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

ANTOINE DeLOACH,	)	
Defendant-Below,	)	
Appellant	)	
v.	)	ID#1104015991PLA
STATE OF DELAWARE,	)	
Plaintiff-Below,	)	
Appellee		

Submitted: May 16, 2012
Decided: July 16, 2012

ON APPEAL FROM THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

AFFIRMED

Louis B. Ferrara, Esquire, Wilmington, Delaware, Attorney for Appellant-Defendant below.

Eric H. Zubrow, Esquire, Department of Justice, Wilmington, Delaware, Attorney for the State.

ABLEMAN, J.

This is an appeal from the February 14, 2012 conviction of defendant Antoine DeLoach ("Defendant") in the Court of Common Pleas. Following a bench trial, DeLoach was found guilty of Driving Under the Influence of Alcohol in violation of 21 *Del. C.* §4177(a). On appeal, DeLoach contends that he was entitled to a missing evidence instruction following the suppression hearing giving exculpatory weight to the unrecorded video footage of the portable Breathalyzer test. DeLoach also contends that the trial court erred by considering the results of his field sobriety tests, which he argues were illegally compelled.

Facts

Shortly before 6:00 a.m. on the morning of April 20, 2011, Larry Hamby reported to work at the Ferris School for Boys near the intersection of Route 141 and Faulkland Road in New Castle County, Delaware.[1] Hamby found the Route 141 entrance partially blocked by a vehicle driven by defendant Antoine DeLoach. The vehicle was stopped with the motor running and one wheel on top of the curb.[2] Hamby went to his office and returned in a State car to the illegally parked vehicle, where Hamby observed the driver of the car, who was alone in the vehicle,

[1] Trial Tr., Feb. 13, 2012, at 21.
[2] *Id.* at 22.

slumped over the center console and unresponsive.[3] Out of concern for the driver's safety, Hamby called 911 to report the incident.

Delaware State Police officers Brian Crisman and Jack Tsai were dispatched to a single-car accident on Route 141. Upon arriving first at the scene, Trooper Crisman observed a black GMC Yukon with its engine running and its right front wheel over the curb and on the grass. The right rear tire was flattened against the curb.[4] Trooper Crisman found Defendant unconscious in the driver's seat and roused him after three attempts. Upon awakening, Defendant recognized Crisman and said, "[h]ey, I know you, I shot with you." At that point, Trooper Crisman recognized Defendant as a fellow officer of the Delaware State Police.

At the suppression hearing that was conducted immediately before the trial of this matter, Trooper Crisman testified that he detected the odor of alcohol on Defendant's breath.[5] In response to Trooper Crisman's questioning, Defendant admitted that he had had "a few drinks" while out at a club the night before but declined to provide further information.[6] After this initial interview, Sgt. Tsai arrived and observed the Yukon's position against the curb. Trooper Crisman advised Sgt. Tsai that the driver of the car was an officer of the Delaware State Police and returned to his vehicle to verify Defendant's license and vehicle

[3] *Id.* at 23.
[4] *Id.* at 40-41.
[5] *Id.* at 43.
[6] *Id.*

registration information. In the meantime, Sgt. Tsai interviewed Defendant. According to Sgt. Tsai's trial testimony, Defendant told Sgt. Tsai that he was going to Lamont's to hook up with girls and got off the road to wait for a phone call because he didn't know how to get there.[7] Sgt. Tsai testified that Defendant refused to say how long he had been there and characterized Defendant's behavior during their interview as "evasive."[8] Sgt. Tsai also noted that Defendant mumbled and avoided eye contact during their interaction.[9]

Sgt. Tsai asked Defendant to exit the car and walked him around to see how it was positioned on the curb.[10] Sgt. Tsai then instructed Trooper Crisman to proceed with the investigation as he would with any other individual suspected of driving under the influence. Trooper Crisman proceeded to administer field sobriety tests. At trial, Defendant testified that he felt that the field sobriety tests were "something that I had to do because I was a state trooper."[11] On cross-examination, Defendant explained that his understanding was that he would have to submit to field sobriety testing as ordered by Sgt. Tsai or be subject to an internal affairs investigation and risk losing his job.[12] Defendant also admitted that

[7] Trial Tr., Feb. 14, 2012, at 45.
[8] *Id.* at 46.
[9] *Id.*
[10] *Id.* at 48.
[11] Trial Tr., Feb. 14, 2012, at 205.
[12] *Id.* at 212-13.

he was aware that, under Delaware law, a citizen of Delaware who is not employed by the State Police is not required to participate in field sobriety testing.[13]

Trooper Crisman first asked Defendant to recite the alphabet from the letters E to P. Defendant omitted the letters J, K, L, and M.[14] Next, Trooper Crisman asked Defendant to count backwards from 98 to 83. Defendant faltered on his first attempt but successfully completed the test on his second attempt.[15] Trooper Crisman then administered the horizontal gaze nystagmus (HGN) test, which measures impairment based on involuntary eye movements. Trooper Crisman concluded that Defendant exhibited six out of a possible six signs of impairment, which, according to National Highway Traffic Safety Administration standards, establishes a 77 percent probability that the individual's blood alcohol content exceeds 0.10.[16] Trooper Crisman also asked Defendant to perform the "walk and turn" test and the "one leg stand" test, which Defendant refused because he had had two knee surgeries.[17] Defendant then failed to perform the "finger to nose" test as instructed.[18] Based on Defendant's performance on the field sobriety tests, Trooper Crisman administered a portable breathalyzer test, calibrated to 0.08,

