COURT OF COMMON PLEAS
FOR THE STATE OF DELAWARE
WILMINGTON, DELAWARE 19801

John K. Welch
Judge

October 29, 2009

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Re: *State of Delaware of Jamal F. Elliott*
Case No.: 0811020586

Date Submitted: October 26, 2009
Date Decided: October 29, 2009

MEMORANDUM OPINION ON DEFENDANT'S MOTION TO SUPPRESS

Dear Counsel:

A hearing was held on Jamal F. Elliot's ("defendant") Motion to Suppress ("Motion") on Monday, October 26, 2009 in the Court of Common Pleas, New Castle County, State of Delaware. Following the receipt of documentary evidence and sworn testimony the Court reserved decision. This is the Court's Final Decision and Order on defendant's Motion.

THE FACTS

Corporal Geoffrey Biddle ("Corporal Biddle") presented testimony at the Suppression Hearing. Corporal Biddle is employed by the Delaware State Police at

Troop 9 for the past four (4) years. His duties involve handling law enforcement, criminal and traffic complaints and enforcement of these laws in Delaware. On November 28, 2008 he was employed in that capacity at 10:00 p.m. and was on routine parole. Corporal Biddle testified although he was not formally involved in the roadblock in question, he was sitting near the roadblock. His attention was drawn to a GMC Envoy driven by defendant on Wrangle Hill Road in New Castle County.

Corporal Biddle was sitting north of the Delaware State Police sobriety checkpoint and saw defendant's Envoy turn into a driveway. The defendant sat in the driveway and then turned his lights off and according to Corporal Biddle, this appeared "suspicious". Corporal Biddle ran the registration of defendant's motor vehicle. It did not "come up" with the address of the driveway that defendant's Envoy was located. He approached the defendant and asked him, "What are you doing?" The defendant replied that he thought the checkpoint was a car accident and he had turned his lights off so that they would not shine into the residence. Corporal Biddle noticed an odor of alcohol and that defendant appeared "nervous".

The defendant admitted he had a couple of beers.[1] According to Corporal Biddle, which is contradicted by defendant's testimony, the defendant admitted that he had a small amount of marijuana in his console, but would not allow Corporal Biddle to search his motor vehicle.

[1] On cross-examination it was learned that it was several hours earlier that defendant had consumed alcohol.

Corporal Biddle then called Delaware State Police and requested another officer to come to the scene for officer safety purposes. The defendant was then administered a portable breath test, which he passed successfully. The defendant was also administered field sobriety coordination tests, which he also passed successfully. Corporal Biddle testified that after he conducted those tests he located a small plastic bag with green leafy substance in the console of defendant's motor vehicle. The defendant was then taken back to the Troop and his car was subsequently towed.

On cross-examination Corporal Biddle confirms he was not part of the "road block team". However, Corporal Biddle testified he was "working in concert" with the roadblock and was "set up" near the roadblock a few hundred yards away. The defendant's motor vehicle was coming from the North to the South when he passed Corporal Biddle. Corporal Biddle conceded the defendant did not perform U-turn and there is "nothing illegal" in the motor vehicle laws for pulling into a driveway. Corporal Biddle testified the defendant could have had a chat with girlfriend, use his phone or perform other activity which was otherwise legal. Corporal Biddle testified defendant told him he thought there was an accident "up the road" and that he was trying to use his GPS to find an alternate way home. Defendant produced his driver's license, registration and insurance card properly. Corporal Biddle confirmed that the defendant informed him that he had a "couple of beers" but does not recall telling him that it was several hours previous to the traffic stop. Corporal Biddle also

confirmed on cross-examination that the defendant passed all field coordination tests and the portable breath test.

The defense presented its case-in-chief. Jamal F. Elliott (the "defendant") was sworn and testified. The defendant was the driver of the motor vehicle who pulled into the driveway on Wrangle Hill Road when the officer approached him. He had GPS set to a new location and was trying to find an alternate way home. When asked for his driver's license, registration and insurance card, he produced it properly. After the defendant passed the portable breath test and field coordination test administered by Corporal Biddle, he was told that the tests were "inconclusive". The defendant was then taken back to the troop and administered an Intoxilizer test, which he also passed. The defendant denied that he told Corporal Biddle that there was a small plastic bag of marijuana inside his motor vehicle. Defendant also testified that the marijuana was actually seized back at the Troop after an inventory search when the defendant's car was towed.

THE PARTIES CONTENTIONS

(i). The Defendant's Contention:

The defendant contends in his Motion that the State was obligated to show that the police complied with their guidelines regarding DUI checkpoints and failed to do so in the instant case through documentary evidence or oral testimony. *See State v. Gonzales-Ortis*, 2007 WL 549907, Del. Com.Pl., Trader, J. (Jan.30, 2007); *Bradley v. State*, 858 A.2d 1960 (Del. 2004); *State v. McDermitt,* 1999 WL 1847364, Del. Com.Pl.,

Stokes, J. (April 30, 1999). (Motion, ¶ 3). Defendant also contends, assuming arguendo that the roadblock guidelines were set forth in the record that the State should have established that it had reasonable articulable suspicion to detain the defendant plus probable cause to effect a warrantless arrest. Defendant also points in ¶ 4 of its Motion that this Court has recently ruled that a vehicle turning just prior to entering a DUI checkpoint, by itself is not sufficient grounds to stop the motor vehicle. *Simmons v. Shahan*, 2008 WL 5208573, Del.Com.Pl., Smalls, C.J. (Dec. 11, 2008). Hence defendant argues there was no basis to detain the defendant in the first place which actually occurred at the time the Trooper pulled behind the defendant in the driveway. (*See* ¶ 4, Motion).

