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

STATE OF DELAWARE,	)	
	)	
v.	)	Case No. 1503017997
	)	
MARIA AKLILU,	)	
	)	
Defendant	)	

Submitted: December 15, 2016
Decided: January 4, 2017

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MEMORANDUM OPINION AND ORDER ON DEFENDANT'S MOTION TO SUPPRESS

The defendant, Maria Aklilu (hereinafter the "Defendant"), brings this motion to suppress evidence obtained in connection with a Driving Under the Influence ("DUI") investigation. The Defendant asserts three grounds for suppression: 1) the investigating officer improperly failed to retain evidence; 2) the Defendant was not given *Miranda* warnings in violation of the Fifth Amendment; and 3) the investigating officer lacked probable cause to arrest the Defendant.

On December 6, 2016, a hearing was convened to allow the parties to question witnesses and to present oral argument. At the conclusion of the hearing, the Court determined the Defendant's Motion to Suppress would be best addressed by a written opinion and requested

supplemental briefing.[1] This is the Final Decision of the Court on the Defendant's Motion to Suppress.

FACTS

During the hearing convened on December 6, 2016, the Court heard from Delaware State Police Corporal Brian A. Timmons ("Corporal Timmons"), the sole witness in this matter. Corporal Timmons was dispatched to the scene of a two vehicle accident on Route 40, near Scotland Drive. Upon arriving at the scene, Corporal Timmons observed the Defendant standing behind her vehicle. Corporal Timmons approached the Defendant and asked where the Defendant was coming from, to which the Defendant responded she had been at Ruby Tuesday. Corporal Timmons then observed the Defendant had watery, bloodshot, and glassy eyes, and also detected an odor of alcohol. Corporal Timmons asked the Defendant whether she had been drinking; the Defendant advised that she had been drinking, but did not specify how much she had to drink.

After Corporal Timmons inquired about the accident, the Defendant advised she did not know how it had happened. The accident had occurred in the rightmost of two parallel left turn lanes on Route 40; the Defendant's vehicle had rear-ended a vehicle that had been stopped at the light. The Defendant stated she never saw the other vehicle. At this point, Corporal Timmons initiated an investigation into whether the Defendant was driving under the influence (the "DUI investigation").

Corporal Timmons began with the alphabet test and instructed the Defendant to recite the alphabet from D to T. The Defendant recited as follows: D, E, F, G, A, B, C, D, E, F, G, L [pause] Q, R, S, T, U, V. Corporal Timmons regarded this as a failure. Next, Corporal Timmons

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[1] On January 3, 2017, the Court received late submissions from both parties concerning the applicability of the recent Superior Court case of *State v. Wise*, 2016 WL 7468058 (Del. Super. Dec. 22, 2016). Upon reviewing the submissions, the Court does not find *Wise* to alter the Court's rulings.

instructed the Defendant to count backward from 79 to 64; Corporal Timmons also asked if the Defendant understood, to which the Defendant responded in the affirmative. The Defendant counted as follows: 79, 78, 77, 76, 75, 74, 73, 72, 71, 70, 69, 68, 76, 65, 64, 64, 63, 62, 61, 60, 59, 58, 57, 56.

Next, Corporal Timmons instructed the Defendant on the walk-and-turn test. While Corporal Timmons did not ask whether the Defendant had any injuries or disabilities, Corporal Timmons did explain and demonstrate the test, while also ensuring the Defendant understood the instructions. The Defendant reportedly started too early, missed heel to toe, stepped off the line, raised arms, and took only eight steps. Corporal Timmons advised this constituted a failure. On the one-leg stand test, Corporal Timmons reportedly observed the Defendant swayed and raised her foot, thus also failing that test. No other field sobriety tests were conducted.[2] At this point the Defendant was placed under arrest and taken to Troop 2, where an intoxilyzer test was administered.

During the hearing on the instant Motion to Suppress, several corollary matters were brought to the Court's attention through the examination of Corporal Timmons. First, Corporal Timmons detected the Defendant spoke with an accent, but could not recall whether the Defendant advised English was not her native language. While counsel for the Defendant represented the Defendant was not born in the United States, the Court heard no testimony as to the Defendant's place of birth or proficiency with the English language.[3] Second, there was testimony regarding the (lack of) an MVR. Corporal Timmons testified to his understanding of

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[2] While Corporal Timmons did not conduct the HGN, and his testimony was silent as to the reason for not administering the HGN, Corporal Timmons did administer a PBT. However, the State abandoned any attempt to enter the PBT into evidence.

