

December 19, 2007

Antonia S. Bevis, Esquire  
Ferrara, Haley, Bevis & Collins  
1716 Wawaset Street  
P.O. Box 188  
Wilmington, DE 19899  
*Attorney for Appellant*

Frederick H. Schranck  
Deputy Attorney General  
P.O. Box 778  
Dover, DE 19903  
*Attorney for Appellee*

**Re: *Richard P. Mullins v. Michael Shahan, Director, Division of Motor Vehicles***  
**C.A. No.: 2007-07-334**

**Date Submitted: December 3, 2007**

**Date Decided: December 19, 2007**

**FINAL OPINION AND ORDER**

Dear Counsel,

This is an appeal pursuant to Court of Common Pleas Civil Rule 72.1 from a decision of the Department of Public Safety, Division of Motor Vehicles (the “DMV”) revoking Richard P. Mullins (“Mullins”) license under 21 *Del. C.* §2742(c). Following a hearing before the DMV on June 15, 2007, the Hearing Officer entered an order revoking Mullins’ license for Operating a Motor Vehicle While Under the Influence of Alcohol in violation of 21 *Del. C.* §4177. Mullins docketed this appeal on July 17, 2007, and the parties thereafter entered into a briefing schedule. This is the Court’s Final Opinion and Order following the submission of briefs.

**I. Facts**

On May 1, 2007, City of Newark Police Officer D. Saunders (“Officer Saunders”) was set up for radar enforcement activity on Nottingham Road, within city limits. In the early evening, during rush hour, he observed Appellant’s vehicle traveling at fifty-one miles per hour in a thirty-five mile

per hour zone, and then observed the vehicle disregard a red light at the nearby intersection with Casho Mill Road.

Officer Saunders turned his vehicle around, lit his police lights on his unmarked car, and conducted a traffic-stop on the vehicle for the above-stated violations. Upon making contact with Mullins, Officer Saunders observed a faint odor of alcohol on his breath. Officer Saunders also observed that Mullins had glassy, bloodshot eyes. He asked him if he had been drinking. Mullins responded that he had a beer. Due to the traffic violations and the odor of alcoholic beverages, the officer conducted Field Coordination Tests.

Prior to conducting the Field Coordination Tests, Officer Saunders asked Mullins if he had any physical disabilities that would prevent him from completing the field tests. The defendant stated that he had injured his right knee in a motorcycle accident.

Officer Saunders then began the field tests. He first administered the Horizontal Gaze Nystagmus Test (“HGN”). Officer Saunders is certified by the National Highway Traffic Safety Administration (“NHTSA”) to administer the HGN. Mullins matched each of the three clues Officer Saunders looked for in each eye. He then administered the walk and turn test. He first demonstrated the test, and then allowed Mullins to perform the test. Mullins failed all portions of this test.

Based on the results of the field tests, the Officer Saunders administered a Portable Breath Test (“PBT”). The PBT tested positive, and thereafter Officer Saunders transported Mullins to the Newark Police Department for a Breathalyzer test. Mullins refused to take the test. Officer Saunders read him the warnings of the potential consequences of his refusal, and Mullins refused again. Mullins was subsequently arrested for driving under the influence of alcohol.

## **II. Discussion**

The defendant argues the officer did not have probable cause to make an arrest. The provisions of 21 *Del. C.* §4177 prohibit persons from operating motor vehicles while under the influence of alcohol. Under 21 *Del. C.* § 742(b)(1), the Division of Motor Vehicles may revoke a driver's license for violations of §4177 "upon certification by the police officer that there existed probable cause to believe the person had been acting in violation of §4177. . .and that the person refused to submit to a chemical test after being informed of the penalty of revocation for such refusal. . ."

Probable cause is measured by the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213 (1983). A police officer has probable cause to believe that a defendant has violated 21 *Del. C.* §4177 "... [w]hen the officer possesses information which would warrant a reasonable man in the belief that such a crime has been committed. *State v. Maxwell*, Del.Supr. 624 A.2d 926, 930 (1993) citing *Clendaniel v. Vosbell*, Del. Supr. 562 A.2d 1167 (1989). The police are neither required to prove a defendant is guilty beyond a reasonable doubt nor by a preponderance of the evidence. *State v. Jarvis*, Del. Supr. 600 A.2d 38, 43 (1991). Instead, police are only required to "present facts which suggest, when viewed under the totality of the circumstances, there is a fair probability the defendant has committed a crime." *Id.* at 42 (citing *Illinois v. Gates*, 462 U.S. 213). In *Binkley*, this Court upheld the hearing officer's conclusion that there was probable cause to believe the defendant was in violation of 21 *Del. C.* §4177. *Binkley v. Shaban*, Del.Com.Pl., C.A. No. 04-05-143, Smalls, J. (Sept. 24, 2004). The officer also testified that he detected an odor of alcohol and that the defendant's eyes were glassy and bloodshot. The defendant failed the HGN test, the one-leg stand test and the PBT test. In its opinion, this Court held that the record, considered in its entirety, was *clearly sufficient* for the hearing officer to conclude that there was probable cause to believe that the defendant was driving under the influence of alcohol. (emphasis added).

