

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

BRETT TRACY,)	
)	
Defendant-Below,)	
Appellant.)	
v.)	
)	I.D. No. 0905021449
STATE OF DELAWARE,)	
)	
Plaintiff-Below,)	
Appellee.)	

Date Submitted: July 18, 2011
Date Decided: October 10, 2011

OPINION

*On Appeal From a Decision of the Court of Common Pleas: **AFFIRMED***

John S. Malik, Esquire, 100 East 14th Street, Wilmington, DE 19801, Attorney for the Appellant, Brett Tracy.

Sonia Augusthy, Deputy Attorney General, Department of Justice, Carvel State Office Building, 820 N. French Street, Wilmington, DE 19801, Attorney for the Appellee, the State of Delaware.

Jurden, J.

I. NATURE AND STAGE OF THE PROCEEDINGS

Brett Tracy's appeal stems from his arrest on May 24, 2009 for Driving Under the Influence of Alcohol and/or Drugs ("DUI"),¹ Driving on the Wrong Side of the Roadway,² and Driving Without Proof of Insurance.³ On July 15, 2009, formal charges were filed via information against Tracy. Tracy pleaded not guilty to all three charges at his arraignment on July 29, 2009 in the Court of Common Pleas. After a bench trial on September 15, 2010, the Court of Common Pleas found Tracy guilty of DUI and Driving on the Wrong Side of the Roadway.⁴ On September 28, 2010, Tracy timely appealed the convictions, contending that insufficient evidence presented at his bench trial failed to support his convictions.

After consideration of the briefs and record on appeal, this Court finds that there is sufficient evidence to support the Trial Court's finding that Tracy violated 21 *Del. C.* § 4177 (a), and 21 *Del. C.* § 4114 (a). Thus, for the reasons explained below, the judgment of the Court of Common Pleas is **AFFIRMED**.

II. FACTS

On May 24, 2009, Kay Buchanan and her husband were driving on Naamans Road in Wilmington, Delaware, when they noticed an erratically driven car. It was approximately 3:45 p.m. Out of concern, Buchanan called 911, and described

¹ 21 *Del. C.* § 4177 (a).

² 21 *Del. C.* § 4114 (a).

³ 21 *Del. C.* § 2118 (p).

⁴ The State entered a *nolle prosequi* on the Driving Without Proof of Insurance charge prior to trial.

the car to the dispatcher as an older model, dark-colored sedan. Buchanan advised the dispatcher that she observed the car moving across multiple lanes, and feared that the car may hit someone.

At trial, Buchanan testified that she decided to follow the car so that the police could find it. While following the car, Buchanan observed the car make a wide turn on to Marsh Road. The car eventually stopped at the intersection of Silverside and Foulk Roads for a red light. Buchanan noted while she waited behind the car at the light that the driver's head tilted to one side, and despite the light turning green, the car remained still.

Eventually the car accelerated away from the intersection and turned into the parking lot of Silverside Medical Center. Buchanan followed the car and parked to wait for the police to arrive. Dispatch alerted Corporal Walker of the Delaware State Police about the situation. Before arriving, Dispatch kept Walker continually apprised of Buchanan's observations. Once Walker learned that the car was stopped in the Silverside Medical Center, he responded to the area and made contact with Buchanan.

After speaking with Buchanan, Walker approached the car.⁵ Walker testified that the engine was running, and Tracy had left the car in drive. Luckily, Tracy's foot remained on the brake as he slumped to his right in the driver's seat.

⁵ During his testimony Walker identified Tracy as the driver.

In an effort to “rouse” Tracy, pounded on the driver’s side window of the car for thirty to forty-five seconds. Walker observed when Tracy finally awoke from his slumber, he seemed confused. In that apparent confusion, Tracy took his foot off the brake. Tracy’s car jumped forward and struck the curb. Suspecting some sort of impairment, Walker explained to Tracy how to put the car in park.

With the car safely in park, Walker inquired multiple times whether Tracy had any medical conditions that would explain his unusual behavior. Tracy said he did not. Tracy exited his car, and Walker noticed that Tracy used the driver’s side door for support. Tracy’s lethargic demeanor, watery eyes, and constricted pupils raised Walker’s suspicions. Walker testified that based on his training and experience with individuals under the influence of alcohol or drugs, constricted pupils can be caused by numerous things. But, the most common cause is the use of drugs – illegal or not. Further questioning by Walker revealed that Tracy had recently taken Paxil, Seroquel, and Methadone. Consequently, Walker administered field sobriety tests.