[3] The Court recognizes this would be difficult to accomplish without the Defendant taking the stand to testify. The decision not to testify is a tactical choice, which the Court recognizes and understands. However, the State established the Defendant spoke and understood English. If the Defendant wished to rebut this testimony, then it would be incumbent on the Defendant to produce evidence upon which the Court could rely. No such evidence was provided.

how the MVR system in his patrol vehicle works. Specifically, Corporal Timmons believes the system continually records, but only retains the most recent sixty seconds of footage; upon activation of the MVR, the prior sixty seconds then become part of the permanent recording.[4] According to Corporal Timmons, there are several ways in which the MVR begins recording – and permanently storing – footage. Two of those methods include activating the vehicle's emergency equipment and the officer pressing a button on his or her radio device. During his testimony, Corporal Timmons admitted he had made a conscious decision not to record the proceedings of his investigation. There was no conclusive testimony as to why Corporal Timmons made this decision.

PARTIES' CONTENTIONS

The Defendant argues three grounds for suppression. First, the Defendant argues the State is responsible for destroying or failing to preserve evidence in the form of the MVR. As the Court understands it, the argument is thus: the MVR recorded the entirety of the DUI investigation, albeit in a long string of individual segments that were overwritten by the subsequent recordings. Corporal Timmons knew the MVR was recording the investigation and, rather than act to preserve the recording, Corporal Timmons made the conscious decision to allow the buffer to clear and to permanently erase the temporary MVR data. This decision, according to the Defendant, constitutes an affirmative decision to destroy – or, at a minimum, fail to preserve – evidence.

Second, the Defendant argues Corporal Timmons was required to advise the Defendant of her *Miranda* rights prior to any questioning. Specifically, the Defendant argues *Miranda* is required when the facts transcend the "ordinary traffic stop." According to the Defendant, an

[4] The Court takes this to mean the recording device utilizes a sort of buffer, which constantly maintains the most recent sixty seconds of footage. Once the recording "begins," those sixty seconds of recording are moved from the buffer into permanent storage.

investigation into a motor vehicle accident and a DUI investigation are sufficiently beyond ordinary to necessitate *Miranda* warnings. Third and finally, the Defendant argues the walk-and-turn and one-leg stand tests were not conducted in accordance with NHTSA standards and, irrespective of whether the tests are considered, Corporal Timmons lacked probable cause to arrest the Defendant under suspicion of DUI.

The State argues there is no duty for an officer to create an MVR and, therefore, Corporal Timmons' decision not to record the investigation cannot be deemed a violation on the part of the State. Second, the State characterizes the Defendant's position with regard to *Miranda* as requiring the Court "to rule that, as soon as an officer smells alcohol emanating from a person during a traffic stop or car accident investigation, the Constitution requires that the officer give *Miranda* warnings before asking that person why they smell like alcohol." The State argues this ruling is inappropriately broad and not required under the jurisprudence applying *Miranda* to such investigations. Third, the State argues the field sobriety tests are admissible because they are merely personal observations of the officer and within the ken of the average layperson; based upon the totality of the circumstances, the State argues probable cause exists.

DISCUSSION

On a Motion to Suppress, the State bears the burden of proving the legality of the underlying stop and subsequent arrest by a preponderance of the evidence.[5] The standard for probable cause is well established:

> To establish probable cause for a DUI offense, an officer must possess "information which would warrant a reasonable [person] in believing that [such] a crime ha[s] been committed." Therefore, an officer must "present facts which suggest, when those facts are viewed under the totality of the circumstances, that there is a fair probability" that the defendant has committed a DUI offense.[6]

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[5] *State v. Anderson*, 2010 WL 4056130 at *3 (Del. Super. Oct. 14, 2010).
[6] *Slaney v. State*, 2016 WL 5946485, at *6 (Del. Super. Oct. 7, 2016) (citations omitted).

