

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

<b>STATE OF DELAWARE,</b>	)
	)
<b>v.</b>	) <b>Case No.: 1103005290</b>
	)
<b>CHRISTOPHER O. DAVIS,</b>	)
<b>Defendant.</b>	)

**Submitted: June 5, 2012**

**Decided: July 9, 2012**

**On Defendant's Motion to Suppress  
DENIED**

**MEMORANDUM OPINION and ORDER**

Darryl A. Parson, Esquire, Deputy Attorney General, Department of Justice, 820 N. French Street, 7<sup>th</sup> Floor, Wilmington, Delaware, 19801. Attorney for the State of Delaware.

Louis B. Ferrara, Esquire, Ferrara & Haley, 1716 Wawaset Street, Wilmington, Delaware, 19806. Attorney for Defendant.

**ROCANELLI, J.**

Defendant Christopher O. Davis is charged by information with one count of driving under the influence of alcohol in violation of 21 *Del. C.* § 4177(a). Defendant filed a Motion to Suppress based, in part, on the State's improper blood draw. At the April 19, 2012 hearing, the State conceded that the blood draw was not proper and would not be relied upon in the prosecution of this case. Thus, the State presented this case at trial as an impairment case rather than as a blood-test case. Defendant therefore withdrew his Motion to Suppress.

Delaware State Police Corporal Dermot Alexander testified that he responded to an accident scene on March 7, 2011. After preliminary field tests and an interview of Defendant at the scene, Corporal Alexander transported Defendant from the accident scene to the police station to complete the DUI investigation. Before putting Defendant in the rear of the marked

police vehicle, Corporal Alexander placed Defendant in handcuffs. Upon arrival at the police station, Corporal Alexander administered Horizontal Gaze Nystagmus (“HGN”) and One-Leg Stand tests. Defendant declined a Portable Breath Test (“PBT”), and refused to perform the Walk and Turn test.

Upon the presentation of Corporal Alexander’s testimony, Defendant moved to exclude the evidence that developed after Defendant was handcuffed – arguing that placing Defendant in handcuffs was a formal arrest requiring a showing of probable cause. Defendant also argued that the Court should exclude the results of the National Highway Traffic Safety Administration (“NHTSA”) field tests because the State had not provided sufficient foundational testimony at trial to support the admission of NHTSA tests performed in this case.

On a motion to suppress, the State bears the burden to establish by a preponderance of the evidence that the challenged search or seizure was lawful.<sup>1</sup> The parties submitted memoranda of law. This is the Court’s decision denying Defendant’s verbal Motion to Suppress.

### **ANALYSIS**

Defendant has asked the Court to suppress all evidence gathered by Corporal Alexander after Defendant was placed in handcuffs. Defendant claims this was an arrest that must be supported by probable cause. Defendant further claims that the State cannot establish probable cause at the time that Defendant was placed in handcuffs. The State argued that the removal of Defendant from the accident scene was a proper investigatory detention, pursuant to 11 *Del. C.* § 1902(c), requiring only a showing of reasonable articulable suspicion.

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<sup>1</sup> *Hunter v. State*, 783 A.2d 558, 560 (Del. 2001); *State v. Tieman*, 2008 WL 5160100, at \*4 (Del. Com. Pl.).

This Court is guided by the Superior Court’s decision in *State v. Kang*, in which the Court ruled:

[i]n order to determine whether a seizure is an investigatory detention or an arrest, the Court must examine ‘the reasonableness of the level of intrusion under the totality of the circumstances.’ The following considerations are pertinent to the analysis: (1) the amount of force used by the police; (2) the need for such force; (3) the extent to which the individual’s freedom of movement was restrained; (4) the physical treatment of the individual, including whether handcuffs were used; (5) the number of agents involved; (6) the duration of the stop; and (7) whether the target of the stop was suspected of being armed.<sup>2</sup>

In other words, *Kang* distinguishes investigatory detentions from formal arrests based on the consideration of a variety of factors and circumstances – including whether handcuffs were used.<sup>3</sup> Use of handcuffs is a relevant but not dispositive factor in distinguishing investigatory detentions from formal arrests. The Court therefore specifically rejects Defendant’s argument that handcuffing a defendant *per se* transforms an investigatory detention into a formal arrest.

