

August 8, 2007

Matthew B. Frawley, Esquire  
Deputy Attorney General  
820 N. French Street  
7<sup>th</sup> Floor Criminal Division  
Wilmington, DE 19801

Thomas A. Foley, Esquire  
1326 King Street  
Wilmington, DE 19801

*Re: State of Delaware v. John J. Wicks*  
**Criminal Action No.: 0607015596**

**LETTER OPINION**

Dear Counsel:

On June 5, 2007 this Court issued a briefing schedule regarding the above captioned matter that was set for trial June 4, 2007 after a bifurcated hearing on Defendant's Motion to Suppress. The Court issued a briefing schedule in order for counsel of record to address two separate legal issues pending before the Court. The following is the Court's final decision and order in this matter on both issues.

**The Facts**

At the Motion to Suppress hearing, the defendant was charged with four alleged Title 21 traffic violations. First, John J. Wicks (the defendant) was charged by Information filed with the Clerk of the Court by the Attorney General that on July 8, 2006 he drove his motor vehicle Under the Influence of Alcohol or Drug in violation of Title 21, Section 4177(a) in New Castle County. Second, defendant was charged with Driving a Vehicle at Unreasonable or Imprudent Speed in the same location and county

in violation of Title 21, Section 4168(a). Third, defendant was charged with one count of Failure to Obey a Traffic Control Device purportedly in violation of Title 21, Section 4122(3) on the same date and location in New Castle County. Fourth, defendant was charged with Failure to Have Insurance Identification in Possession in violation of Title 21, Section 2118(p).

At the Motion to Suppress hearing, Corporal John Forester, (Officer Forester) testified that he has been employed by Troop 1 of the Delaware State Police in Penny Hill since 1999. He is an eight year veteran. He has training in DUI detection, NHTSA training, as well as training with the Delaware State Police Academy in DUI enforcement. Officer Forester is a certified DUI trainee for students and has been qualified to operate the HGN, one legged stand and other physical field coordination tests certified under NHTSA. States Exhibits 1 and 2 were moved into evidence without objection which are his certification cards.

On July 8, 2006 at 1:45 AM Officer Forester was on routine patrol in a marked police vehicle. He activated his overhead lights at Concord Pike north bound. He was on traffic patrol and observed a 2006 Infiniti FX3 near the Concord Mall area operating at a “high rate of speed”. Officer Forester testified he was traveling approximately forty-five to fifty miles per hour in the opposite direction of the defendant’s motor vehicle. He performed a u-turn on Concord Pike and traveled passed the Silverside Road and “caught up” with defendant’s motor vehicle. He stationed his patrol car approximately two hundred to three hundred feet behind the defendant’s motor vehicle. Officer Forester attempted to pace defendant’s motor vehicle with a speed of limit of forty five miles per hour but defendant’s motor vehicle appeared “to be going faster than the speed limit”.

Officer Forester activated his overhead lights in his police vehicle on his motor vehicle twenty to thirty feet away from the defendant. The defendant “went onto the shoulder” shortly before this activation. After his patrol vehicle’s overhead lights were turned on, and approximately one thousand feet away from Officer Forester, the defendant pulled his motor vehicle into the Charcoal Pit parking lot. Officer Forester approached the motor vehicle’s driver side and made the observations of defendant that he had a “strong odor of alcoholic beverage”; defendant’s eyes were “blood shot” as well as “glazy”. Officer Forester requested the defendant’s driver’s license, registration, and insurance card. The defendant could not produce an insurance card.

According to Officer Forester, there was “nothing abnormal” about the defendant’s retrieval of his registration and license. Officer Forester checked the accuracy of the documents in his patrol car and then re-approached defendant’s motor vehicle. He then set up his patrol car for field tests with the police video tape.

Officer Forester asked the defendant: Do you know why you are pulled over? The defendant explained “he had a new car” and he realized he was over the speed limit.

The defendant also made an admission he was coming from a bar and had “a couple of drinks”.

A video was shown of the defendant’s performance of the physical field coordination tests in the Charcoal Pit parking lot. The evidence was presented by the defendant who received the same in his Criminal Rule 16 discovery request. The police video depicted the defendant actually crossed over the white lines on Concord Pike and that it took approximately five to six seconds before the defendant stopped his motor vehicle in front of the Charcoal Pit.

The defendant was asked to perform some field tests and was also asked whether he had any weapons on his person.

The defendant told Officer Forester he had a “back problem”. He also had an implanted hip. The defendant was instructed to perform the alphabet from “E to U”. According to Officer Forester the defendant failed the alphabet test. Next, the defendant was asked to perform the finger to nose test. The defendant closed his eyes and leaned over against the side of the car. The defendant then told the officer “he did not want to do anymore field tests”.

The defendant was given a portable test. He told Officer Forester that he did not have dentures or false teeth but did have an implant in his mouth.

The defendant was administered and failed the portable breath test. (“PBT”)

Officer Forester also testified the defendant “slurred and mumbled his speech”.

At this juncture the Court ordered briefing the following. I. Is the defendant John J. Wicks entitled to a *DeBerry-Lolly* instruction regarding the State police video presented to the Court during the motion to suppress because although the tape was running it did not film completing the Field Physical Coordination Test administered at the scene following the stop of the defendant because the video was misaligned. The Court requested counsel to analyze the three step process in *DeBerry v. State*, 457 A.2d 744 (Del.1983).<sup>1</sup> The Court also requested counsel to address the applicability of the Best Evidence Rule, D.R.E. 1001 as detailed below and whether Officer Forester is barred from presenting oral testimony as secondary evidence if the police video tape constitutes the “best evidence” under the Best Evidence, Rule D.R.E. 1001.

