IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
Plaintiff,	)	
	)	
	)	
v.	)	**Case No.: 1110000079**
	)	
HARVIST E. SMALLWOOD,	)	
	)	
Defendant.	)	
	)	

Date Submitted: October 17, 2012
Date Decided: November 9, 2012

MEMORANDUM OPINION

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Attorney for the State of Delaware

Louis B. Ferrara, Esquire, Attorney at Law, 1716 Wawaset Street, Wilmington, DE 19806.
Attorney for Defendant

WELCH, J.

I. Introduction

A trial was held in the above captioned matter on Wednesday, October 17, 2012 in the New Castle County Courthouse. Defendant previously notice was present for a hearing on Defendant's Motion to Suppress which was decided by an Opinion and Order in writing this Court on May 16, 2012. This matter proceeded to trial on a violation of 21 *Del. C.* §4177(a)(1), driving under the influence charged by Information on an impairment theory.[1]

II. The Facts

At trial on October 17, 2012 Trooper Mark T. Conway ("Trooper Conway") was duly sworn and testified. He is a Delaware State Trooper First Class at Troop 6 and was on routine patrol on the date, time and place in the charging documents on October 1, 2011 at 1:42 a.m. while responding to an accident on I-95 southbound north of Route 896.

Corporal Edward Larney ("Corporal Larney") of the Delaware State Police Troop 6 was also present. Trooper Conway observed a motor vehicle on the right shoulder with front end damage. Trooper Conway then spoke with the operator of the first motor vehicle who reported no injuries and he then called for a tow truck.[2] Trooper Conway then spoke with Corporal Larney for approximately five (5) minutes who informed him that the defendant was in his patrol car seated in the back seat.

Trooper Conway then spoke with defendant in the rear of Corporal Larney's car. He also observed the defendant's car in front of Corporal Larney's motor vehicle with severe front end damage. It was a Cadillac Escalade.

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[1] In the Court's May 16, 2012 Opinion, the Court found, *inter alia*, that the defendant had been previously arrested when he was placed in the patrol car of the Delaware State Police. The Court was proceeding on an impairment theory that the defendant's motion to suppress was withdrawn at trial.

[2] The Court incorporates herein by reference the sworn testimony of Corporal Larney, as well as the Court's factual findings in its May 16, 2012 Opinion and Order.

Trooper Conway then took over the investigation because Corporal Larney was going off shift in one hour.

Trooper Conway spoke with the defendant and observed a “strong odor” of alcohol from his person, and “glassy eyes” and “mumbled speech”. The defendant informed him that a motor vehicle cut in front of him on I-95 which caused him to be involved in an accident. Trooper Conway made no attempt to conduct field tests because defendant was on Interstate 95 Southbound which he concluded was a very busy highway with safety issues. The defendant refused to answer any questions about drinking alcoholic beverages.

The defendant and Trooper Conway then walked over to his patrol vehicle. Trooper Conway observed over a period of ten (10) feet that the defendant was “staggering side to side”.

Defendant was therefore taken back to Troop 6 and exited his motor vehicle. Trooper Conway spoke to the defendant in the parking lot. Trooper Conway offered the defendant three (3) options; 1) field sobriety tests; (2) Intozilyzer; and (3) a refusal of all field coordination tests and intoxilyzer. Trooper Conway testified that defendant indicated he would exercise option three (3) and the defendant refused the intoxilyzer and all NHTSA Field Sobriety Coordination Tests.

The defendant was then taken into Troop 6 and read the Implied Consent Form. Trooper Conway then contacted his superiors to pick up the defendant.

According to Trooper Conway, the defendant was upset and had a “bit of attitude” and he concluded the defendant “didn’t like what was going on”.

In the Intoxilyzer Room Trooper Conway read the defendant the Implied Consent Form and handed the defendant a copy of it. The defendant refused to sign the Implied Consent Form.

According to Trooper Conway, the defendant fell asleep while waiting for his supervisors at approximately 3:20 a.m. at Troop 6.

Trooper Conway testified he has been a Trooper for four (4) years. Based upon his observations and training and previous DUI arrests he testified he believed the defendant was under the influence of alcoholic beverages.

On cross-examination Trooper Conway testified he has been employed as a State Trooper for four (4) years; but had only three (3) years experience and with six (6) months in the Police Academy his total experience was actually two and a half years as a Delaware State Trooper. Trooper Conway testified he knew the defendant had been drinking because he smelled an odor of alcohol beverages and testified he "wouldn't have arrested the defendant if he didn't believe he wasn't driving under the influence".