Finally, defendant asserts that, even assuming arguendo the "stop" was deemed lawful, the State did not have probable cause even the totality of circumstances that a fair probability existed that defendant had actually committed a crime. *See, State v. Maxwell,* 624 A.2d 926, 930 (Del.Supr., 1993); *Illinois v. Gates*, 462 U.S. 213 (1983). In essence, defendant argues the State did not have "probable cause" under any scenario to take the defendant into custody. *See, State v. Maxwell*, 1996 WL 658993, Del.Supr., Carpenter, J. (Aug. 30, 1996); *State v. Hunter*, 2006 WL 1719966, Del.Com.Pl., Welch, J. (June 9, 2006); *State v. McGinley*, CCP No. 96-06-173, DiSabatino, J. (Aug. 14, 1996). In support of this proposition, defendant points out that Delaware Courts have ruled a combination of odor of alcohol plus bloodshot and watery eyes and mumbled or slurred speech, without more, that arguably not constitute probable cause to believe

that a driver's under the influence of alcohol. *See, Price v. Voshell*, C.A. No.: 1991 WL. 89866, Del.Super., Barron, J. (May 10, 1991); *Esham v. Voshell*, 1986 WL 8277, Del.Super., Chandler, J. (March 2, 1987).

(ii) State's Contention:

The State argues that the instant case is not a DUI stop, but an arrest for possession of marijuana as set forth in the charging documents, purportedly in violation of Title 16, §4714(d)(19). Hence, the State argues it did not need to lay the foundation for implementation of a valid sobriety checkpoint in the record. When questioned, the State proffered that the fact that there were no DUI procedures or testimony established at the hearing from officers establishing a valid sobriety checkpoint, this lack of foundation is just "one factor" in determining whether there was an unlawful arrest or probable cause in the record. Second, the State argues there was reasonable articulable suspicion to stop the defendant, or probable cause existed because the defendant pulled into a driveway.

THE LAW

On a Motion to Suppress, the State bears the burden of establishing the search or seizure [of the defendant] comported with the rights guarded by the United States Constitution, the Delaware Constitution, or Delaware Statutory Law. The burden of proof on a Motion to Suppress is proof by a preponderance of the evidence. *See, Hunter v. State*, 878 A.2d 558, Del.Supr., No. 279, 2000, Steele, J. (Aug. 22,

2001)(Mem.Op at 5-6); *State v. Bien-Aime*, Del.Super., Lexis 132, Cr.A. No.: IK92-08-326, Tolliver, J. (March 17, 1993)(Mem.Op.).

As set forth in *Beverly Howard v. Robert J. Voshell*, 621 A.2d 804, Del. Supr., Ridgely, J. (June 19, 1992); the facts of this case concur with previous case law:

> **B. *The Legality of the Stop***
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> The parties do not contest "that stopping a vehicle and detaining its occupants is a Fourth Amendment seizure regardless of the reason for the stop or the brevity of the detention." *See State of Utah v. Talbot,* 792 P.2d 489, 491 (Utah App.1990) (citing *Delaware v. Prouse,* 440 U.S. 648, 653, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), *aff'g* Del.Supr., 382 A.2d 1359 (1978). While Delaware does not require that an officer have probable cause to stop and detain a motorist, the officer must still have at least a "reasonable and articulable suspicion." *See Downs v. State of Delaware,* Del.Supr., 570 A.2d 1142, 1145 (1990) (citing *Delaware v. Prouse,* 440 U.S. at 663, 99 S.Ct. at 1401) ("police have the authority to forcibly detain a person if they have a reasonable suspicion that a vehicle or its occupants are subject to seizure for violation of law"). Proof of reasonable suspicion requires less evidence than that of probable cause. Courts commonly equate "reasonable suspicion" with "an officer's ability to 'point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion.' " *Coleman v. State,* Del.Supr., 562 A.2d 1171, 1174 (1989) (quoting *Terry v. Ohio,* 392 U.S. 1, 21, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968)), quoted in *Downs v. State of Delaware,* 570 A.2d at 1145.
>
> Delaware has considered the constitutionality of DUI roadblocks and has found no *per se* Fourth Amendment violation. *State of Delaware v. Stroman,* Del.Super., IN83-02-0055T, N83-04-0132T, N83-09-0620T, Stiftel, P.J. (May 18, 1984). The stopping of a vehicle within the purview of a