According to *Kang*, “police officers may transport suspects from a scene as part of an ‘investigatory detention’ when such action is *reasonable and necessary* under the circumstances.”<sup>4</sup> For example, in *State v. Burris*, the Court of Common Pleas found that it was reasonable and necessary to transport a defendant from the scene of a motor vehicle accident as part of an investigatory detention to conduct field tests because there was no shoulder on the roadway near the scene, it was raining, and only the investigating officer was present.<sup>5</sup>

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<sup>2</sup> *Kang*, 2001 WL 1729126, at \*6 (Del. Super.).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* (emphasis added).

<sup>5</sup> 2010 WL 2195967, at \*3 (Del. Com. Pl.).

In the case before this Court, Corporal Alexander responded to a motor vehicle accident scene. There were several individuals and vehicles on the scene. An effort was underway to remove a vehicle from a ditch. Corporal Alexander was the only officer present. Based on his observations of tire tracks in a light snow, Corporal Alexander concluded that the vehicle in the ditch had not stopped at the stop sign and had driven off the road, onto private property, before coming to a stop in a ditch.

Corporal Alexander spoke to Defendant at the scene. Defendant identified himself as the driver of the car that was being pulled from the ditch. Corporal Alexander observed a strong odor of alcohol and also noticed Defendant had red, watery, glassy eyes. Defendant claimed he was driving home when the accident occurred – stating that his house was “just up the road.” Defendant admitted he had been drinking. Specifically, Defendant stated, “I had a few beers earlier.”

Corporal Alexander instructed Defendant to perform alphabet, counting, and finger dexterity tests on the scene. Although Defendant properly performed the finger dexterity test, Defendant did not perform the alphabet test or a counting test according to the instructions given by Corporal Alexander. By now, according to Corporal Alexander, it was raining lightly. He decided to transport Defendant from the scene for further testing because Corporal Alexander had concluded, based on his training and experience, that it was not safe to perform additional field tests at the scene. Corporal Alexander placed handcuffs on Defendant for officer safety reasons consistent with his practice to secure a person being transported under these circumstances.

The Court finds that Defendant was transported to the Delaware State Police troop as part of an investigatory detention; Defendant was not under arrest when he was placed in handcuffs;

and Corporal Alexander took reasonable and necessary action to complete the investigatory detention in the least intrusive manner possible. Therefore, the State must demonstrate reasonable articulable suspicion for the detention and is not required to meet the standard of probable cause for an arrest.

“A police officer may detain an individual for investigatory purposes if the officer has a reasonable articulable suspicion that the individual is engaged in criminal activity.”<sup>6</sup> It is the State’s burden to establish that Corporal Alexander had reasonable articulable suspicion that Defendant had been operating a motor vehicle while under the influence of alcohol. “To support a reasonable and articulable suspicion of criminal activity, ‘the totality of the circumstances [must] indicate[] that the [detaining] officer had a particularized and objective basis for suspecting legal wrongdoing.’”<sup>7</sup> The court looks to the totality of the circumstances “as viewed through the eyes of a reasonable, trained police officer in the same or similar circumstances, combining objective facts with such an officer’s subjective interpretation of those facts.”<sup>8</sup>

The *Kang* Court found that an investigatory detention to investigate a potential violation of 21 *Del. C.* § 4177 was based on reasonable grounds when an officer responded to the scene of a single vehicle accident involving occupants who appeared to be young; the officer detected an odor of alcohol emanating from the defendant; the defendant’s eyes were glassy and bloodshot; and the defendant admitted to drinking.<sup>9</sup> The case before this Court is very similar.