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<sup>1</sup> Defendant’s Motion to Suppress alleges that the defendant performed “adequately on the field test” particularly given his age and medical conditions and believes the Motion to Suppress should be granted.

### Opinion and Order

The Court finds that a *DeBerry* analysis is not required under the facts of this case as this Court is not dealing with “lost” or “destroyed” physical evidence. The Court notes defendant received the police video tape of Officer Forester during his Criminal Rule 16 discovery request. The State did not present this video as evidence at trial, but instead, the defendant requested the Court review the same. The apparent dispositive legal issue before the court is that Officer Forester apparently misaligned the police video camera during the filming of the Field Coordination Tests. The issue is whether this misalignment constitutes “lost” or “destroyed” evidence triggering a *DeBerry* or *Lolly* Instruction. Officer Forester did not capture the defendant’s full performance of the Field Coordination Test outlined in the statement of facts above. The court finds on this record that this misalignment of the video is not “lost or destroyed evidence” under *DeBerry*.

In addition, there was not a scintilla of evidence at the Motion to Suppress that there was any bad faith on behalf of the investigating officer, Officer Forester in setting up the video. At best, this police video camera was misaligned because of its location in the Restaurant parking lot and the Court finds on this record that there was no active intent to conceal or destroy evidence. The Court finds the *DeBerry* analysis and the evidence and the case law cited to by the Court, *State of Delaware vs. David B. Shugard*, Del. CCP., Case No.: 0302017363, Beauregard, J. (June 21, 2005) is wholly inapplicable.

The Court also notes that following presentation of the video at the hearing that the video is still in the exact same condition the night the video film was taken of the defendant’s field coordination tests. Simply put, the in car video was never “lost” or “destroyed” but exists in the same exact condition. The Court notes that patrol officers

on highways operating on public streets have a duty to safeguard the defendant as well as their own personal safety in performing DUI stops and field coordination tests. This particular test was given in a restaurant parking lot in the evening hours. The Court finds Officer Forester did not breach his duty to the defendant, the public and himself. The misalignment of the video of defendants Field Coordination test is a separate issue, but bears on the Officer's duty to safeguard the public and was apparently misaligned when it was set up in the restaurant parking lot, not on a public street.

The court therefore does not need to reach the issue of applying the three prong test of *DeBerry* based upon this initial finding. The State has preserved the evidence in question.<sup>2</sup>

The instant case is different than the Court's findings on *State v. Shugard*, Case No.: 0302017363, CCP, Beauregard, J. (June 21, 2005). In *Shugard* Judge Beauregard found that the State's failure to preserve the video tape in the DUI case caused the defendant to be "severely prejudiced" by the lost evidence. In the instant case, no evidence was lost; it was gathered but because of a misalignment of the police video equipment, the defendant's field coordination test was not fully depicted.

Contrary to defendant's assertion, the court finds that the misalignment does not constituted gross negligence or "bordering on bad faith". No evidence was produced at

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<sup>2</sup> Arguendo, should the court perform the three step analysis under *DeBerry*, the Court finds that the evidence in question, the police video tape, was discoverable under Criminal Rule 16 and *Brady v. Maryland*. The Court also finds the State had a duty to preserve the police video tape which the State has done in this matter. Finally, under the third prong of *DeBerry* the state had the duty to preserve or gather the evidence. The Court so finds that there was no duty breached because of a simple misalignment of the police video tape. Nor was the video tape tampered with, lost, or inadvertently or intentionally damaged.

the Motion to Suppress hearing that the officer intentionally, or purposely, or negligently misaligned the camera in question.<sup>3</sup>

Counsel is free to argue at trial or at the Motion to Suppress hearing when it is continued or a trial under the reasonable doubt burden of proof what weight this court should give to the police video because the same was misaligned. 11 *Del.C.* §301.

II. Does Delaware Best Evidence Rule, D.R.E. 1001, require this court to consider the actual tape as documentary evidence, as “Best Evidence” prohibiting supplemental secondary evidence through oral testimony of Officer Forester?

The Court again notes that it has carefully reviewed the legal filings of counsel. As defendant has pointed out in his answering memorandum, the Best Evidence Rule, DRE 1001 works as follows: “if an article is a document, writing, or photograph, and the contents of the writing/photograph are at issue, then the State must produce an original or duplicate or if lost or destroyed through no bad faith, offer admissible secondary evidence”. See e.g. *Imwinkelried, Courtroom Criminal Evidence*, (3<sup>rd</sup> Edition 1998) §1501; D.R.E. 1001.

The Court finds wholly inapplicable the argument that a misaligned video tape of a defendant’s performance of a field coordination test violates the Best Evidence Rule. The original document or police video is before the Court and is not “lost” or “damaged”. The Court also finds that the misaligned video footage does not prohibit the investigating trooper in this case to offer oral testimony as secondary evidence on his actual observations of the defendant. As the court noted above, counsel is free to argue what weight the court should grant the video tape at trial. 11 *Del.C.* § 301.

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<sup>3</sup> The Court can consider the evidence following its ruling on the Motion to Suppress or at trial beyond a reasonable doubt. 11 *Del.C.* § 301.

Nor does counsel of record cite case law from any jurisdiction on point which would prohibit the oral testimony of Officer Forester because of the misalignment of the video camera.

**Conclusion**

Officer Forester may provide oral testimony as secondary evidence of the defendant's performance on the Field Coordination Tests at the Motion to Suppress hearing.

The matter should be scheduled for completion of the Motion to Suppress at Counsel's earliest convenience.

**IT IS SO ORDERED** this 8<sup>th</sup> day of August, 2007

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John K. Welch  
Judge

cc: Theresa Bleakly, Supervisor, Criminal Scheduling