Trooper Conway reaffirmed on cross-examination that he gave the defendant three (3) options outside the troop in the parking lot. The defendant exercised option three (3) to neither perform NHTSA Field Coordination Tests nor take the Intoxilyzer 5000 Test. The defendant instead was given the Implied Consent Form to sign. Trooper Conway testified he observed a "strong odor" of alcoholic beverages on the defendant at that time.

During this investigation Trooper Conway testified there was front end damage to the defendant's motor vehicle and that the defendant had told him someone had "cut him off". Trooper Conway doesn't remember if the airbag had been deployed in defendant's motor vehicle. Trooper Conway also testified on cross-examination that the defendant produced his driver's license appropriately and told him his registration and insurance card was inside his motor vehicle.

During the investigation the defendant was asked and told Trooper Conway testified that the defendant did not have any weapons in his possession as he was an off-duty Wilmington Police Detective. Defendant showed his police Identification Card to Trooper Conway as a WPD Detective and produced his driver's license "without difficulty".

According to Trooper Conway, in his AIIR Report, the defendant's eyes were "bloodshot and glassy;" and defendant appeared "tired". Also in the AIIR Report Trooper Conway testified he noted that the defendant was dressed "orderly" but had a "flushed face" and a "strong odor" of alcoholic beverage.

Trooper Conway admitted on cross-examination that the difference between "strong" and "moderate" is a "judgment call" and that the two (2) terms have different meanings.

Trooper Conway testified he smelled an odor of alcohol when the defendant was in his patrol vehicle for approximately five (5) minutes and conceded the inside of a vehicle is a "confined space".

According to Trooper Conway, on cross-examination, the defendant's speech condition was noted in his AIIR Report was "mumbled", but not "slurred".

Trooper Conway testified defendant walked approximately ten (10) feet to his patrol car and defendant "swayed". Trooper Conway testified he didn't see any other swaying while walking at the Troop in the parking lot or into the Intoxilyzer Room and the defendant was not hand-cuffed because of "professional courtesy".

Trooper Conway testified the defendant had "no difficulty" exiting his patrol car. He also testified the defendant was "free standing" in the parking lot and was not leaning on his patrol car or any other object to maintain his balance. The defendant also understood the three (3) options that were offered to him in order for the State Police to complete the investigation.

According to Trooper Conway, defendant testified he had chose option 3 and "I'm not doing anything."

Trooper Conway testified he watched the defendant walk approximately twenty (20) feet from his patrol car in the Troop 6 parking lot and the defendant "did not sway". Trooper Conway also watched the defendant walk down the steps and into the intoxilyzer room and testified that the defendant didn't sway at that time.

According to Trooper Conway on cross-examination, the defendant told him he would not sign any blank consent form and therefore the defendant waited in the Intoxilyzer Room until his superiors arrived.[3]

Defendant presented his case-in-chief. Harvist E. Smallwood ("defendant") was duly sworn and testified.

Defendant testified he is a City of Wilmington Police Officer in the Criminal Investigation Unit for the past sixteen (16) years. He remembers the incident on the date, time and place in the charging documents. He testified he was coming home from a fifteen (15) year anniversary for the Wilmington Police Department at the Riverfront. The defendant was southbound in I-95 approaching Route 896 when "someone cut him off". He testified his motor vehicle, a Cadillac Escalade, "sustained a lot of front end damage". Defendant testified the State Troopers arrived in approximately ten (10) minutes and that he was sitting in his motor vehicle waiting for their arrival. He testified he climbed out the passenger door of his Escalade because his door was damaged and "would not open".

Defendant testified he spoke with Trooper Conway outside of his motor vehicle as well at the Troop and that his superiors "showed up" at Troop 6 after his arrest.

[3] At this time defendant made a Motion for Judgment of Acquittal of the defendant's Driving Under the Influence Charge, 21 *Del.C.* §4177(a) which was denied by the Court on the record.

Defendant agrees there was an odor of alcoholic beverages as he drank several drinks on the Riverboat Queen at the Riverfront celebrating the fifteen (15) year anniversary. He testified he had beer and cognac and had "maybe" three (3) drinks during the entire evening. He testified he weighs 290 lbs and does not believe he was impaired and testified further that he wouldn't have driven his motor vehicle if he was intoxicated.

