

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

STATE OF DELAWARE,)	
)	
v.)	C.A. No. 1001000056
)	
MICHELLE R. PASAWICZ,)	
)	
Defendant.)	

Submitted: February 6, 2012
Decided: March 16, 2012

MEMORANDUM OPINION AND ORDER

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DAVIS, J.

Defendant Michelle R. Pasawicz was arrested on January 1, 2010 and charged with the offenses of: (i) driving under the influence of alcohol (the “DUI Offense”) in violation of Title 21, Section 4177 (a) (1) of the Delaware Code of 1974, as amended; and, (ii) failing to stop at a stop sign at a stop intersection on S. Chapel Street, Newark, Delaware (the “Failure to Stop Offense”) in violation of Title 21, Section 4164 of the Delaware Code of 1974, as amended. On November 28, 2011, counsel for Ms. Pasawicz filed a motion to suppress (the “Motion”) all evidence following Ms Pasawicz’s detention by Corporal Adam Mease of the Newark Police Department on January 1, 2010. The Court held an evidentiary hearing on the Motion on December 7, 2011. At the conclusion of the hearing, the Court reserved making a final ruling on

the Motion pending additional briefing by the parties. This is the Court's decision 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.

BACKGROUND

A. General Information

Through the Motion, Ms. Pasawicz seeks to have the Court suppress all evidence following her detention and seizure by Corporal Adam Mease of the Newark Police Department on January 1, 2010.¹ The Motion contends that the evidence should be suppressed because the State violated Ms. Pasawicz's constitutional rights under the Fourteenth Amendment of the United States Constitution, Article 1, Section 6 of the Delaware Constitution, 11 Del. C. §§ 1902-1904 and 21 Del. C. § 701.²

On December 7, 2011, the Court held an evidentiary hearing on the Motion. At the hearing, the State called one witness – Corporal Adam Mease. Corporal Mease did not make the initial stop of Ms. Pasawicz. However, Corporal Mease was the officer that: (i) first observed Ms. Pasawicz; (ii) directed Corporal Marsilii of the Newark Police Department to initiate the traffic stop of Ms. Pasawicz; and, (iii) subsequently investigated and charged Mr. Pasawicz with the DUI Offense and the Failure to Stop Offense. In addition to the witness, the State introduced one exhibit into evidence at the hearing. This exhibit is Corporal Mease's Certificate of Training in the Advanced Roadside Impaired Driving Enforcement Program dated December 16-17, 2010 (“Ex. 1”).

¹ See Motion at 1.

² The Court ruled on the Motion's 21 Del. C. § 701 argument and, for the reasons set forth at the hearing, held that the State did not violate 21 Del. C. § 701 when it detained Ms. Pasawicz. This Memorandum and Opinion will not readdress that holding.

Other than examination of Corporal Mease, Ms. Pasawicz did not present any additional testimonial or physical evidence at the hearing.

B. Facts Developed at the Hearing

The State called Corporal Mease to testify at the hearing. Corporal Mease is currently employed with the Newark Police Department. Corporal Mease has been with the Newark Police Department for over four years. Prior to coming to the Newark Police Department, Corporal Mease was employed for two and one-half (2.5) years with the University of Delaware Police Department. Corporal Mease testified that he has completed a standard NHTSA course while at the police academy and, from December 16 through 17, 2010, completed NHTSA's Advanced Roadside Impaired Driving Enforcement Program.³ Corporal Mease testified that he has made approximately one hundred and forty (140) driving under the influence arrests.

On January 1, 2010, at approximately 1:30 a.m., Corporal Mease was travelling on South Chapel Street in Newark, Delaware. At this time, Corporal Mease observed a vehicle in front of him swerve in the bike lane and then return to the right lane. According to Corporal Mease, the vehicle crossed in the bike lane by approximately one foot with the passenger side tires completely over the bike lane line. Corporal Mease conceded that at this time he did not intend to stop the vehicle for committing a traffic violation. Corporal Mease also testified that the vehicle was driving within the posted speed limit. Corporal Mease continued to observe the vehicle as it stopped at one intersection before failing to stop at a stop sign and a blinking red light located at the intersection of South Chapel Road and East Park Place. Due to this additional violation, Corporal Mease then directed Corporal Marsilii of the Newark Police Department to initiate the traffic stop of the vehicle.