I. Failure to Preserve the MVR

The objection to the lack of an MVR is not novel to this Court. Delaware courts address such claims under the *Deberry* standard:

> 1) would the requested material, if extant in the possession of the State at the time of the defense request, have been subject to disclosure under Criminal Rule 16 or Brady [v. Maryland]?
> 2) if so, did the government have a duty to preserve the material?
> 3) if there was a duty to preserve, was the duty breached, and what consequences should flow from a breach?
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> The consequences that should flow from a breach of the duty to gather or preserve evidence are determined in accordance with a separate three-part analysis which considers:
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> 1) the degree of negligence or bad faith involved,
> 2) the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available, and
> 3) the sufficiency of the other evidence produced at the trial to sustain the conviction.[7]

On the first step, there is no question an MVR depiction of a DUI investigation would be subject to disclosure under Rule 16. The Court's primary concern is the second step, which asks whether the State had a duty to preserve the evidence. The Defendant has suggested Corporal Timmons did not merely fail to preserve the evidence, but rather, deliberately chose to destroy the evidence by affirmatively declining to activate the MVR.

Delaware courts have addressed issues of duty with respect to evidence obtained during the course of DUI investigations. The Superior Court has held there is no duty for the Delaware State Police to record all DUI investigations.[8] However, "[w]hile the State does not have an

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[7] *State v. Thomas*, 2016 WL 6820636, at *2 (Del. Com. Pl. Nov. 16, 2016) (citing *Johnson v. State*, 27 A.3d 541, 545-56 (Del. 2011)).
[8] *DeLoach v. State*, 2012 WL 2948188, at *4 (Del. Super. Jul. 16, 2012) (citations omitted).

affirmative duty to record all traffic stops, the State does have an obligation to preserve a recording in the event that the State successfully collects such evidence."[9]

The Superior Court has held there is "no duty to preserve evidence that [the State] failed to collect[.]"[10] Where there is no duty to create, there is no violation of *Deberry* for failure to preserve that which was not created. However, once evidence exists, it must be preserved only if there is a further duty of preservation.[11] Because the case law is clear in holding there is no duty to create an MVR, the question most often addressed by the Court is whether there was a duty to preserve an MVR. As noted, Delaware courts have found there is a duty to preserve an MVR once it is made, provided the MVR is likely to be probative.

Turning to the facts of this matter, there is an ambiguity as to whether the MVR may be said to have existed at any point during the DUI investigation. The Court did not hear any expert testimony on the inner workings of MVR systems; instead, the only testimony – which, for the purposes of the matter *sub judice*, the Court accepts as true and accurate – came from Corporal Timmons.[12] According to Corporal Timmons, the MVR system continuously records, but only retains the previous sixty seconds of recordings until the MVR is "activated," at which point the preceding sixty seconds become the beginning of the full recording. These temporary recordings are inherently transient, yet nevertheless exist in digital form.

The transient nature of the recordings present a significant distinction from prior case law on the preservation of evidence. Because the recordings exist only in temporary storage, it is inherently unknowable whether the State ever "successfully collected" the information. The Court has not heard any testimony suggesting these temporary recordings may be viewed

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[9] *State v. Wright*, 2014 WL 6693953, at *3 (Del. Com. Pl. Sep. 25, 2014).
[10] *DeLoach*, *supra*, at *4.
[11] *See State v. Noonan*, 2007 WL 1218032, at *2 (Del. Com. Pl. Jan. 31, 2007) (finding no duty to preserve field notes taken during DUI investigation).
[12] Corporal Timmons did not purport to be, and was not accepted as, an expert on the MVR system.

without transferring them into permanent storage. Therefore, it begs the question of whether the recordings can be said to exist, because there is no proof either way until the video is moved into permanent storage – at which point the recordings necessarily exist and must therefore be preserved.[13] It is the Defendant's burden to prove the MVR existed and was not preserved. Because the Defendant has failed to introduce actual proof of the existence of MVR recordings, the Court cannot, and will not, conclude the MVR in this matter existed to be preserved.

Furthermore, the Court is unaware of, and the parties have not provided, any guidance on what degree of permanency is required to implicate *Deberry*. Absent clear precedent on the matter, the Court turns to its common sense to resolve this issue. The fact of data being temporarily recorded in a digital medium is a reality of modern life. By way of example, an individual may type an email, yet never send the email. The email in this hypothetical would have existed in much the same form as the MVR – existing as pure data, but not received into any form of "permanent" storage. The transient nature of electronic data, when not kept in a form of "permanent" storage, presents a different factual scenario than a permanent, discrete, and accessible MVR.