Walker testified that he uses a field sobriety test for “[a]ny suspicion of any type of inability to perform normally . . . drugs, alcohol, it doesn’t matter.”⁶ First, Tracy successfully recited the alphabet. Next, Tracy failed in his attempt to count

⁶ Defendant’s Appendix at A-25.

backwards from 97 to 79 without error.⁷ After that, Tracy did the “walk and turn” test. Walker testified that he is trained to look for eight different clues during this test. If the individual taking the test exhibits two clues, it is a sign of impairment. Walker testified that the “walk and turn” is accurate 68% of the time that an individual has a blood alcohol reading above .10.⁸

Walker observed four clues during Tracy’s test: (1) Tracy missed the heel to toe; (2) Tracy stepped off the line; (3) Tracy did not perform the turn as instructed; and (4) Tracy could not maintain his balance.

Walker also subjected Tracy to a one-leg stand test. Not only did Tracy put his foot down several times, but he failed to complete the test. The one-leg stand test has four clues that an officer looks for to establish impairment. According to Walker, if an officer observes at least 2 clues, this test is 65% accurate in indicating an individual’s blood alcohol level is above .10.⁹ Walker also observed that Tracy could not touch the tip of his finger to the tip of his nose four separate times. Walker testified that he conducts a field sobriety test regardless of whether he suspects the individual is impaired by alcohol or drugs.

III. SUMMARY OF TRACY’S ARGUMENT

⁷ *Id.* at A-25-26. Tracy started with number 96, skipped 89 through 87, went to 70 from 80, and then said 71 and 79. (A-26).

⁸ *See id.* at A-30.

⁹ *See id.* at A-32.

On appeal, Tracy seeks to reverse the Trial Court’s finding of guilt. Tracy contends that insufficient evidence presented at his trial failed to support his convictions. Particularly, Tracy takes issue with the State’s presentation of its case-in-chief. Tracy argues that the State failed to meet its burden of proof by not offering any evidence at trial identifying him as the driver or the owner of a car that a witness observed driving erratically. Moreover, Tracy contends that the State failed to prove beyond a reasonable doubt that Tracy’s alleged lethargy and confusion were caused by prescription medication. The State counters that the evidence supports both contentions.

IV. STANDARD OF REVIEW

Title 11 Section 5301(c) of the Delaware Code provides the standard and scope of appellate review of criminal actions in the Delaware Court of Common Pleas.¹⁰ These appeals “shall be reviewed on the record and not tried *de novo*.”¹¹ As such, “in its review of appeals from Court of Common Pleas decisions, this Court sits as an intermediate appellate court.”¹² The Court’s purpose here is similar to that of the Supreme Court.¹³ Accordingly, this Court’s role on appeal is to “correct errors of law and to review the factual findings of the court below to

¹⁰ 11 *Del. C.* § 5301 (c): “From any order, rule, decision, judgment or sentence of the Court in a criminal action, the accused shall have the right of appeal to the Superior Court in and for the county wherein the information was filed as provided in § 28, article IV of the Constitution of the State. Such appeal to the Superior Court shall be reviewed on the record and shall not be tried *de novo*.”

¹¹ *Id.*

¹² *Bennefield v. State*, 2006 WL 258306, at *2 (Del. Super.) (citing *Disabatino v. State*, 808 A.2d 1216, 1220 (Del. Super. 2002)).

¹³ *Bennefield*, 2006 WL 258306, at *2.

determine if they are sufficiently supported by the record and are the product of an orderly and logical deductive process.”¹⁴

The Court does not apply the “beyond a reasonable doubt” standard of proof when reviewing an appeal of a conviction.¹⁵ Instead, the test on appeal “is not whether the defendant is guilty . . . beyond a reasonable doubt, but whether there is sufficient evidence to support the findings of the Trial Court.”¹⁶ This standard of review requires the Court to “defer to [the trial court’s] findings if any rational trier of fact could have found the evidence sufficient to establish the essential elements of the offense beyond a reasonable doubt.”¹⁷ Thus, “if substantial evidence exists for a finding of fact this Court must accept that ruling, as it must not make its own factual conclusions, weigh evidence, or make credibility determinations.”¹⁸ Contradictory findings of fact are only permissible “when the record below indicates that the trial judge’s findings are clearly wrong” and the Court “is convinced that a mistake has been made which, in justice, must be corrected.”¹⁹

V. DISCUSSION

Title 11 Section 4177(a)(2) provides that “[n]o person shall drive a vehicle . . . when the person is under the influence of any drug.” The State’s burden at trial

¹⁴ *Id.* (citing *Disabatino*, 808 A.2d at 1220)).

¹⁵ *Bennefield*, 2006 WL 258306, at *2.

¹⁶ *Id.* (citing *State v. Cagle*, 332 A.2d 140, 142 (Del. 1974)).

¹⁷ *Id.* (citing *Casey v. State*, 2000 WL 33179684, at *3 (Del. Super.) (internal quotation marks omitted)).

¹⁸ *Id.* (citing *Fiori v. State*, 2004 WL 1284205, at *1 (Del. Super.)).

