December 9, 2008

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Re: ***State of Delaware v. Mark J. Munzer***
Case No.: 0805019677

Date Submitted: December 3, 2008
Date Decided: December 9, 2008

LETTER OPINION

Dear Counsel:

On Wednesday, December 3, 2008 a hearing was held in the Court of Common Pleas, New Castle County, State of Delaware on Mark J. Minzer's (defendant") Motion to Suppress filed pursuant to Court of Common Pleas Criminal Rule 12. Defendant alleges in his motion, *inter alia*, that any evidence offered by the State should be suppressed because the arresting officer did not have a reasonable and articulable suspicion to "initiate and follow through with the stop of defendant's vehicle."

By Information filed with the Criminal Clerk, the defendant was charged with one Count of Driving Under The Influence, 21 *Del. C.* §4177(a), on May 16, 2008, New Castle County Red Lion Road.

This is the Court's Final Decision and Order on Defendant's Motion to Suppress. For the following reasons the Court finds there was no reasonable and articulable suspicion to stop defendant's motor vehicle on the date, time and place charged in the Information. Therefore the Court GRANTS Defendant's Motion to Suppress.

THE FACTS

Corporal Keith Dempsey ("Corporal Dempsey"), a law enforcement officer employed by Division of Natural Resources and Environmental Control, Division of Parks for the past nine (9) years testified at the Suppression Hearing. Corporal Dempsey was so employed on May 15th and 16th in 2008 and was working the night shift in New Castle County. He was traveling on a public highway near Lum's Pond near the end of his shift. State's Exhibit's No. 1 and No. 2 were received into evidence which indicate Corporal Dempsey had NHTSA DUI Detection and HGN Certification on October 15, 2001 and successfully completed a DUI Detection and Standard Field Sobriety Testing Refresher Course on March 23, 2007.

At approximately 23:38 hours Corporal Dempsey was driving his white Crown Victoria, a partially marked patrol vehicle, and was stopped at a railroad train crossing. Officer Dempsey then observed a black SUV on the southbound side of the railroad tracks facing his direction. Corporal Dempsey was two cars back from the crossing facing the northbound direction. He observed the defendant leaning to the right side of his motor vehicle. Corporal Dempsey they crossed the railroad tracks when the train passed, performed a U-turn and got behind the defendant's motor vehicle at that instant he made his decision to perform a traffic stop of the defendant. Approximately five to six cars went around the defendant. When Corporal Dempsey approached the motor vehicle in the roadway the defendant began to drive away slowly.

Corporal Dempsey then followed the motor vehicle and initiated a traffic stop. The defendant pulled over to the shoulder partially blocking a driveway. It took approximately one minute to conduct the stop. Corporal Dempsey activated his lights in order to perform the stop. The road conditions were clear and dry and there was "light traffic".

On cross-examination Corporal Dempsey testified that he saw the defendant only for a couple of seconds but could not refute or testify that the defendant's motor vehicle had been turned off while waiting for the train to pass. He could not determine if defendant had tinted windows in his motor vehicle. Defendant's motor vehicle was properly placed in the middle of the roadway "where it was supposed to be" and was stopped apparently waiting for the train to pass.

According to Corporal Dempsey the reason he stopped the defendant was because he wanted to know "what was going on". When Corporal Dempsey in cross-examination observed the defendant at the railroad tracks and testified the defendant was properly within the road lane marking.

On re-direct by the State Corporal Dempsey testified he believed the defendant could be impeding the flow of traffic. At this time the State proffered several statutes the defendant could be violating but Corporal Dempsey was candid when asked why he stopped the defendant and he stated because "traffic was apparently being backed up."[1] The statutes were legal argument at

[1] The State proffered 21 *Del. C.* §4130. "Vehicle Obstructing Traffic" applied. That Title 21 provisions provides" … no driver shall enter an intersection or a marked cross-walk or drive onto any railroad crossing unless there is sufficient space on the other side of the intersection, cross-walk or wherever a crossing is to accommodate the vehicle the driver is operating without obstructing the passage of other vehicle, pedestrians or railroad trains not withstanding any traffic-controlled signal indication to proceed." The State also proffered a second statute, 21 *Del. C.* §4171 "Minimum Speed" which provides "… (a) No person shall drive a motor vehicle at such a slow speed as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for the safe operation and compliance with the law." The Court finds neither one of these statutes apply and Officer' Dempsey's candid reply to the question was that it was a simply obstructing traffic issue.

the suppression hearing and were not articulated at the suppression hearing as the legal or factual basis for the traffic stop of the defendant on May 16, 2008 by Corporal Dempsey.

Corporal Dempsey did not know how long the train was holding up traffic or how long the defendant was actually stopped at the railroad tracks.

