

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

<b>STATE OF DELAWARE,</b>	)	
	)	
Plaintiff,	)	
	)	
v.	)	<b>Case No.: 1110000079</b>
	)	
<b>HARVIST E. SMALLWOOD,</b>	)	
	)	
Defendant.	)	
	)	

**Date Submitted: April 25, 2012**  
**Date Decided: May 16, 2012**

**ORDER ON DEFENDANT'S**  
**MOTION TO SUPPRESS**

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*Attorney for the State of Delaware*

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*Attorney for Defendant*

**WELCH, J.**

## **I. Introduction**

A hearing was held in the Court of Common Pleas on April 9, 2012 on Defendant's Motion to Suppress. Defendant had been charged by Information filed with the Clerk by the Attorney General with several motor vehicle violations; driving a motor vehicle under the influence of alcohol allegedly in violation of 21 *Del.C.* §4177(a)(1) and Failure to have insurance in his possession (*nolle prosequi*) on or about October 1, 2011 in New Castle County on I-95 South bound.

Following a hearing on Defendant's Motion to Suppress, the Court requested Counsel by Order dated April 9, 2012 to file legal memoranda as to whether the defendant was legally placed under arrest pursuant to 11 *Del.C.* §1901(1). Specifically counsel was requested to address whether the defendant was taken into formal custody that he be forthcoming to answer for a violation of 21 *Del.C.* §4177(a)(1) at the time he was placed in State Police Corporal Edward Larney's patrol vehicle on October 1, 2011.

Second, assuming the defendant was placed under arrest, counsel was requested to file memoranda on the second legal issue of whether probable cause exists for the pending Informations filed with the Clerk of the Court for the violation of 21 *Del.C.* §4177(a). This is the Court's decision on those two (2) issues.

For the reasons that follow, the Court finds that the defendant was not legally taken into custody or under arrest pursuant to 11 *Del.C.* §1901(1) on the date, time and place in the charging documents on October 1, 2011. Second, since there is further testimony to be presented by a second police officer, the Court will defer its finding on whether probable cause existed to arrest the defendant for a violation of 21 *Del.C.* §4177(a)(1) until the testimony is completed at the suppression hearing.

## **II. The Facts**

Michelle Hover (“Hover”) presented sworn testimony. On October 1, 2011 at 1:42 am on I-95 southbound, ½ mile from Exit 1. Hover was proceeding at 60 mph to an exit and she was struck behind in her motor vehicle by a white Escalade driven by later identified as the defendant on I-95 southbound. Hover was with her husband and promptly called 9-1-1. Hover testified that she exited her motor vehicle after the accident and the Delaware State Police came to investigate the accident. She did not see the driver of the other motor vehicle at the time.

On cross-examination, Hover testified that Exit 1 on I-95 allows a driver to exit Rt. 896 at Middletown. She was southbound on I-95 and was proceeding to that exit, traveling approximately 60 mph. It was approximately 1:30 am and Hover moved into the right lane and suddenly saw a “bright light” and then was abruptly struck from behind by an unknown motor vehicle. Hover testified she never actually traveled into the right lane. She claims that checked her speedometer periodically on October 1, 2011 to confirm she was actually traveling 60 mph.

On redirect, Hover testified it was approximately 1:40 am on the date, time and place in the charging documents, she was on I-95 southbound, Hover only saw the light in her rear view mirror for approximately one (1) second.

Corporal Edward Larney (“Corporal Larney”) of the Delaware State Police, Troop 6 testified at the suppression hearing. Corporal Larney has been a Delaware State Police Officer for seven (7) years and was on routine patrol October 1, 2011. Corporal Larney was called to the scene of the accident by 9-1-1 dispatch. Corporal Larney responded to the scene at approximately 1:40 pm and saw one motor vehicle in the center of the highway and another motor vehicle pulled directly behind that vehicle. The SUV, which was later determined to be driven by the defendant, was “disabled”. When Corporal Larney inquired to the defendant and asked “What happened?” the defendant told him “a car cut me off and I got into an accident”.

The defendant was identified in the courtroom. The SUV being driven by the defendant was in the center lane of the highway and a tow truck had been called by the Delaware State Police.

Corporal Larney then placed the defendant in the back seat of the police vehicle for officer's safety. He observed an odor of alcohol from the defendant's breath and described the defendant as "lethargic".<sup>1</sup> At that time Corporal Larney testified he believed the defendant was possibly under the influence of alcohol.

The windows in Corporal Larney's patrol car were rolled down in the patrol car and the defendant was not in handcuffs. Because there was only two and a half hours left in his shift, Corporal Larney passed this accident investigation onto another Delaware State Trooper. He wrote no AIIR Report or accident report on the accident. Nor did he issue a supplemental report after Trooper Conroy's report.

When the defendant got into the car, defendant informed Corporal Larney that he was a Wilmington Police Department Officer and was asked by Corporal Larney "Do you have a gun?"

Corporal Larney does not recall whether the defendant produced a driver's license, registration, or insurance card. Corporal Larney further testified that he placed the defendant in his Delaware State Police patrol vehicle because the defendant walked unaided to the police car and then walked out of the police car and attempted to leave the scene on a high speed public highway. Corporal Larney made no effort to conduct field coordination tests on the defendant.