¹⁹ *Id.*

meant that they had to prove beyond a reasonable doubt that Tracy drove a car at or about the time and place charged, and that Tracy was under the influence of a drug or drugs while he drove the car. Tracy argues that since Buchanan never identified him as the driver of the erratically driven car, and because the State did not provide a medical examiner's laboratory report to prove Tracy had prescription drugs in his system, the State failed to meet its burden.

A. Sufficient Evidence Exists in the Record to Support the Lower Court's Determination that Tracy was the Driver of the Erratically Driven Car.

The Trial Court's decision after Tracy's bench trial is not only sufficiently supported by the record below, but it is also clearly the result of an orderly and deductive process. The record shows that Walker received information from Buchanan concerning Tracy's actions. This is similar to *Guilfoil v. State*, where an unidentified employee of a supermarket called the police to report that a white male and female were hitting their child.²⁰ The employee suspected that the two were under the influence of alcohol.²¹ State Police were dispatched and received updates from the informant over their radio while responding to the area.²² The employee informed the police that the couple left the store, entered a green Subaru, and proceeded towards the exit of the parking lot.²³ The police were also provided

²⁰ 3 A.3d 1097 (Del. 2010) (TABLE).

²¹ *Id.* at *1.

²² *Id.*

²³ *Id.*

with the license plate number of the vehicle.²⁴ The responding officer encountered a white male and female driving a green station wagon towards the exit of the parking lot.²⁵ The officer stopped the car, and eventually performed field sobriety tests and administered a portable breath test on the defendant.²⁶ Subsequently, the officer arrested the driver of the green Subaru for DUI.²⁷ Before his trial, the defendant moved to suppress the evidence obtained as a result of the stop, arguing that the officer lacked the reasonable, articulable suspicion necessary to justify a stop.²⁸ The Trial Court denied the motion, and the Delaware Supreme Court agreed with its analysis.²⁹ The Delaware Supreme Court assessed whether the officer had a reasonable, articulable suspicion for the stop.³⁰ Tracy has not alleged an illegal stop in his appeal, but the Court finds the analysis in *Guilfoil* instructive with respect to whether the Court of Common Pleas' determination that Tracy was the driver of the erratically driven car on May 24, 2009 was "logical and deductive."

The Fourth Amendment to the United States Constitution³¹ and the Delaware Constitution³² protect Delaware citizens from unreasonable searches and

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at *1-2, 4.

³⁰ *Id.* at *2-4.

³¹ U.S. Const. amend. IV.

³² Del. Const. art. I, § 6.

seizures. *Terry v. Ohio* establishes that a police officer may conduct a brief investigatory stop of a person when there is a “reasonable articulable suspicion that criminal activity is afoot.”³³

When a police officer does not observe criminal actions prior to a stop, the Court “must decide whether the tip contained sufficient indicia of reliability to support a stop on the basis of the tip alone.”³⁴ In *Bloomingtondale v. State*, the Delaware Supreme Court stated that “a tip about readily observable criminal activity is more reliable than one concerning concealed criminal activity”³⁵

As in this case, the police in *Bloomingtondale* received a report of a possible drunk driver.³⁶ The make, model, color the car, and license plate number were provided, but the identity of source remained unknown.³⁷ The officer observed a car similar to the description, confirmed the license plate number, and stopped the car without observing any erratic driving.³⁸ Upon encountering the defendant, the officer suspected he had been drinking.³⁹ Thus, field sobriety tests were administered. After a poor performance, the officer arrested the defendant.⁴⁰ The Court held that the tip was sufficiently reliable to justify a stop. The Court in *Bloomingtondale* offered a variety of reasons: (1) tips reporting erratic driving are

³³ *Guilfoil*, 3 A.3d 1097 (citing *Illinois v. Wardlow*, 528 U.S. 119 (2000)).

³⁴ *Id.* (citing *Bloomingtondale v. State*, 842 A.2d 1212, 1219 (Del. 2004)).

³⁵ *Id.* (citing *Bloomingtondale*, 842 A.2d at 1220).

³⁶ *Bloomingtondale*, 842 A.2d at 1213.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

more reliable because the offense is carried out in public and easily observable; (2) tips reporting erratic driving are more reliable because they are made closer in time to the alleged illegal activity; (3) it is less likely that a tip that someone is driving erratically involves malicious intent on the part of the tipster; (4) the mobility of cars increases reliability if readily observable descriptive details are provided; and (5) the government's interest in quelling unsafe driving should be weighed against the "comparatively modest intrusion on individual liberty that a traffic stop entails."⁴¹

With respect to the fourth factor, the Court in *Bloomingtondale* noted that "[a]n officer . . . should be permitted to give greater credence to an anonymous report of unsafe driving when it is supported by: (a) the precise description of the vehicle; and (b) the officer's corroboration of the descriptive features of the vehicle and the location of its travel in close temporal proximity to when the report was made."⁴²

Here, Buchanan directly observed erratic driving by an individual in a dark colored sedan. Not only did Buchanan report this information, but she also waited near Tracy's car until the police arrived. For that reason, Buchanan's information is very reliable. Tracy makes much of the fact that Buchanan never provided the officer with his license plate number, and that she described the car as an "older model" even though it is a 2009 model. Under the facts here, even without that

⁴¹ *Id.* at 1219-21.