THE LAW

In *State v. Robert S. Edwards*, 2002 Del. C.P. LEXIS 28, Clark, Judge (May 31, 2002) this Court applied the following standard to similar facts as follows:

> A police officer may detain an individual for investigatory purposes for a limited scope, but only if the detention is supported by a reasonable and articulable suspicion of criminal activity. ***Jones v. State****, 745 A.2d 856 (Del. 1999),* **[*4]** (citing ***Terry v. Ohio****, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868,* (1968)). A determination of reasonable and articulable suspicion must be evaluated by the totality of the circumstances as viewed through the eyes of a reasonable, trained police officer under the same or similar circumstances, combining objective facts with the officer's subjective interpretation of them. ***Id.*** The Delaware Supreme Court defines reasonable and articulable suspicion as an officer's ability to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. ***Id.*** In the absence of reasonable and articulable suspicion of wrongdoing, detention is not authorized.
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> * * *

In *State of Delaware v. John C. Dinan*, 1998 Del. C.P. LEXIS 31, (Welch, J. Oct. 15, 1998), this Court applied a "similar standard" for a motor vehicle stop by a police officer:

> As stated in *State v. Arterbridge, 1995 Del. Super. LEXIS 587, 1995 W.L. 790965* (December 7, 1995), the law with regard to "reasonable articulable suspicion" provides as follows:
>
> The Fourth Amendment in Article 1, Sec. 6 of the Delaware Constitution **[*7]** protecting individual's right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; Del. Const. Art. I § 6. Accordingly, a police officer must justify any "seizure" of a citizen. The level of justification required varies with the magnitude of the intrusion to the citizen. See, *U.S. v.*

Hernandez, 854 F.2d 295, 297 (8th Cir. 1988). Not every contact between a citizen and a police officer, however, involves a "seizure" of a personal under the Fourth Amendment. See, *Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868, n16 (1968);* see also, *Thompson v. State, Ark. Supr., 303 Ark. 407, 797 S.W.2d 450, 451 (1990). . . .*

There are three categories of police-citizen encounters. See, *Hernandez, 854 F.2d 295 at 297.* First, the least intrusive encounter occurs when a police officer simply approaches an individual and asks him or her to answer questions. This type of police-citizen confrontation does not constitute a seizure. *Robertson v. State, Del. Supr., 596 A.2d 1345, 1351 (1991)* (citing *Florida v. Bostick, 501 U.S. 429, 434, 115 L. Ed. 2d 389, 111 S. Ct. 2382 (1991);* **[*8]** *Hernandez, 854 F.2d 295 at 297.* Second, a limited intrusion occurs [like the facts of this case] when a police officer restrains an individual for a short period of time. This *Terry* stop encounter constitutes a seizure and requires that the officer have an "articulable suspicion" that the person has committed or is about to commit a crime. *Hernandez, 854 F.2d at 297.* Third, the most intrusive encounter occurs when a police officer actually arrests a person for a commission of a crime. Only "probable cause" justifies a full scale arrest. Id. n2. (emphasis supplied)

As stated in *Arterbridge*, "stopping an automobile falls under the second category and therefore requires that the officer have a reasonable articulable suspicion to do so." *Delaware v. Prouse, 440 U.S. 648, 59 L. Ed. 2d 660, 99 S. Ct. 1391 (1979).* Initially in this matter the Court, as it did in *Arterbridge*, must determine whether the police officer had a reasonable articulable suspicion to stop the defendant's vehicle on March 24, 1998. There was clearly a "seizure" because under the facts of this case, Officer Huber restricted the liberty by a show of authority by turning on his overhead lights, siren and beeping his horn when following the defendant. *Terry, 392 U.S. at 20 n.16.* This police contact "conveyed to a reasonable person that he or she is not free to leave." *United States v. Mendenhall, 446 U.S. 544, 545, 64 L. Ed. 2d 497, 100 S. Ct. 1870 (1980); Florida v. Royer, 460 U.S. 491, 502, 75 L. Ed. 2d 229, 103 S. Ct. 1319 (1983).* The Court must make this decision objectively by viewing the "totality of circumstances surrounding the incident at that time." *Mendenhall, 446 U.S. 544 at 545.* **[*10]**

* * *

As stated in *State v. Harmon*, 2001 Del. Super., LEXIS 338, Bradley, J., August 22, 2001, the following standard applies:

> "B. Legal Standard for the Stop
>
> The quantum of evidence required for reasonable articulable suspicion is less than that of probable cause. *Downs v. State, Del. Supr., 570 A.2d 1142, 1145 (1990)*. The former requires that an objective standard be met: "would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief that the action taken was appropriate?" *Terry v. Ohio, 392 U.S. 1, 21, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968)* (internal quotations omitted). If Harmon had not actually violated any statutes, this reasonable suspicion standard would be the appropriate one to have used. However, Harmon was charged **[*7]** with violating *21 Del. C. § 4114(a)*, and this violation provided the officer with probable cause to make the stop. *See, State v. Walker, 1991 Del. Super. LEXIS 104,* Del. Super., Cr. A. No. IK90-08-0001, Steele, J. (Mar. 18, 1991) (Order) (holding that changing lanes without a signaling is a violation of *21 Del. C. § 4155* which created probable cause for the officer to stop the vehicle.); and *State v. Huss, 1993 Del. Super. LEXIS 481,* *6-7, Del. Super., Cr. A. No. N93-04-0294AC, 0295AC, Gebelein, J. (Oct. 8, 1993) (stating, "clearly then, if probable cause exists to arrest, this provides more than the reasonable suspicion necessary to stop the vehicle."). *See also, Eskridge v. Voshell, Del. Supr., 593 A.2d 589 (1991)* (ORDER); *Austin v. Division of Motor Vehicles, 1992 Del. Super. LEXIS 10,* Del. Super., C.A. No. 91A-08-2, Goldstein, J. (Jan. 9, 1992) (Op. and Order); *State v. Lahman, 1995 Del. Super. LEXIS 611,* Del. Super., Cr. I.D. No. 9410011118, Cooch, J. (Jan. 31, 1995) (Mem. Op.); *State v. Brickfield*, 1997 Del. C.P. LEXIS 6, Del. CCP, Case No. 9609017975, Stokes, J. (May 8, 1997); *Webb v. State, 1998 Del. LEXIS 107,* Del. Supr., No. 332, 1997, Berger, J. (Mar. 26, 1998) (ORDER)."