On cross-examination, defendant testified the event at the waterfront lasted four (4) hours and the accident occurred at approximately 1:30 a.m. He testified he left the Wilmington Police Department party and exited the vessel and then drove some classmates to a restaurant on the riverfront. He testified on cross-examination the event lasted approximately four (4) hours and the collision occurred at approximately 1:42 a.m. He reiterated his testimony that he had consumed three (3) drinks between 8:00 pm – 12:00 am while on a boat and then left the WPD celebration party. Defendant testified his motor vehicle was disabled and the airbag hit him in the face. According to the defendant the air bag deployed, and that is why he had a flushed complexion. Defendant also testified his legs were sore for a few days but did not have a concussion. He believed this injury caused him to sway.

On re-direct examination defendant testified he had burns on his knees from the airbag and previously had surgery on his legs which had a six inch scar. Defendant testified he was "very tired" or "sleepy all day" and that is why he fell asleep.

III. <u>The Law</u>

> **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:
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> (1) When the person is under the influence of alcohol;
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> (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.

21 *Del.C. §4175* provides:

§4175. Reckless driving:

(a) No person shall drive any vehicle in willful or wanton disregard for the safety of persons or property, and this offense shall be known as reckless driving.

> (b) Whoever violates subsection (a) of this section shall for the first offense be fined not less than $100 nor more than $300, or be imprisoned not less than 10 nor more than 30 days, or both. For each subsequent like offence occurring within 3 years of a former offense, the person shall be fined not less than $300 nor more than $1,000, or be imprisoned not less than 30 nor more than 60 days, or both. No person who violates subsection (a) of this section shall receive a suspended sentence. However, for the first offense, the period of imprisonment may be suspended. Whoever is convicted of violating subsection (a) of this section and who has had the charge reduced from the violation of §4177(a) of this title shall, in addition to the above, be ordered to complete a course of instruction or program of rehabilitation established under §4177D of this title and to pay all fees in connection therewith. In such cases, the court disposing of the case shall note in the court's record that the offense was alcohol-related or drug-related and such notation shall be carried on the violator's motor vehicle record.

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

(a) The State's Position:

The State argued in its closing statement to the Court that the defendant should be found guilty of driving under the influence notwithstanding there was no Intoxilyzer 5000 Test or blood test for a violation of 21 *Del.C.* §4177(a)(1) and (5). The prosecutor argued that while under the influence means "because of alcohol the defendant is less able to than ordinarily exercise clear judgment or sufficient control while driving his motor vehicle." The State testified the defendant admitted drinking alcoholic beverages on the day in question and that he was involved in an accident on I-95 where he rear ended another motor vehicle on a public highway. According to the State, defendant was driving his motor vehicle and was "not driving with sufficient control or

due care". The State asserts that defendant should be found guilty because the defendant exercised lack of sufficient control in operating his motor vehicle or to drive safely and he was involved in the traffic accident.

The State also argues on the record that there was an admission of drinking alcoholic beverages at trial in that the defendant drank three (3) drinks during four (4) hours. There was also an odor of alcoholic beverages which was "strong" and lasting even at Troop 6. The State also asserts that the defendant's demeanor was "tired and slow moving" which indicates an impairment by alcohol. The State asserts that defendant's speech was "mumbled" because of the drinking of alcoholic beverages.

The State asserts that because of defendant's consumption and impaired driving and the defendant was involved in a rear end motor vehicle accident and his behavior, while slow moving and staggering while exiting a motor vehicle was therefore impaired.

The State also argues defendant had blood shot, glassy eyes, mumbled speech and a strong odor of alcohol indicating that he was driving under the influence of alcoholic beverages. The State asserts that applying common sense the Court should find the defendant guilty of violating 21 *Del.C.* §4177(a).

(b) The Defendant's Position:

The defendant asserts the State must prove the instant charge, 21 *Del.C.* §4177(a) beyond a reasonable doubt as set forth by statute, 11 *Del.C.* §301. The defense also argues the defendant explained the accident because another driver cut him off on I-95. The subjective standard of "strong odor" should be disregarded by the Court because it was the opinion of the Police Officer who agreed was subjective in nature. The defense also argued that the defendant's knees were hurt when the airbag went off and that is why his face was flushed. The defense also

asserts that mumbled speech is not necessarily indicative of driving under the influence and not a sign of impairment as the State asserts.

The defense also argues that Trooper Conway spent approximately two (2) hours with the defendant and his characterization while walking with the Trooper indicated the defendant was not impaired.

The defense also asserts there should be no consciousness of guilt[4] imputed to the defendant because he was given three (3) options, one of which was to decline NHTSA Field Coordination Tests and/or an intoxilyzer and this is not a conscious refusal under the decision in *Church v. State*.

