October 6, 2004

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Re: State of Delaware v. Clifford W. Jacobs
Case No. 0310022057

LETTER OPINION

Date Submitted: September 29, 2004
Date Decided: October 6, 2004

Dear Counsel:

On Wednesday, September 29, 2004, a hearing was held in this Court on Defendant's Oral Motion to Suppress ("the Motion").[1] The limited articulated basis for the Motion by Defendant was the limited seizure of Defendant on the date, time and place set forth in the Information was unlawful. This is the Court's Final Decision and Order on Defendant's Motion. For the following reason the Court finds there was no reasonable articulable suspicion to stop the Defendant's motor vehicle on the date, time and place charged in the Information filed with the Clerk of the Court and therefore GRANTS Defendant's Motion to Suppress.[2]

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[1] Although the Defendant did not file a written Motion within ten (10) days of arraignment pursuant to Court of Common Pleas Criminal Rule 12(b)(3), the State took "no position" and the Motion was heard by consent.
[2] Defendant was charged by Information files with the Clerk of the Court by the Attorney General with two (2) counts, a violation of 21 *Del. C.* §4177(a) and one count 21 *Del. C.* §4347(e)

THE FACTS

Delaware State Police Trooper Scott D. Slover ("Slover") presented testimony at trial. He has been employed by Troop 2 for the past 1 ½ years and has been previously employed as a Delaware State Trooper for approximately 6 years. On October 14, 2003 he was serving in the Patrol Unit. Slover has completed the 40 hour DUI Detection Course at the Delaware State Police Academy and has a Bachelor's Degree in Accounting. He also has 40 hours of class work at the Delaware State Police. On the date charged in the Information October 14, 2003 at approximately midnight, he was performing traffic control and DUI detection on Delaware Route 7 in New Castle County, Delaware. Stover was in a fully marked Delaware State Police patrol vehicle and his attention was drawn to Defendant's motor vehicle in the area of Route 40 eastbound, west of Route 7. Slover identified the Defendant's motor vehicle as a Red Ford F150 Pick-up.

Slover noticed the Defendant's vehicle in the left turning lane for Route 7 northbound and proceeded directly behind the Defendant's motor vehicle. The light at Route 7 was red but then turned green and the Defendant's motor vehicle traveled through the intersection with a green arrow. Slover noticed no brake lights when the Defendant went through the intersection and observed the Defendant's motor vehicle traveling approximately 10 mph. The turning lane was approximately 200 feet in length.

Slover also did not see a left turn signal on Defendant's motor vehicle but agreed at trial that there was a green arrow to go northbound on Route 7. The Ford F150 driven by the defendant proceeded through the intersection with the green left turn arrow.

The Defendant then proceed on Route 7 and Slover then activated his emergency equipment and pulled the Defendant over. Slover proceeded to follow the Defendant for

approximately one quarter of a mile. The weather was clear, dry with no wind. Slover indicated that he smelled the odor of alcohol on the defendant.

On cross-examination Slover indicated his attention was drawn to Defendant's Ford F150 pick-up truck, but does not recall when he first observed Defendant's truck or when it allegedly passed him, or even what direction it came from.

Slover indicated that there was nothing in his Police Report regarding the Defendant's brake lights not working or whether Defendant's turn signal was working. Both factual basis for the stop, which Slover testified at trial are absent in the Police Report prepared by Slover as the factual basis for stopping the Defendants Ford F150 pick-up truck.

Slover also indicated that Defendant did not commit any motor vehicle violation such as swerving in or outside the marked roadway lanes. Slover also conceded that Defendant pulled to the shoulder in a timely fashion and came to a full stop. Slover agreed that a motor vehicle operator can use the gearshift to slow down the motor vehicle while lawfully proceeding through a green light causing the brake lights not to be activated.

On redirect examination Slover indicated Defendant's motor vehicle was traveling approximately 50 mph and his vehicle was traveling the same speed when he first noted the Ford F150 pick up truck.

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.

* * *

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

Defendant argues in his Motion to Suppress that the purported two factual basis set forth in the officer's oral testimony at trial, namely non-working brake lights, as well as failure to use a turn signal at a green arrow light do not appear in the Police Report detailing the traffic stop by

Slover. Defendant points out that the traffic stop occurred over one year ago and the officer did not articulate these two factual basis in his Police Report when the same was prepared. Nor was Defendant charged with a violation of Title 21 for "Failure to Use a Turn Signal." Defendant also asserts that the Defendant's motor vehicle was traveling in the lane without crossing the marked lines and was otherwise complying lawfully with other motor vehicle laws in Title 21 of the Delaware Code. The investigating Trooper did not observe any weaving by Defendant's pick-up truck. Defendant also had a green light which he proceed through lawfully with a green arrow. Defendant asserts that since the light was a green arrow and the Defendant's motor vehicle was traveling approximately 10 mph, there was no reason for the brake lights to activate, especially if gears were being used to control the speed of his Ford F150 pick-up. Hence, Defendant argues that there was no reasonable articulable suspicion set forth in the trial record for the stop of Defendant's motor vehicle.

The Court notes the argument of the Department of Justice that failure to use a turn signal and/or improper brakes could constitute a motor vehicle violation if the Court finds such violations in the trial record. However, the factual basis for the stop, which is a critical issue in this case, has not been articulated in the written report filed by the Trooper shortly after the traffic stop. Query, if the basis of the stop was as articulated at trial by the investigating Trooper, why were these factual basis contemporaneously articulated in the summary of the traffic stop in this Police Report? Slover conceded that if the defendant's motor vehicle had a left turn green arrow on the date and at the location charged in the Information and was proceeding through the intersection lawfully there could be no reason for the brake lights to activate. Corporal Slover also did not indicate in his Police Report prepared at the time of the incident that the Defendant failed to use a turn signal. No Information was filed with the Court Clerk by the Attorney

General alleging such a violation. The Court requested argument on the issue of whether Officer Slover actually saw or observed the lack of a turn signal or alternatively, whether Officer Slover simply could not recall actually seeing the Defendant use the turn signal at the green arrow light and the Defendant may have activated the same. The record is mixed with regard to the factual specificity at trial in this regard.

"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 Officer Slover 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 6th day of October, 2004

Sincerely,

cc: Theresa Sama,
Scheduling Supervisor