IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

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| STATE OF DELAWARE | ) | |
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| Plaintiff, | ) | |
| | ) | |
| v. | ) | C.A. No. 0402010505 |
| | ) | |
| ROBERT A. BOYER, | ) | |
| | ) | |
| Defendant. | ) | |

Submitted: October 25, 2006
Decided: June 8, 2007

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**ON DEFENDANT'S MOTION FOR REARGUMENT**

Defendant moves pursuant to Court of Common Pleas *Criminal Rule 47* for reargument of the Court's decision rendered on September 18, 2006, finding him guilty of making an Improper Lane Change in violation of *21 Del. C. § 4122* and Operating a Motor Vehicle While Under the Influence of Alcohol, in violation of *21 Del. C. § 4177*. However, the standard for analysis is under *CCP Civil rule 55(e)*.

A motion for reargument is the proper device for seeking reconsideration by the Court of its finding of facts, conclusions of law, or judgment after a non-jury trial. *Hessler, Inc. Farrell*, Del. Supr., 260 A.2d 701 (1969). However, such motion is not intended to reargue issues already decided by the Courts.

The State moves to dismiss the motion on the basis that it is not timely. The provisions of Court of Common Pleas *Civil Rule 59(e)* provide that a motion for reargument shall be served and filed within 5 days after the filing of the Court's opinion or decision. *Buoncuare v. State*, 2003 WL 22737741 (Del. Supr.). The Court issued its decision on September 18, 206 and the Motion was filed on October 12, 2006.

Counsel for defendant argues he was out of the country and did not receive notice of the Court's opinion until upon return. Thereafter, he took immediate steps to file this motion, thus he argues his action constitutes excusable neglect and the motion should be permitted to proceed. However, the language of *CCP Civil Rule 6(b)* "*Enlargement*", provides that the period of enlargement may be granted for excusable neglect, "but it may not extend the time for taking any action under Rule 50(b), 59(b), (d) and (e), 60(b) except to the extent and under the conditions stated in them." The language of *CCP Civil Rule 59(e)* does not permit the Court to extend the time for which a motion for reargument may be considered. *Dickens v. State*, 852 A.2d 907 (Del. Supr. 2004). In the *Dickens* case, the Supreme Court held that where the motion for reargument was untimely, the Court has no jurisdiction to consider it.

First, defendant argues that Court misapprehended the facts which directly bear on the intoxilyzer card issue. Defendant argues that when the Court held in its opinion of September 28, 2006 that there was a reprint of the intoxilyzer card, there is no evidence to support such conclusion. Defendant argues the intoxilyzer machine prints a single card with three flimsy carbonless forms attached to it. Therefore, the Court's reference that Corporal Butkus printed one card marked "Officer's card" and a second marked "subject's copy" it was in error.

Defendant's argument is misplaced and not supported by the testimony of Corporal Butkus. On *voir dire*, Corporal Butkus testified as follows:

> . . . There was a problem down at Troop 9 with subjects eating the Intoxilyzer card. So, once the Intoxilyzer card comes out of the printer, I secured it into my metal folder and reprinted the card, and gave the defendant the reprinted card, which I have the remaining copies attached to my golden rod ticket. *Transcript at 220.*

Clearly, the conclusion of the Court is supported by the evidence in the record. Thus, defendant's argument on this point lacks merit. Further, the reference that defendant argues that the Court refers to the reprint as a new feature does not address any of the issues in these proceedings. Whether it is a new feature or an old feature is of no consequence because it is a feature utilized in this matter which did not affect the outcome of the analysis.

Second, defendant further argues the Court's reference to the first card being the Officer's copy and the second being the subject's copy is further indication of the Court's failure to understand the facts. This argument fails to evaluate all of Corporal Butkus' testimony. He stated he gave the defendant the reprint card with subject

indicated thereon and kept the other parts in his records. He kept the first printed card and wrote on the document marked Officer's copy. *Transcript voir dire at p. 216-220*.

Thirdly, defendant argues the Court's reference that the cards were printed in rapid-fire succession fails to understand the procedure. First, defendant misreads the Court's opinion in that the Court never held the cards were so printed. The Court at page 11 held that "the Corporal's testimony and the Intoxilyzer result cards established that the cards were created contemporaneously." Defendant argues the machine is capable of reprinting the card minutes or hours after the printing of the first card, thus creating the potential for after created evidence. While one can make such an argument, it misrepresents the evidence in the record. Corporal Butkus testified, as noted above, that the second card was printed immediately after the first card with no intervening use of the machine. Thus, the potential for after created evidence is remote and nearly impossible, and I find lacks merit.

Defendant fourthly argues the Court's reference that the "Officer's copy" was provided to the defense in discovery indicates further misapprehension of the facts of how the intoxilyzer cards are created. He argues that the subject's copy of the card was missing at trial and never produced. Defendant's argument is accurate that the subject's copy of the first printed card was never produced. However, a copy of the card introduced into evidence was provided to the defense in discovery. I fail, as I stated during the trial, to see any prejudice when defendant had, long before trial, the document which the State relied upon to establish his blood alcohol content.

Defendant concludes his argument that the factual errors in the Court's opinion reveal a basic misapprehension of key facts surrounding the issue of the reliability of the intoxilyzer result for which the State relied at trial. Defendant goes on to argue that because the machine has the ability to reprint for hours with no intervening use, the probability of after created evidence is enhanced. This argument fails to take into consideration that the State never relied upon the second printed card at any point during trial. The only issue regarding the second card concerns notice to defendant of the twenty (20) minute observation and Officer's comments.

During oral argument, defendant advances a new theory for reconsideration of the Court's decision. Defendant argues the facts as testified by Corporal Butkus are impossible. He argues the Officer's version that he printed the second document to preserve the original copy to prevent the defendant from eating the subject's copy is not credible. Thus, defendant argues that the subject's copy which the defendant had does not have the 20-minute observation period stated thereon, create doubt. Especially since the Officer's copy does contain the officer's notes and indicates a 20-minute observation period. This is a valid argument because when first asked about the reading, Corporal Butkus testified all the copies were the same, but when showed the subject's copy, he testified he reprinted a card for which he did not write the 20-minute period. Defendant then argues that a more reasonable version is that after the Officer printed the card and realized he failed to indicate the 20-minute period, he later inserted the critical information. Therefore, defendant reasons that the invalidity of the State's position is further indicated by the State's failure to subsequently

produce the other parts of the second copy, if it existed. Thus, he concludes the State's position lacks credibility and believability. Finally, he argues the position of the State defies logic, even though he got a copy of the Officer's copy in discovery and was notice of the differences.

The State argues that this argument of defendant goes to credibility of the witness, which does not go to the misapprehension of facts, and is therefore not appropriate for this motion. The State further argues that the Officer's copy of the intoxilyzer was provided in discovery, so defendant was aware of both copies prior to trial.

If the Court were to adopt defendant's argument, the Court would have to conclude the Officer misrepresented the facts in his testimony, which I find no basis. Thus, I find no basis to alter the Court's decision because there is no reason to conclude the Officer was not truthful in his testimony. The procedure may be unusual, but it does not equate with being untruthful.

Accordingly, the defendant's motion for reargument is DENIED. The Clerk shall schedule the matter for sentencing.

SO ORDERED this 8th day of June, 2007

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Alex J. Smalls
Chief Judge

Boyer-OP Jun 07