The defense also argues the defendant drove other police officers from the WPD event in question and the defendant testified he wouldn't have driven them if he was impaired.

V. Opinion and Order

This Court has previously ruled in order to sustain a conviction under 21 *Del.C.* §4177(a) that "…[t]he evidence proffered 'must show that the person has consumed a sufficient amount of alcohol to cause a driver to be less able to exercise a judgment and control that a reasonable careful person in full possession of his/her faculties would exercise under like circumstances.'"[5] The Court notes that the instant charge must be proven beyond a reasonable doubt, 11 *Del.C.* §301.[6] The Superior Court also has ruled, "[i]t is unnecessary that defendant be 'drunk' or 'intoxicated' to be found guilty of driving under the influence".[7] "Nor is it required that the impairibility to drive be demonstrated by particular acts of unsafe driving."[8]

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[4] *Church v. State* 11 A.3d 220 (Del.Supr.)
[5] *See State v. Brian S. Singleton*, 2008 WL 51600110 (Del.Com.Pl., Welch, J.); *Lewis v. State of Delaware*, 62 A.2d 350 at 1355.
[6] *Matushefske* at 445.
[7] *See State v. Bennefield*, 2006 WL 258306, (Del.Supr. 2006).
[8] *Id.*

The defense argued in its closing by Trooper Conway that this Court should not impute consciousness of guilt because the defendant was clearly explained three (3) options and the defendant exercised his option to take no. 3 and therefore consciousness of guilt should not be imputed.[9]

What is clear to the Court in the trial record is that there was no NHTSA Field Coordination Tests administered to the defendant, a PBT, an Intoxilyzer Test, a blood draw or any normal investigative tool involved in an investigation of a DUI charge brought pursuant to 21 *Del.C.* §4177(a). What is in the record is a motor vehicle accident which the defendant claims was caused by someone cutting him off and him striking another motor vehicle. The State did not attempt to impeach the defendant during this testimony. There is evidence that the defendant swayed while walking ten (10) feet to the second trooper's patrol car. Other evidence in the record is that there was a "strong odor" of alcoholic beverages coming from the defendant's person while seated in the back of the police vehicle. Other evidence is that the defendant's speech was "mumbled".

Unlike other decisions in this Court, other than the ten (10) feet walk to the Trooper Conway's car, there is no evidence of defendant supporting himself by holding onto a motor vehicle or other objects in order to stand while speaking to the police officer. Such facts constitute the totality of circumstances which the Court must determine whether the instant DUI charge was proven beyond a reasonable doubt, 11 *Del.C.* §301. In addition, this Court is unaware of any previous investigation where the defendant was actually given three (3) options at the Troop in order to complete a DUI Investigation. Under the Supreme Court's decision in *Church* the "consciousness of guilt" that the Court could apply from a defendant's outright refusal is not applicable.

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

What the Court finds in this decision because of lack of any other evidence is that the defendant should be adjudicated guilty of reckless driving alcohol related in violation of 21 *Del.C.* §4175. Clearly defendant was in a motor vehicle accident which he explained as another driver cutting him off on I-95 southbound near Route 896. There was also an odor of alcoholic beverages and mumbled speech. Given the trial record and all reasonable inferences the Court adjudicates the defendant the lesser charge of reckless driving alcohol related.

There were also no mental acuity tests; walk and turn tests; alphabet tests; counting test; finger to nose test; or a PBT administered. Nor did the State Police contact a phlebotomist and draw the defendant's blood in order to introduce the defendant's BAC at trial.

"A conviction of Reckless Driving Alcohol Related under 21 *Del.C.* §4175 lies where a defendant is found to have 1) driven a motor vehicle; b) with a willful or wanton disregard for the safety of persons or property; and c) such actions were alcohol related. The first element is conceded. Thus, this Court's inquiry is confined to whether sufficient evidence supports a finding that Appellant exhibited willful and wanton conduct and whether such behavior was alcohol related. For the reasons below, I find that sufficient evidence supports the trial court's decision."

"Wilful or wanton disregard for the safety of persons or property exists where one acts with "conscious indifference or an "I-don't-care attitude." *Eustice v. Rupert*, Del.Super., 460 A.2d 507 (1983) (quoting *Foster v. Shropshire*, Del.Supr., 375 A.2d 458, 461 (1977). The question of willful or wanton conduct in the present case was wholly based on the trial judge's credibility determinations regarding witness testimony."

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

IT IS SO ORDERED this 9th day of November, 2012.

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

/jb

cc: Ms. Diane Healy, Judicial Case Manager