³ See Ex. 1.

Corporal Marsilii stopped the vehicle without incident. Corporal Marsilii then asked the driver of the vehicle, Ms. Pasawicz to exit the vehicle. There is no indication that Ms. Pasawicz had any difficulty in exiting the vehicle.

Corporal Mease returned to the vehicle stop after taking care of a detainee that he had in his car at the time he first observed Ms. Pasawicz's vehicle. Upon arriving at the scene, Corporal Marsilii informed Corporal Mease that he detected an odor of alcohol coming from Ms. Pasawicz. When first encountering Ms. Pasawicz, Corporal Mease also detected a moderate odor of alcohol. Corporal Mease testified that, in addition to the odor of alcohol, he noted that Ms. Pasawicz's speech was slightly slurred and that he believed her eyes were bloodshot and glassy. Corporal Mease testified that he told Ms. Pasawicz that he could smell alcohol coming from her breath and asked her when she last had a drink. Ms. Pasawicz stated that she last had a drink about thirty minutes before being stopped by Corporal Marsilii. Corporal Mease then asked Ms. Pasawicz if she would submit to testing. Ms. Pasawicz did agree to take the sobriety tests.

Corporal Mease also testified that Ms. Pasawicz produced her driver's license and other vehicle information without difficulty. In addition, Corporal Mease stated that Ms. Pasawicz was mostly cooperative and responsive to questioning. Corporal Mease did not note that Ms. Pasawicz had any balance issues.

Corporal Mease then began to perform field sobriety tests at the location of the stop. First, Corporal Mease administered the HGN test. At the hearing, however, the Court sustained Ms. Pasawicz's objection to the testimony relating to the HGN test because the State failed to lay a proper foundation for admission of the results of that test. Therefore, for purposes of the

probable cause analysis, the Court will not consider anything relating to Corporal Mease's administration of the HGN test.

Next, Corporal Mease administered the walk and turn test. Corporal Mease testified that Ms. Pasawicz exhibited three of eight clues when performing this test.⁴ Corporal Mease stated that exhibiting two or more clues indicates impairment. Finally, Corporal Mease had Ms. Pasawicz perform the one-leg stand test. Here, Corporal Mease testified that Ms. Pasawicz, when asked to perform the one-leg stand test, at first attempted to perform the walk and turn test again. Corporal Mease stopped Ms. Pasawicz, re-instructed Ms. Pasawicz and then had her perform the one-leg stand test. After re-starting Ms. Pasawicz on the one-leg stand test, Corporal Mease said he observed Ms. Pasawicz exhibit two of four clues.⁵ According to Corporal Mease, exhibiting two of four clues also indicates impairment.⁶

On cross-examination, Corporal Mease testified that the walk and turn test and the one-leg stand test were performed on a "wet" roadway surface. Corporal Mease stated that NHTSA recommended that the tests be performed on a dry surface. In addition, despite it being cold outside, Corporal Mease had Ms. Pasawicz remove her high heeled shoes before performing the tests. Corporal Mease also testified that he could not remember the exact distances between heel and toe that Ms. Pasawicz missed when she performed the walk and turn test. With respect to the one-leg stand test, Corporal Mease stated that he did not independently time Ms. Pasawicz

⁴ Ms. Pasawicz missed heel to toe on steps two and four during the first nine steps, failed to turn as instructed and missed heel to toe and stepped out of line on step five during the second nine steps.

⁵ Ms. Pasawicz put her foot down at counts eleven, twenty, twenty-two and twenty-four, and hopped to maintain her balance at count twenty-four.