On cross-examination Corporal Larney testified the defendant was "slow moving" when he exited his motor vehicle but was not "swaying" or "out of balance." However, the defendant did have an "odor of alcohol on his breath". He described the odor of alcoholic beverages as a "strong odor". According to Corporal Larney defendant's speech was "slow" but "not slurred"

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<sup>1</sup> Officer Larney has received training from the Delaware State Police Academy and has been involved in sixty (60) DUI arrests.

and the defendant seemed “tired”. Defendant, at that time also displayed no “unusual actions” Corporal Larney could not distinguish on the record to the Court whether the defendant was actually in custody or under arrest or lawfully detained for further investigation for officer’s safety, the public’s safety or other reasons. Hence, the Court ordered further briefing on the facts of the case as to whether a formal arrest had been made.

At 2:04 a.m. on October 1, 2011, Trooper Conway of the State Police responded to the scene and spoke to Corporal Larney who informed Trooper Conway that defendant appeared to be under the influence. Corporal Larney told Trooper Conway that the defendant was seated in the backseat of his open patrol vehicle.

Apparently Trooper Conway, who has not testified at the Suppression hearing, subsequently commenced a formal DUI investigation. The State proffered that defendant refused all field sobriety tests and refused to submit to an intoxilizer breath test but was read the defendant the probable cause implied consent form. The Court is now awaiting further testimony from Trooper Conway at the Suppression hearing.

### **III. Standard and Scope of Review**

In a Motion to Suppress, the State bears the burden of establishing the challenge of a search or seizure comports 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 “proof beyond a preponderance of the evidence.”<sup>2</sup>

### **IV. The Law**

The Court shall conclude on this suppression record that reasonable articulable suspicion exists in the record for the traffic stop in that the defendant was involved in the motor vehicle

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<sup>2</sup> *State v. Oakes*, Del.Comm.Pl. No.0811008904, Welch, J. (Mar 8, 2011)(Mem.Op at 6)(citing *Hunter v. State*, 783 A.2d 558, 560 (Del. 2001).

accident; a smelled of alcohol; his car was disabled on a public roadway, I-95 in New Castle County and the defendant appeared “lethargic”. There was a “strong” odor of alcoholic beverage emanating from the defendant’s person at the time of the accident on October 1, 2012. Because of the traffic accident and these factual findings, the Court finds that clearly reasonable articulable suspicion exists in the record for the traffic stop of the defendant.<sup>3</sup>

The law with regards to whether the defendant was legally placed under arrest pursuant to 11 *Del.C.* §1901 was recently discussed by this Court in a recent DUI case.<sup>4</sup> The Delaware Code as the Court ruled in *Oakes* defines “arrest” as “the taking of a person into custody in order that the person may be forthcoming to answer for the commission of a crime.”<sup>5</sup> As the Court in *Oakes* also ruled... “in the absence of indicia of formal arrest, an arrest occurs “when, in view of all the circumstances, a reasonable person would believe that he is not free to leave.”<sup>6</sup> The officer in this instant matter testified that the defendant was attempting to leave the scene and walk on a public highway. Corporal Larney placed the defendant back of his patrol vehicle for officer’s safety as well as the traveling public safety. I-95 is a high speed public highway. The defendant was not placed in handcuffs; nor were words used indicating that the defendant was lawfully under arrest for a §4177(a) violation of Title 21. The Court finds the defendant was placed in the patrol vehicle for the safety of traveling public on a high speed public highway and for officer and the defendant’s own safety.

In *Stevenson v. State*, the Superior Court held that in order to determine whether an investigative detention was an arrest... “[t]he Court must examine ‘the nature and degree’ of the

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<sup>3</sup> See e.g., *State v. Arterbridge*, 1995 Del. Super. LEXIS 587 (1998); *State v. John C. Dinan*, 1998 Del. C.P. LEXIS 31 (Welch, J)(October 15, 1998).

<sup>4</sup> See *State of Delaware v. Ryan P. Oakes*, Del.Comm.Pl. No.: 0811008904, Welch, J. (Aug. 21, 2010) (Mem.Op. at 6).

<sup>5</sup> See 11 *Del.C.* §1901(1).

<sup>6</sup> *State v. Rizzo*, 634 A.2d 392, 395 (Del.Super.1993); See also *State v. Brown*, 1998 WL 961751, at \*2-3 (Del. Super. 1998) (The Court ruled any reasonable person would no longer believe they were free to leave, even though

intrusion under all the facts of the particular encounter.”<sup>7</sup> In this case, the defendant failed to follow instructions and started to walk from the scene on a high speed public interstate highway. The defendant was not interrogated or placed in handcuffs. Nor was he told he was lawfully placed under arrest. 11 *Del.C.* §1901. As the State points at page eight (8) of their memoranda, a driver who has been involved in a collision, smells of alcohol, and attempts to walk on I-95 is certainly a hazard to himself or other public citizens. No bright line exists, however, the Court finds that the defendant was legally detained for the limited purpose of protecting his own safety as well as the traveling public on a high speed public interstate highway. The defendant, however, was not in fact, legally arrested.

#### **VI. Opinion and Order**

The Court finds the defendant was not arrested pursuant to 11 *Del.C.* §1901. Hence, since the sworn testimony at the Motion to Suppress hearing has not been completed, the Court will defer until the State makes argument and the record is closed as to sworn testimony and evidence as to the issue of whether probable cause for a violation of 21 *Del.C.* §4177(a)(1) is completed. The Court shall reschedule the suppression hearing with notice to all parties at the earliest convenience of the Court.

**IT IS SO ORDERED** this 16<sup>th</sup> day of May, 2012.

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John K. Welch, Judge

/jb

cc: Ms. Diane Healey, CCP Case Manager

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the formal words of an arrest were lacking if a defendant was placed in handcuffs in separate police cars, where there was no reason to believe that they posed a danger to the officers.)

<sup>7</sup> See *Stevenson v. State*, 1999 WL 464524, at \*3 (Del.Super., April 27, 1999).