* * *

In *State v. Bloomingdale*, 2000 C.P. LEXIS 63, Smalls, C.J., (July 7, 2000), the Court of Common Pleas also similarly defined the standard for this limited seizure as reasonable articulable suspicion;

> The Supreme Court when examining the issue of reasonable articulable suspicion in *Jones v. State, Del. Supr., 745 A.2d 856 (1999)* stated that the determination of reasonable suspicion must

> be evaluated in the context of the totality of the circumstances as viewed from the eyes of a reasonable, **[*7]** trained police officer in the same or similar circumstances, combining objective facts with an officer's subjective interpretation of those facts. The Court went on to hold that the determination in Delaware of whether an officer has reasonable articulable suspicion to detain an individual may rest not only on the Fourth Amendment of the U.S. Constitution, but also on Delaware Constitutional provisions. In reaching this decision, the Court pointed to *Arizona v. Altieri, 191 Ariz. 1 951 P.2d 866 (1977)* and concluded that a person's (particularly an anonymous caller's) subjective belief that another person is suspicious without more fails to raise a reasonable and articulable suspicion of criminal activity. (emphasis supplied).

DISCUSSION

Corporal Dempsey's candid proffer to the Court was that he believed the reason he stopped the defendant because he believed he was obstructing traffic and he wanted to know simply "What was going on?" However, the defendant was waiting for the train to pass and defendant's argument was made at the Suppression Hearing, unrebutted by the State was that the defendant simply stopped his motor vehicle, turned the engine off, and waited until such a time the train passed. The State offered several statutes as a legal basis for what could constitute a crime for which there was reasonable articulable suspicion. However, Corporal Dempsey's proffer to the Court was without reference of proffer to an actual violation of Title 21 "a crime". At the suppression hearing the record was that six to eight cars went around the defendant without difficulty once the train crossed the railroad tracks. Corporal Dempsey was candid and testified that he did not know whether the defendant had turned his motor vehicle off or whether his windows were tinted.

The legal issue pending before the Court is whether there was a reasonable articulable suspicion, considering the totality of circumstances and considering the officer's ability to point to specific and articulable facts, taken with rational inferences that could reasonably warrant the

intrusion by Corporal Dempsey. Specifically, the Court must determine under the case law listed above whether there a crime being committed, about to be committed or had been committed by the defendant to allow the limited seizure. Even more specific, was there a specific motor vehicle violation cited in the suppression record by the State for the reason for the stop? The defendant was not charged with any motor vehicle violations in Title 21. The defendant performed lawfully when Corporal Dempsey activated and conducted the traffic stop. He was lawfully stopped waiting for the train to pass in the middle of the traffic lane.

The Attorney General argued that several motor vehicle statutes could have been charged. However, Corporal Dempsey's candid proffer to the Court that he believed the defendant simply was obstructing traffic and he wanted to know "what was going on" without reference to any motor vehicle violation. This testimony causes this Court to conclude there was no reasonable articulable suspicion that a crime was being committed, about to be committed or had been committed by the defendant.

Hence, this Court must grant defendant's Motion to Suppress. "In a Motion to Suppress the State bears the burden of establishing the challenged search or seizure comported 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 by proof by a preponderance of the evidence." See *Hunter v. State*, Del. Supr., No. 279, 2000, Steele, J. (August 22, 2001) (Mem. Op. at 5-6); *State v. Bien-Aime*, Del. Supr., Cr.A. No. IK92-08-326, Tolliver, J. (March 17, 1993)(Memo. Op.) (citations omitted). The State has not met this burden in the trial record. Applying the totality of circumstances test set forth in the case law above, the Court finds that Corporal Dempsey did not have a reasonable articulable suspicion that the defendant had

committed or was about to commit a crime. Hence, the seizure of defendant on the date, time and place charged in the Information was unlawful.

OPINION AND ORDER

The Court therefore GRANTS Defendant's Motion to Suppress.

IT IS SO ORDERED this 9th day of December, 2008

John K. Welch
Judge

/jb

cc: Ms. Juanette West, Case Manager
CCP, Scheduling, Criminal Division