As with statutory construction, this Court will not interpret precedent such as *Deberry* in a way "which would lead to unreasonable or absurd results."[14] Therefore, the Court finds that imposing an affirmative duty to move electronic data from a transient "buffer" to a permanent record would be impractical and absurd. Such a ruling would ultimately circumvent precedent holding the Delaware State Police lacks a duty to record traffic stops. Because the MVR system functions by continually capturing everything in the form of temporary recordings, any duty to

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[13] This problem is fundamentally similar to the experiment of Schrödinger's Cat. In the experiment, a cat is placed inside of a sealed box. While the box is closed, the cat can be considered to be simultaneously alive and dead. It is only when the box is opened and the cat is observed that the cat is known to be alive or dead. Here, the video may be said to both exist and not exist, and it is not until the video is observed is the answer known.

[14] *State v. Murray*, 2016 WL 561180, at *3 (Del. Super. Feb. 5, 2016) (citations omitted).

transfer the temporary recording into a permanent form would necessitate recording virtually every traffic stop. Accordingly, under the second prong of *Deberry*, the State did not have a duty to preserve whatever temporary recording may have existed.

Because the State did not breach a duty, the Court does not reach the remainder of the factors under *Deberry*. However, the Court will address one additional matter. At the hearing, Corporal Timmons acknowledged he had a working MVR, yet chose not to record. However, Corporal Timmons denied making a conscious decision to destroy data that had already been recorded. There was no testimony as to why Corporal Timmons decided he would not record the investigation.[15] The Defendant suggests Corporal Timmons intentionally destroyed data. The Court disagrees. At best, the Court is of the opinion Corporal Timmons did not feel the need to activate the MVR for a motor vehicle accident. Because there was no testimony as to whether Corporal Timmons decided not to record after the matter had turned into a DUI investigation, the Court cannot find Corporal Timmons acted in bad faith. Therefore, even if Corporal Timmons was obligated to preserve the MVR, it is unlikely the Court would order suppression on the basis of such a failure.

II. Failure to Give *Miranda* Warnings

Next, the Defendant argues she should have been given *Miranda* warnings prior to any questioning by Corporal Timmons. In *Berkemer v. McCarty*, the United States Supreme Court held routine traffic stops do not require *Miranda* warnings prior to questioning; *Miranda* is only required when the routine traffic stop results in the suspect being placed in custody.[16] The Defendant has argued a distinction between "routine traffic stops" and investigations of traffic

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[15] The Court notes Corporal Timmons testified the MVR would begin recording when his emergency lights were activated. However, there was no testimony as to whether his lights were activated and, if they were, whether he then decided – or was even able – to turn off the recording.

[16] *See Berkemer v. McCarty*, 468 U.S. 420 (1984)

accidents turned into DUI investigations, and buttresses this position through Corporal Timmons admitting such an occurrence was not "ordinary."

In *State v. McDowell*, the Superior Court recently analyzed a case where the officer began his contact with the defendant under the community caretaker exception.[17] The officer had assisted the defendant, who had run out of gas, and in doing so the officer developed reasonable articulable suspicion to begin a DUI investigation.[18] The officer detected an odor of alcohol, glassy eyes, and a flushed face, while the defendant also seemed confused during the encounter.[19] The Court specifically found the defendant was not in custody for the purposes of *Miranda*: "While a DUI investigation is more serious than an ordinary traffic stop it does not automatically rise to the level of custodial interrogation."[20]

In the case *sub judice*, Corporal Timmons was dispatched to the scene of a two-vehicle collision. After approaching the Defendant – who had rear-ended the other vehicle at a light – Corporal Timmons detected an odor of alcohol and bloodshot, glassy, and watery eyes. These facts warranted the initiation of a DUI investigation, but did not transform the encounter into one where the Defendant was unquestionably in custody. Absent additional facts, such as the use of handcuffs, force, significant police presence, or other circumstances where a reasonable person would not feel free to leave, the mere fact of an accident and a DUI investigation does not implicate *Miranda*.[21]

Lastly, the Defendant cites to *Fuentes v. State* to support the proposition "that where a motor vehicle accident is concerned (versus a "routine traffic stop") more protection should be