> sobriety checkpoint remains a legitimate tool for the enforcement of laws prohibiting driving while under the influence. However, this Court has also noted that, "[e]xcept for roadblock or sobriety-checkpoint type stops that do not involve the unconstrained exercise of discretion by peace officers, the Fourth Amendment requires that a police officer have at least an articulable and reasonable suspicion that the operation of a vehicle is unlicensed, that the vehicle is unregistered, or that the vehicle or an occupant is otherwise subject to seizure for a violation of law before a vehicle is stopped on a public roadway." *807 *Marousek v. Voshell,* Del.Super., C.A. No. 90A-JN-10, Ridgely, P.J., 1990 WL 251362 (Dec. 17, 1990); *See also Delaware v. Prouse,* 440 U.S. at 663, 99 S.Ct. at 1401, 59 L.Ed.2d at 673-74 (Constitution violated if stop involves unconstrained exercise of discretion); *United States v. Martinez-Fuerte,* 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976) (Court considered checkpoint designed to prevent entry of illegal aliens acceptable only to extent not subject to police officers' unfettered discretion).

As set forth in *State of Delaware v. Rebecca R. Rentoul*, 2006 WL 951315, Del.Com.Pl. Welch, J. (April 6, 2006):

> Delaware Courts have also approved the use of sobriety checkpoints in Delaware when procedures are in existence to ensure that cars passing through checkpoints are stopped in a reasonably safe manner and that sufficient safeguards are in place limiting the discretion of law enforcement officers with respect to the location of each checkpoint and the stopping of vehicles. *Bradley v. State,* 2004 WL 1964980 (Del. Aug.19, 2004). See also *State v. McDermott,* 1999 WL 1847364 (Del.Com.Pl. Apr.30, 1999).

As set forth in *State of Delaware v. Oliver L. Stroman*, 1984 WL 547841, Del.Super., Stiftel, P.J. (May 18, 1984):

> Under the Delaware program, the decision to conduct a roadblock must be based on the standard procedure set forth in Delaware State Police Order No. 39-82. Pursuant to this order, the Troop Commander or someone acting in his capacity must approve the decision to conduct a roadblock at a given time and place. Selection of the location of the roadblock is based upon a demonstrated problem with drunk drivers in that particular area. Factors to be considered include alcohol related fatal accidents, alcohol related accidents and the number of DUI arrests in the area. Verification that the location chosen is a "problem area" for alcohol related incidents must be obtained from the Traffic Control Section. Once the location is chosen, the officers are required to conduct the roadblock in a manner designed to protect the safety of both the motorists and the troopers, and to minimize the inconvenience and anxiety to the motorists stopped.

DISCUSSION

In the instant case it is clear that the State's did not proffer any testimony or documentary evidence that the State Police set up a valid sobriety check point or roadblock in accordance with established procedures. *See, e.g.*, as in *State v. Robert J. McDermitt, Jr.*, 1999 WL. 1847364, Del.Com.Pl., Stokes, J. (Apr. 30, 1999). The Court notes the State did not produce any fact witnesses or documentary evidence in the record that a valid sobriety checkpoint was set up by the State Police. There was no testimony on the record that the State Police made a valid request for a sobriety checkpoint was for a road block in definitive grid designations. A grid number indicates the area that will be used for a checkpoint and no State Police officer presented testimony as to this request or any grid designation. There is no testimony

about a police officer that included a foundation setting forth his or her duties including processing requests for this checkpoint or that an officer checked a list of grid numbers approved for sobriety check points. There was also no State Police statistician or testimony that proffered or determined the number of alcohol related accidents in DUI arrests in the preceding three year period based upon the federal fiscal year or the number of alcohol related accidents. No statistical fact witness provided the list of approved locations or any officer or lieutenant on a yearly basis. In fact, no policy implement testimony from a police officer or statistical data of any kind was set forth in the record that an established sobriety check point was established by the State Police. No testimony was that the officer notified the Director of the Traffic Control Section about a check point one week advance as required by the Sobriety Checkpoint Procedures. The State did not proffer that the check point was conducted in a safe location and individuals had time to realize they were being stopped at the check point. Hence, this Court must conclude that no record was set forth in the suppression hearing that a valid check point was established. Although defendant was apparently stopped for a DUI and was subsequently charged with possession of marijuana, the checkpoint cannot be used in the instant record to show that there was a valid stop under established checkpoint procedures or probable cause, or even reasonable articulable suspicion for the traffic stop.

Second, although Corporal Biddle testified at the hearing that it was suspicious that defendant pulled into a driveway, no proffer was made as to any reasonable articulable basis as to what crime, if any, or motor vehicle violation in Title 21 was committed by the defendant..

OPINION AND ORDER

For all the reasons set forth herein, the Court hereby GRANTS defendant's Motion to Suppress that all evidence gathered by the police following the detention of the defendant's motor vehicle on November 20, 2008 shall be suppressed.

IT IS SO ORDERED this 29th day of October, 2009.

John K. Welch
Judge

/jb

cc: Ms. Juanette West, Scheduling Supervisor
CCP, Criminal Division