Officer Saunders had probable cause to believe Mullins was driving under the influence of alcohol. The facts of the present case are very similar to the record in *Binkley*. Officer Saunders' radar unit showed Mullins' was speeding in violation of Delaware law. Upon stopping Mullins, Officer Saunders detected a faint odor of alcohol and observed defendant's eyes were bloodshot and glassy. Mullins also admitted to drinking one beer. Thereafter, Mullins failed the HGN test, the PBT test, and the walk and turn test. Clearly there is substantial evidence in the record to support a finding of probable cause for Officer Saunders to arrest Mullins for violating 21 *Del. C.* § 4177.

The defendant also argues that Officer Saunders' failure to provide him with *Miranda* warnings during the initial traffic stop violated the Fourth Amendment. However, Delaware law permits officers to detain persons for up to two hours, when the officer "has reasonable ground to suspect" the person has committed a crime. 11 *Del. C.* §1902. This type of detention is permitted for purposes of allowing the officer to make a more complete investigation into whether a crime has been committed. *Purnell v. State*, 832 A.2d. 714, 720 (Del.Supr. 2003). According to the statute, the stop is "not an arrest" and questioning of the suspect by the officer is permitted for investigatory purposes. 11 *Del. C.* §1902. The officer does not have to charge the suspect with a crime during the detention; he is only required to possess a reasonable and articulable suspicion that the driver of the vehicle has been or may be violating the law. Because the detainee is not in custody during the stop, *Miranda* warnings are not required.

In the present case, Officer Saunders' observations of Mullins speeding and disregarding a traffic control device gave the officer a reasonable and articulable suspicion to stop the defendant's vehicle. The officer's subsequent observations of the odor of alcohol on Mullin's breath, bloodshot, glassy eyes, and the admission of drinking all sustain the officer's decision to continue the stop to advance the investigation. Officer Saunders was not required to charge Mullins with a crime at this time, nor was he obligated to provide *Miranda* warnings.

Defendant Mullins further argues the Hearing Officer's decision should be reversed because the field tests were improperly conducted. Nevertheless, this Court concludes sufficient evidence exists in the record to conclude the field tests were properly conducted. With regards to the walk and turn test, Mullins failed all portions of it even after Officer Saunders performed a demonstration of how the test should be executed requiring defendant to do so. Because the purpose of the hearing below was to establish probable cause, Officer Saunders was not required to give an exact account of the NHTSA standards in his testimony in order to lay a sufficient foundation to support the use of the HGN test results in the proceedings below. In order to introduce such evidence, Officer Saunders was only required to show evidence of certification to administer the HGN tests, and testify concerning the administration of the test to Mullins. *Mooney v. Shaban*, 2001 WL 1079040 (Del.Super. 2001). Officer Saunders' testimony indicated his NHTSA certification and gave an account of the administration of HGN tests to Mullins. Furthermore, although the record shows Mullins informed Officer Saunders of a prior knee injury, there is no evidence in the record indicating Mullins was not able to perform the tests.

### **III. The Law**

Appeals from the Division of Motor Vehicles (hereinafter "DMV") are reviewed by this Court on the record. *Court of Common Pleas Civil Rule 72.1(a) and 72.1(g)*.<sup>1</sup> The standard and scope of review is limited to correcting errors of law and determining whether substantial evidence exists to support the findings of fact and conclusion of law. *Eskridge v. Vosbell*, 593 A.2d 589, 1991 WL 78471 (Del.Super. 2004). If substantial evidence exists in the record below, this Court "may not re-

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<sup>1</sup> Rule 72.1(a) reads, "This Rule shall apply to appeals to the Court of Common Pleas from the Department of Safety from which an appeal may at any time lie to the Court of Common Pleas to be tried or heard on the record made below. Section (g) reads, "Appeals should be heard and determined by the Court of Common Pleas from the record of the proceedings below, except as may be otherwise provided by statute. The Clerk of the Court shall give all parties written notice of the date of the filing of the record of the proceedings below. The appellant's brief shall be served and filed 20 days after the date of said filing of such record as provided in Rule 72.1(e). The appellee's answering brief shall be served and filed 20 days thereafter. The appellant shall serve and file the reply brief, if any, not later than 10 days thereafter. If appropriate, the assigned judge shall schedule the case for argument."

weight and substitute its own judgment for that of the Division of Motor Vehicles.” *Barnatt v. Division of Motor Vehicles*, 514 A.2d 1145 (Del.Super. 1986); *Janaman v. New Castle Court Board of Adjustment*, 364 A.2d 1241, 1242 (Del.Super. 1976). The Division’s understanding of what transpired is entitled to some deference since the hearing officer is in the best position to evaluate the credibility of witnesses and the probative real evidence. *Vosbell v. Attix*, 574 A.2d 264 (Del.Super. 1990).

#### **IV. Opinion and Order**

The Court finds that Mullins was driving under the influence of alcohol in violation of 21 *Del. C.* §4177 by a preponderance of the evidence. The record clearly supports Officer Saunders' finding of probable cause to arrest the defendant for driving in violation of 21 *Del. C.* §4177(a). Since Mullins did not present any legal argument as to the factual issue of whether Mullins refused to permit the chemical test after being informed of the penalty of revocation for such refusal, the Court need not address that issue.

For the reasons stated above, the Division of Motor Vehicles’ Decision is hereby AFFIRMED.

**IT IS SO ORDERED** this 19<sup>th</sup> day of December, 2007

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**JOHN K. WELCH**  
Judge

cc: Ms. Karen Gallagher  
CCP, Civil Chief Clerk of the Court