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[17] *State v. McDowell*, 2016 WL 6462143 (Del. Super. Oct. 31, 2016).
[18] *See id.* at *3.
[19] *See id.*
[20] *Id.* The Superior Court reached this conclusion after quoting and discussing *Loper v. State*, 8 A.3d 1169 (Del. 2010) and *Berkemer v. McCarty*, 468 U.S. 420 (1984), the latter of which was discussed by both the State and the Defendant in the briefs.
[21] *See Loper*, *supra*, at 1176.

afforded the Defendant[.]" The Court disagrees with this interpretation of *Fuentes*. On its face, *Fuentes* reinforces two statements of law: "*Miranda* warnings are not required in the "routine, initial, on-scene investigation by the police" at a crime scene" and "[i]nvestigation at the scene immediately following an accident is considered routine, initial investigation[.]"[22] While *Fuentes* does reference *Miranda's* concern with accusation and custodial interrogation, the Defendant does not cite to any precedent where an accident and an officer inquiring as to whether the suspect had been drinking was inadmissible under *Miranda*.

In *State v. Hernandez*, this Court applied *Fuentes* to suppress a statement when, during a DUI investigation, a defendant admitted to drinking earlier that evening, but had not been given the *Miranda* warnings.[23] However, the Court explicitly reached this ruling because it found the defendant was in custody at the point where he was forcibly removed from his vehicle and handcuffed. The Court did not hold *Miranda* was immediately applicable to the DUI investigation. Based upon the Court's interpretation of *Fuentes*, along with the Superior Court's guidance in *McDowell*, the Court does not find *Miranda* applicable under the facts of this case.

III. Probable Cause

As a preliminary matter, the Court affords little weight to the walk-and-turn and one-leg stand tests. While the Superior Court has repeatedly held field sobriety tests are not wholly invalidated by failure to strictly comply with NHTSA standards,[24] the Court "is free to disregard field tests when assessing whether probable cause exists if such tests were not conducted in accordance with NHTSA guidelines."[25] Of primary concern to the Court is Corporal Timmons' lack of testimony on the scientific principles underlying the field sobriety tests. While the Court

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[22] *Fuentes v. State*, 2002 WL 32071656, at *2 (Del. Super. Dec. 30, 2002) (citations omitted).
[23] *State v. Hernandez*, 2011 WL 2163419, at *6 (Del. Com. Pl. May 2, 2011).
[24] *See State v. Dale*, 2016 WL 691445, at *3 (Del. Super. Feb. 11, 2016).
[25] *State v. Iyer*, 2011 WL 976480, at *10 (Del. Super. Feb. 23, 2011).

may place some weight upon an officer's general observations of a defendant during the performance of such tests, as it may rely upon observations unrelated to a test, the true weight derives from the standardization and the scientific principles identified by NHTSA. Without testimony on the appropriate correlations between the clues and the likelihood of impairment, there is no scientific weight – only the weight of simple observation. Therefore, the Court assigns little weight to such tests.

Without an HGN, a PBT, or the other NHTSA tests, the Court is left with the following factors: a traffic accident, bloodshot, glassy, and watery eyes, an odor of alcohol, and an admission of drinking.[26] Of particular note is the accident; the Defendant rear-ended a vehicle while the other vehicle was stopped at an intersection. Furthermore, the Defendant stated she had not seen the vehicle prior to striking it, and did not know how the accident happened. These circumstances are significant.

In *Bease v. State*, the evidence suggesting impairment included rapid speech, an odor of alcohol, admission of drinking, bloodshot and glassy eyes, and a traffic violation.[27] Those facts are ultimately less significant than the facts implicated in the case at bar. The significance of the Defendant's statements concerning the accident, along with the accident itself, contribute far more weight than a mere traffic violation. Combined with the bloodshot, glassy, and watery eyes, the odor of alcohol, and the admission of drinking, the Court finds there is sufficient evidence to demonstrate probable cause.

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[26] While the Court recognizes the Defendant also failed the alphabet and counting tests, the Court does not find these failures to add any significant weight.

[27] *Bease v. State*, 884 A.2d 495, 499-500 (Del. 2005).

CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED** this 4th day of January, 2017, that Defendant's Motion to Suppress is **DENIED.** The matter will be scheduled for trial.

The Honorable Carl C. Danberg
Judge

cc: Diane Healy, Judicial Case Management Supervisor