⁶ The State asked questions regarding the administration of a portable breath test by Corporal Mease. The Court allowed certain questions regarding the portable breath test but does not believe that the State laid a proper foundation with respect to the administration of this test. Therefore, the Court will not consider anything relating to this test in determining whether Corporal Mease had probable cause to take Ms. Pasawicz into custody for the DUI Offense.

during the test but, rather, calculated the time based on the count performed by Ms. Pasawicz during the test.

At this point during the traffic stop, Corporal Mease took Ms. Pasawicz into custody for suspicion of driving under the influence. Corporal Mease testified that he did this based, in part, upon Ms. Pasawicz's performance on the HGN test, the walk and turn test and the one-leg stand test. In addition, Corporal Mease stated he took Ms. Pasawicz into custody because she had: (i) committed a traffic violation, (ii) an odor of alcohol and (iii) admitted to drinking prior to the traffic stop.

ANALYSIS

As explained at the hearing, the Motion contends that Corporal Mease lacked reasonable suspicion to stop Ms. Pasawicz's vehicle and to administer field sobriety/coordination tests.⁷ Moreover, the Motion argues that Corporal Mease lacked probable cause to take Ms. Pasawicz into custody for the DUI Offense and transport her to the police station for further testing.

A traffic stop constitutes a seizure for Fourth Amendment purposes and is subject to constitutional limitations.⁸ The State bears the burden of showing that the "stop and any subsequent police investigation were reasonable in the circumstances."⁹ First, the stop must be supported by reasonable articulable suspicion that a crime has occurred, is occurring, or is about to occur.¹⁰ Second, the stop and ensuing inquiry must be reasonably related in scope to the reason for initially stopping the car.¹¹ "[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

⁷ At the hearing, the Court ruled, for the reasons set forth on the record, that Corporal Mease and Corporal Marsilii did have reasonable articulable suspicion for stopping Ms. Pasawicz on the Failure to Stop Offense and the DUI Offense.

⁸ *Whren v. United States*, 517 U.S. 806, 809 (1996).

⁹ *Terry v. Ohio*, 392 U.S. 1, 29 (1968).

¹⁰ *Delaware v. Prouse*, 440 U.S. 648, 663 (1979).

¹¹ *Jenkins v. State*, 970 A.2d 154, 158 (Del. 2009) (citing *Caldwell v. State*, 780 A.2d 1037 (Del. 2001)).

must be supported by additional facts sufficient to justify the additional intrusion.”¹² 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.”¹³

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.’”¹⁴ 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.¹⁵ An officer has probable cause when the officer has information which would warrant a reasonable man in believing that a crime has occurred.¹⁶

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.”¹⁷ 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.¹⁸

¹² *Id.*

¹³ *Jones v. State*, 745 A.2d 856, 862 (Del. 1999).

¹⁴ *Lefebvre v. State*, 19 A.3d 287, 292 (Del. 2011) (quoting from *Bease v. State*, 884 A.2d 495, 497-98 (Del. 2005)).

¹⁵ *Id.*

¹⁶ *State v. Trager*, 2006 WL 2194764 (Del Super. 2006) (citing *State v. Maxwell*, 624 A.2d 926 (Del. 1993)).

¹⁷ *Lefebvre*, 19 A.3d at 292 (quoting from *Clendaniel v. Voshell*, 562 A.2d 1167, 1170 (Del. 1989)).

¹⁸ *Id.* at 292-93 (quoting from *State v. Maxwell*, 624 A.2d 926, 929 and 930 (Del. 1993)).

