IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

Kelly Cicero, Defendant below, Appellant, vs. MICHAEL SHAHAN, Director of DIVISION OF MOTOR VEHICLES, DEPARTMENT OF TRANSPORTATION, Plaintiff below, Appellee.	:	C.A. NO. 04-02-093

Submitted: March 26, 2009

Decided: March 26, 2009

On appeal from Division of Motor Vehicles

Affirmed.

Eric G. Mooney, Esquire, 11 South Race Street, Georgetown, Delaware 19947, Attorney for Appellant.

Frederick Schranck, Esquire, Department of Transportation, Post Office Box 778, Dover, Delaware 19903-0778, Attorney for Appellee.

Trader, J.

In this civil appeal from the Division of Motor Vehicles, Department of Public Safety, (Division) I hold that that the hearing officer was correct in finding that Trooper Dykstra had reason to believe that the defendant was driving a motor vehicle under the influence of alcohol. I also hold that she was correct in determining that the Division had established by a preponderance of the evidence that the defendant was driving under the influence of alcohol.

The relevant facts are as follows: On July 29, 2003 at approximately 2:25 A.M. Corporal Dykstra saw the defendant driving his truck directly toward the trooper's parked vehicle on State Route 1 north of Fenwick Island, Sussex County, Delaware. The defendant missed the trooper's vehicle, but went into a nearby ditch.

When the trooper approached the defendant, she told the officer that she had been drinking, there a moderate odor of alcoholic beverage on the defendant's breath, and her eyes were blood shot, glassy and watery. She failed certain field coordination tests including an alphabet test, counting test, one leg stand test, and walk and turn test. The trooper also testified as to her qualifications to administer a HGN test and the defendant failed that test.

On appeal this court must determine whether there is substantial evidence of record to support the findings of fact and conclusion of law of the hearing officer. *Eskridge v. Voshell*, Del. Supr., 593 A.2d 589,591, 1991 Del. LEXIS 155 (1991). The hearing officer's understanding of what transpired is entitled to deference, since the hearing officer is in the best position to evaluate the credibility of the witnesses and probative value of real evidence. *Voshell v. Attix*, Del. Super., 574 A.2d 264 (1990) WL 40028 *2. The hearing officer's findings of facts will not be overturned on appeal as

long as they are sufficiently supported by the record and are the product of an orderly and logical deductive process. *Levitt v. Bouvier*, 287 A.2d 671 at 673 (Del. Super. Ct. 1972)

The defendant contends that the hearing officer's finding that there was probable cause to arrest the defendant for driving under the influence is in error. I disagree.

The defendant's argument as to this issue is essentially broken down into the following three parts. (1) The defendant substantially passed the field tests. (2) The evidence does not support the conclusion that there was an odor of alcohol on the defendant's breath, her eyes were glassy and blood shot and that she staggered upon exiting her vehicle. (3) If the hearing officer considered all of the evidence, there is not enough evidence to support probable cause that the defendant drove a motor vehicle under influence of alcohol.

The hearing officer must make a decision of probable cause based on the totality of the circumstances. She decides the weight of the evidence and the credibility of the witnesses. It is not up to the court to reweigh the evidence if the findings are supported by the record and the product of an orderly and logical deductive process.

The totality of the circumstances considered by the hearing officer was as follows: the defendant drove her truck at the trooper's vehicle and missed it landing in a ditch. She told the trooper that she had been drinking, she had a moderate odor of alcohol on her breath, glassy and blood shot eyes, and she failed certain coordination tests such as the alphabet tests, the counting tests, one leg stand test, and the walk and turn test, as well as the HGN test. The defendant's argument that she substantially performed the test correctly is an issue for the trier of fact. The hearing officer decides whether the

defendant failed the test based on the evidence. I conclude that her findings are supported by substantial evidence.

The defendant contends that the hearing officer's findings that the defendant's face was pale, she staggered upon exiting the vehicle, and that her eyes were glassy are not supported by evidence. This assertion is correct, but because of the overwhelming weight of the evidence of probable cause, this error is harmless. *See Borden v. Voshell*, 1992 WL 51868, at *2 (Del. Super Ct.) (holding that where some factors constituted substantial or overwhelming evidence of probable cause, erroneous admission of other evidence is harmless error.)

Finally the issue of lack of probable cause to arrest the defendant for driving under the influence was not specifically raised before the Division hearing. Those issues not raised at the hearing cannot be considered on appeal.

The defendant's next contention is that the Division has not established by a preponderance of the evidence that the defendant was driving a motor vehicle under the influence of alcohol. I disagree.

The defendant argues that the hearing officer failed to consider in her findings that the defendant was upset and her eyes were red and blood shot because her boyfriend had just hit her. This contention is incorrect. The hearing officer recites in her findings that the defendant stated that she was coming from the beach and her boyfriend hit her. She also found that the defendant was extremely upset and crying and she had a domestic incident with her boyfriend. Based on the hearing officer's findings, she apparently rejected the defendant's contention that the defendant's condition was not due to intoxication, but due to the domestic incident with her boyfriend.

The defendant next contends that the Division has not established by a preponderance of the evidence that she was under the influence of alcohol. I disagree. Based on the hearing officer's findings that the defendant failed the one leg stand test, the walk and turn test, the counting test, the alphabet test, the HGN test, her erratic driving, and her admission that she had a couple of drinks there is substantial evidence to support the hearing officer's finding that the Division established driving under the influence by a preponderance of the evidence.

The defendant contends that she passed five of the six tests given to her by the police officer. Again, the hearing officer considered this evidence and made a finding adverse to the defendant. These issues are presented to the reviewing court as if I was the finder of fact. I cannot reweigh the findings of the hearing officer if there is substantial evidence to support her conclusions.

The Division is not required in a civil proceeding to establish under the influence beyond a reasonable doubt. The burden of proof on the Division is to establish driving under the influence by a preponderance of the evidence. I am satisfied that the hearing officer fairly considered all of the evidence and substantial evidence does support her conclusions. Any error relating to the color of her face or condition of her eyes was a harmless error. Therefore, the findings of the hearing officer are affirmed.

IT IS SO ORDERED.

Merrill C. Trader
Judge