *State v. Brickfield*, 1997 Del. C.P. LEXIS 6, Del. CCP, Case No. 9609017975, Stokes, J. (May 8, 1997); *Webb v. State, 1998 Del. LEXIS 107,* Del. Supr., No. 332, 1997, Berger, J. (Mar. 26, 1998) (ORDER).

* * *

In *State v. Bloomingdale*, 2000 C.P. LEXIS 63, Smalls, C.J., (July 7, 2000), the Court of Common Pleas also similarly defined the standard for this limited seizure as reasonable articulable suspicion;

> The Supreme Court when examining the issue of reasonable articulable suspicion in *Jones v. State, Del. Supr., 745 A.2d 856 (1999)* stated that the determination of reasonable suspicion must be evaluated in the context of the totality of the circumstances as viewed from the eyes of a reasonable, trained police officer in the same or similar circumstances, combining objective facts with an officer's subjective interpretation of those facts. The Court went on to hold that the determination in Delaware of whether an officer has reasonable articulable suspicion to detain an individual may rest not only on the Fourth Amendment of the U.S. Constitution, but also on Delaware Constitutional provisions. In reaching this decision, the Court pointed to *Arizona v. Altieri, 191 Ariz. 1 951 P.2d 866 (1977)* and concluded that a person's (particularly an anonymous caller's) subjective belief that another person is suspicious without more fails to raise a reasonable and articulable suspicion of criminal activity. (emphasis supplied).

> §4155(a) of Title 21 of the Delaware Code, failure to signal "no person shall turn a vehicle at an intersection unless the vehicle is in proper position upon the roadway as required in §4152 of this title, or turn a vehicle to enter a private road or driveway, or otherwise turn a vehicle from a direct course or move right or left upon a roadway or turn so as to proceed in an opposite direction unless and until such movement can be made with safety without interfering with other traffic. No person shall so turn any vehicle without giving an appropriate signal in the manner hereinafter provided."

III. Discussion

The applicable law that governs the instant case is 11 *Del.C.* §1902(a) and provides, *inter alia*, "A peace officer may stop any person abroad, or in a public place, who the officer has reasonable ground to suspect is committing, has committed or is about to commit a crime, and may demand the person's name, address, business abroad and destination."[5]

Reasonable suspicion requires that a police officer … to "[p]oint to specific and articulable facts which taken together with all rational inferences from those facts, reasonably warrant the intrusion." *See State v. Stewart*, 2000 WL 494734 at 3 (Del.Super.)(*citing Terry v. Ohio*, 392 U.S. 1 (1968). "[W]hen determining whether there is reasonable suspicion to justify detention, the Court 'defers to the [subjective] experience and training of law enforcement officers.'" *See Woody v. State.*[6]

[5] *See 11 Del.C.* §1902; *Coleman v. State,* 562 A.2d 1171, 1174 (Del. 1989)
[6] 765 A.2d 1257, 1262 (Del.)

As set forth in *State v. Stewart*, the Superior Court has ruled that in determining the totality of circumstances, the Court does not require the arresting officer to negate possible innocent explanations to establish reasonable articulable suspicion including whether there was a reason to stop the defendant.[7]

Finally, the Delaware Supreme Court has consistently recognized that …"[s]eemingly innocent behavior, in the eyes of a trained law enforcement officer may provide reasonable suspicion for an investigatory detention.[8] In essence, a police officer or law enforcement personnel may have reasonable suspicion that an individual was engaged in criminal activity even if it turns out later the individual did not violate a criminal statute.[9]

The Court must note that another Delaware Supreme Court doctrine that governs the instant proceeding is the Community Care Doctrine as set forth in *Moore v. State*, 997 A.2d 656 (Del.Supr.)(July 6, 2010) where the Court found the Community Care Doctrine has three predicate (3) elements:

> First, if there are objective, specific and articulable facts from which an experienced officer would suspect that a citizen is in apparent peril, distress or need of assistance, police officer may stop and investigate for purpose of assisting the person; second, if citizen is in need of aid, then officer may take appropriate action to render assistance or mitigate the peril; and third, once officer is assured that citizen is not in peril or is no longer in need of assistance or that peril has been mitigated, caretaking function is over

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7 *State v. Stewart*, 2001 WL 49473403.
8 *Harris v. State*, 806 A.2d 119, 121 (Del. 2002).
9 *See Stewart*, 2000 WL 494734 at 4.

> and any further detention constitutes an unreasonable seizure unless officer has a warrant, or some exception to warrant requirement applies, such as a reasonable, articulable suspicion of criminal activity.[10]

OPINION AND ORDER

The Court finds Officer Smiley had reasonable articulable suspicion to stop the defendant's motor vehicle on the date, time and place set forth in the charging documents. Both under §1902 of Title 10, established case law, as well as the Community Care Doctrine sets forth the legal basis for the traffic stop under the facts of the instant case.[11] First, it was clear to Officer Smiley that the defendant's motor vehicle was pulled over to a shoulder and Officer Smiley later observed while traveling behind defendant for a ¼ mile, front end damage to the motor vehicle while traveling behind defendant's white Lexus for ¼ mile. The Court finds that the delay in stopping the defendant after a quarter mile does not prevent this Court from applying this doctrine. Third, the Court finds that it was reasonable for Officer Smiley to conclude defendant may be in distress and the Court finds and the three prongs of *Moore* have been satisfied in this suppression record. Clearly, objective facts coupled with Officer Smiley's subjective observation, exists that defendant may be in peril after he was on the shoulder, at night, with later detailed front end damage to his motor vehicle.

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[10] *See Moore v. State*, *Id.*

[11] The Court acknowledges that the State did not assert or argue the doctrine in the briefing schedule.

With regard to a separate reasonable articulable suspicision argument, the suppression record indicates that Officer Smiley observed the defendant fail to maintain his balance and stumbled after he exited the motor vehicle at 7-11. Officer Smiley observed the defendant open his driver's door, stumble out of the vehicle and stumble into the 7-11 while the door of the motor vehicle remained open. Before defendant drove off, he turned his windshield wipers on when it was not raining. Officer Smiley testified at the suppression hearing that she believed at that time the defendant was under the influence after he turned his wipers on with no rain and a clear night. The Court must also note that defendant also committed a violation of 21 *Del.C.* §4155 because defendant left the shoulder of Route 40 and traveled into the left lane with his right turn signal activated. Clearly a statutory violation of Title 21 constitutes, at a minimum, reasonable articulable suspicion.[12] Officer Smiley turned her patrol car into the parking lot and observed the motor vehicle, as well as the defendant from approximately 50-60 feet away when she made all these observations. Looking at the totality of circumstances, even discounting innocent explanations, the Court finds based upon the suppression record and the above case law, there was a reasonable articulable suspicion to stop the defendant on the date, time and place in the charging documents.[13]

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12 *See State v. Walker*, 1991 Del. Super. LEXIS 104, Del.Super., (C.A. No.: IK90-08-0001 Steele, J.) (March 18, 1991)

13 *See State v. Walker*, 1991 WL 53385, at 1 (Del.Supr.)

This matter shall be set for trial at the earliest convenience of the Court with notice to counsel of record.

IT IS SO ORDERED this 22nd day of February, 2012.

/S/ John K. Welch
John K. Welch
Judge

/jb
cc: Ms. Diane Healy, Case Manager
CCP, Criminal Division