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.¹⁹ 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.²⁰

Ms. Pasawicz was initially stopped by Corporal Marsilii for failure to stop at a stop sign – an offense witnessed and testified to at the hearing by Corporal Mease. The initial stop was justified because Corporal Marsilii, as directed by Corporal Mease (who saw Ms. Pasawicz fail to stop at the stop sign), had reason to believe Ms. Pasawicz had committed a motor vehicle violation. In addition, Corporal Mease had observed Ms. Pasawicz driving her car and entering the marked bike lane prior to running the stop sign and disregarding the blinking red light. Both Corporal Mease and Corporal Marsilii detected a moderate odor of alcohol coming from Ms. Pasawicz. Corporal Mease testified that Ms. Pasawicz's speech was slightly slurred and that he believed her eyes were bloodshot and glassy. Ms. Pasawicz admitted to Corporal Mease that she had been drinking and last had a drink about thirty minutes before being stopped.

Corporal Mease then conducted field sobriety tests – HGN test, walk and turn test, one-leg stand test and the portable breath test. For the reasons set forth above, the Court is not considering the results or testimony relating to the HGN test or the portable breath test. Corporal Mease testified that Ms. Pasawicz exhibited three of eight clues while performing the walk and turn test and two of four clues while performing the one-leg stand test. Corporal Mease testified that exhibiting that many clues on each of the tests indicated impairment.

¹⁹ *Id.* at 293.

²⁰ *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)

Ms. Pasawicz argues that the results of the walk and turn test and the one-leg test should be disregarded as not having been performed in accordance with NHTSA standards. In support, Ms. Pasawicz notes that: (i) the surface area where the tests were performed was not dry; (ii) it was cold out and Ms. Pasawicz was asked to perform the tests in her bare feet; (iii) Corporal Mease failed to independently time Ms. Pasawicz during the one-leg stand test; and (iv) Corporal Mease could not specifically recall the distance missed heel to toe or the distance stepped off the line by Ms. Pasawicz during the walk and turn test. Ms. Pasawicz contends that these are “requirements” 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 Mease 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.”²¹ Instead, the Court is to consider the deficiencies when giving weight and value to the tests performed.²² Here, the Court does not find the deficiencies significant enough to disqualify the tests entirely.²³

²¹ 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).

²² *Id.*

²³ A review of the attachments submitted with Defendant’s Opening Brief in Support of Motion to Suppress (“Opening Brief”) supports the conclusion that many of the “requirements” pointed out by Ms. Pasawicz are more recommendations rather than requirements. For example, the need to perform the walk and turn test on a dry surface is not a requirement nor does NHTSA say that failure to perform the test on a dry surface negates the test results. Instead, the “Instructor Notes” state that

Standardizing this test for every type of road condition is unrealistic. The original research study recommended that this test be performed on a dry, hard, level, nonslippery surface and relatively safe conditions. If not, the research recommends: 1) suspect be asked to perform the test elsewhere; or 2) only HGN be administered. *However, recent field validation studies have indicated that varying environmental conditions have not affected a suspect’s ability to perform this test.*

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 Ms. Pasawicz committed the DUI Offense. In this case Ms. Pasawicz was mostly cooperative and responsive to questioning during the traffic stop, had no trouble exiting the vehicle or providing her license and other vehicle information, and did not exhibit any balance issues when walking to where the field sobriety tests were to be performed. There is also a moving motor vehicle violation (the Failure to Stop Offense), moderate odor of alcohol detected by two officers, slight slurring of speech, believed to be bloodshot and glassy eyes, admission to drinking, and indications of impairment through the results of the walk and turn test and the one-leg stand test. With all these facts, the Court finds that Corporal Mease possessed that quantum of trustworthy factual information sufficient to warrant him in believing that Ms. Pasawicz committed the DUI Offense. Accordingly, Corporal Mease's detention of Ms. Pasawicz for the DUI Offense is supported by probable cause.²⁴

Opening Brief, Ex. 3 (emphasis added).

²⁴ 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).

CONCLUSION

For the foregoing reasons, the Court holds that the stop of Ms. Pasawicz's detention for the DUI Offense was supported by probable cause. The Motion is, therefore, DENIED.

The Clerk of the Court shall schedule this matter for a continuation of the trial before this judicial officer.

IT IS SO ORDERED.

Eric M. Davis

Eric M. Davis
Judge