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<sup>6</sup> *Hall v. State*, 981 A.2d 1106, 1111 (Del. 2009) (citing *Terry v. Ohio*, 392 U.S. 1, 22 (1968)).

<sup>7</sup> *Id.* at 1110 (quoting *Sierra v. State*, 958 A.2d 825, 828 (Del. 2008)).

<sup>8</sup> *Id.* at 1111 (quoting *Woody v. State*, 765 A.2d 1257, 1263 (Del. 2001)).

<sup>9</sup> *Kang*, 2001 WL 1729126 at \*6.

Corporal Alexander responded to the scene of a single vehicle accident and learned that Defendant had driven his car off the road. Corporal Alexander detected a strong odor of alcohol on Defendant's breath and noted that Defendant had red, watery, glassy eyes. Defendant admitted he had been drinking before his car crashed into a ditch. Defendant did not perform an alphabet test or a counting test according to the instructions given by Corporal Alexander. Therefore, the investigatory detention in this case was lawful because it was supported by reasonable articulable suspicion.

Finally, Defendant's moved to exclude the HGN and One-Leg Stand tests<sup>10</sup> on the grounds that the State did not offer adequate foundation for the admission in evidence of these NHTSA field test results. Defendant argues the State failed to lay a proper evidentiary foundation for the test results as required by *Zimmerman v. State*.<sup>11</sup> Defendant claims that Corporal Alexander was unfamiliar with rotational and caloric nystagmus, was unable to testify as to the mathematical correlation between alcohol ingestion and nystagmus, and did not know the margin of error associated with the HGN test. Defendant also argues that the Corporal Alexander's inability to testify as to the mathematical correlation between alcohol ingestion and a failure with respect to the One-Leg Stand test.

The State contends that NHTSA test results are admissible if the officer testifies that he understands NHTSA requirements for the administration of the HGN test and actually followed those requirements while administering the test at issue. In support of this position, the State

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<sup>10</sup> In Defendant's post-hearing memorandum of law, he argues that the results of the HGN, walk and turn, and one leg stand tests should be excluded from the record in this case. While the Court will rule on Defendant's arguments with respect to the HGN and one leg stand tests, the Court declines to rule on the admissibility of the walk and turn test because Corporal Alexander's testimony establishes that Defendant declined to perform this test.

<sup>11</sup> 693 A.2d 311, 315 at n. 15 (Del. 1997).

cites authority issued after *Zimmerman* both from this Court and the Superior Court where HGN test results have been admitted into evidence notwithstanding imperfect administration of the HGN test<sup>12</sup> or the officer's failure to testify as to the proper margin of error in HGN testing.<sup>13</sup>

Corporal Alexander is certified by the Delaware State Police in NHTSA-DUI Detection and HGN.<sup>14</sup> There is no testimony in the record indicating that Corporal Alexander did not understand NHTSA requirements governing the administration of the HGN or One-Leg Stand tests, or that he did not follow these requirements when he administered the tests. Accordingly, the Court finds that the State has laid a proper foundation for the admissibility of the NHTSA test results. As set forth in *State v. Ministero*, any defects in the presentation of this evidence shall be considered in connection with the weight afforded the evidence and not the admissibility.<sup>15</sup>

**THEREFORE, DEFENDANT'S MOTION TO SUPPRESS IS HEREBY DENIED.**

**The matter shall be scheduled for trial before this judicial officer to conclude the proceedings.**

**IT IS SO ORDERED this 9<sup>th</sup> day of July, 2012.**

*Andrea L. Rocanelli*

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**The Honorable Andrea L. Rocanelli**

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<sup>12</sup> *State v. Ministero*, 2006 WL 3844201, at \*5 (Del. Super.).

<sup>13</sup> *State v. Sabol*, 1999 WL 1876067, at \*2-4 (Del. Com. Pl.).

<sup>14</sup> Performance of NHTSA field tests was part of Corporal Alexander's training at the Delaware State Police Academy.

<sup>15</sup> 2006 WL 3844201 at \*5.