⁴² *Id.*

information, Walker observed a dark colored sedan with its engine running. Common sense dictates that Walker could determine which car to approach using deductive reasoning. In fact, in a situation such as this one, Walker could have approached every dark colored car in the parking lot.

Nothing in the record below indicates that the Court of Common Pleas did not engage in a logical and deductive process (much like Walker) to establish that Tracy was the driver of the dark colored sedan. Moreover, Walker identified Tracy as the driver while testifying, and thus, there is sufficient evidence to support the findings of the Trial Court.

B. Sufficient Evidence Exists in the Record to Establish Tracy’s Drug Impairment.

Tracy argues that the absence of tangible evidence in this case, i.e., blood tests and lab reports, to establish his drug use means that the State failed to prove beyond a reasonable doubt that he operated his car while under the influence of drugs. This Court, however, finds sufficient evidence in the record to support Tracy’s conviction.

Neither the Delaware Code, nor Delaware case law requires a “chemical test of blood, breath, or urine to determine the concentration or presence of alcohol or drugs” to convict someone for DUI.⁴³ In *Lefebvre v. State*, the State convicted the defendant for DUI without chemical testing despite the fact the defendant passed a

⁴³ See *Bennefield*, 2006 WL 258306, at *3 (citing 21 Del. C. § 4177(g)(2)).

finger dexterity test,⁴⁴ a walk-and-turn test, and a one-leg stand test.⁴⁵ According to the Delaware Code, “while under the influence” means that the “person is, because of alcohol or drugs or a combination of both, less able than the person would ordinarily have been, either mentally or physically, to exercise clear judgment, sufficient physical control, or due care in the driving of a vehicle.”⁴⁶ Hence, DUI convictions can be based solely on a police officer’s testimony concerning his observations of the defendant.

Here, Walker responded to a report of an erratic driver in a dark colored sedan. According to Walker, he banged on Tracy’s window for thirty to forty-five seconds to wake him up. Walker testified that Tracy appeared to be lethargic and disoriented once he was awake. Tracy relied upon the driver’s side door of his car for support while exiting the car. Then, Tracy failed three field sobriety tests.

C. Sufficient Evidence Exists in the Record to Support the Trial Court’s Decision to Convict Tracy for Driving on the Wrong Side of the Road.

On direct examination, Buchanan testified that she observed a car being driven erratically on Naaman’s Road. For the reasons stated above, it was reasonable for the Court of Common Pleas to infer that this car is the same car that

⁴⁴ This test involves taking one’s thumb and touching it to the tip of each finger while counting one, two, three, four, and then going back counting, four, three, two, one. Lefebvre did this twice with each hand.

⁴⁵ *Lefebvre v. State*, 19 A.3d 287, 291-92 (Del. 2011). Two other tests were conducted that Lefebvre failed, but the results were not considered because of mistakes in the administration of the tests. The first test, a horizontal gaze nystagmus test (“HGN”), was not conducted according to the standards of the National Highway Traffic Safety Administration (“NHTSA”) protocol. The officer compromised the second test, a portable breath test (“PBT”), by not following protocol when administering the test. Thus, both tests were not considered when determining whether probable cause to arrest had been established.

⁴⁶ *Lefebvre*, 19 A.3d 287 at 292 (citing 21 *Del. C.* § 4177(c)(5)).

Tracy was in when Walker approached. Therefore, Tracy's conviction for Driving on the Wrong Side of the Road is supported by the record.

VI. CONCLUSION

In sum, testimony elicited at trial established that a man: (1) in a dark colored sedan drove erratically; (2) appeared to fall asleep while waiting for a stop light to turn green; and (3) stopped in a parking lot. Walker's testimony established that: (1) he approached a running dark colored car; (2) pounded on the window to wake up the driver; and (3) observed a lethargic and disoriented Tracy exit the car. This testimony clearly establishes that Tracy exhibited less than an ordinary ability to "exercise clear judgment, sufficient physical control, or due care in the driving of a vehicle."⁴⁷ Therefore, the Court finds that there is sufficient evidence to support the findings of the Trial Court.

Accordingly, the decision of the Court of Common Pleas is **AFFIRMED**.

IT IS SO ORDERED.

Jan R. Jurden

cc: Prothonotary

⁴⁷ *Id.*