[13] *Id.* at 213.
[14] Trial Tr., Feb. 13, 2012, at 45.
[15] *Id.* at 47.
[16] *Id.* at 51.
[17] *Id.* at 52.
[18] *Id.* at 57-58.

which Defendant failed.[19] Trooper Crisman then placed Defendant under arrest for driving under the influence and transported him to Troop 6 for further testing. Blood testing taken just after 7:30 AM on April 20, 2011 established that Defendant's blood alcohol content at that time was 0.086.[20]

During the course of the investigation, Sgt. Tsai summoned Trooper Susan Carbine, also of Troop 6, to the scene to videotape the investigation because Trooper Crisman and Sgt. Tsai did not have the appropriate video recording equipment in their respective vehicles.[21] Sgt. Tsai ordered Trooper Carbine to report to Troop 6 and to insert a new tape into her mobile video recorder (MVR) before reporting to the scene of the investigation. Trooper Carbine arrived after the field sobriety tests had been completed but before Trooper Crisman administered the portable breathalyzer test. Trooper Carbine parked her vehicle some distance away from the investigation and recorded the administration of the breathalyzer test. Upon returning to the station, Sgt. Tsai placed the video into evidence and Lieutenant John Slank removed the video from storage for review later in the day on April 20, 2011.[22] When he reviewed the video, Lt. Slank found that the tape contained no visual footage of the investigation and only ambient road

[19] *Id.* at 57.
[20] Trial Tr., Feb. 14, 2012, at 348.
[21] *Id.* at 59.
[22] *Id.* at 8.

noise. No officer was able to provide an explanation for why the video failed to record as expected.

Defendant's Contentions

In his appeal of his conviction, DeLoach raises two arguments. First, he submits that the trial judge erred by failing to apply unambiguously a missing-evidence instruction giving exculpatory effect to the video of the administration of the portable breathalyzer test. DeLoach argues that he is entitled to such an instruction because he believes that the video evidence would have been helpful to him and because the police have provided no satisfactory explanation for the MVR's apparent failure to record.[23]

The defendant's second ground in this appeal is that the investigating officers at the scene compelled him to submit to field sobriety tests in violation of Delaware law. Defendant contends that he felt that he "had" to participate in the field sobriety testing in order to save his job and as such, his participation in the tests should not be considered voluntary.

Standard and Scope of Review

[23] Since this case was not tried to a jury, the Court assumes that Defendant is not claiming that the Judge should have given an instruction to himself, but rather that the Court should have given exculpatory weight to the fact that the evidence was missing.

In reviewing appeals from the Court of Common Pleas, this Court sits as an intermediate appellate court, and its function mirrors that of the Supreme Court.[24] As such, the Court has an obligation to correct errors of law and to review findings of fact "to determine if they are sufficiently supported by the record and are the product of an orderly and logical deductive process."[25] This Court is not permitted to make its own factual conclusions, weigh evidence, or make credibility determinations.[26] Questions of law are subject to *de novo* review, while questions of fact are reviewed under a "clearly erroneous" standard.[27]

Discussion

DeLoach first argues that the trial judge committed prejudicial error by failing to give exculpatory effect to the missing MVR video tape pursuant to *Deberry v. State*.[28] Specifically, DeLoach complains that it is "unclear" whether the trial court gave portable breathalyzer test exculpatory weight as DeLoach argues the court was required to do under *Deberry*. Under *Deberry* and its progeny, the Court is permitted to give a curative instruction to the jury regarding missing evidence where the State has breached a duty to preserve evidence.[29]

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[24] *See, e.g.*, *Baker v. Connell*, 488 A.2d 1303, 1309 (Del. 1985); *State v. Richards*, 1998 WL 732960, at *1 (Del. Super. May 28, 1998).
[25] *See, e.g.*, *J.S.F. Props., LLC v. McCann*, 2009 WL 1163494, at *1 (Del. Super. Apr. 30, 2009) (quoting *Disabatino v. State*, 808 A.2d 1216, 1220 (Del. Super. 2002)).
[26] *State v. Goodwin*, 2007 WL 2122142, at *2 (Del. Super. July 24, 2007).
[27] *J.S.F. Props, LLC*, 2009 WL 1163494, at *1.
[28] 457 A.2d 744 (Del. 1983).
[29] *Id.*

On appeal, a claim that the trial court improperly denied a missing evidence instruction is reviewed *de novo*.[30] In reviewing a claim that the State lost or destroyed exculpatory evidence, the Court must consider (1) whether the requested material would have been subject to disclosure under Criminal Rule 16 or *Brady v. Maryland*;[31] (2) if so, whether the government had a duty to preserve the material; and (3) if so, whether the State breached that duty and what consequences should flow from that breach.[32] The consequences of the breach are determined in accordance with the following three-part test, which considers:

> (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.[33]

If, under that analysis, the State fails to preserve evidence that is material to the defense, the defendant is entitled to a missing evidence instruction.[34] Where the State does not act negligently or in bad faith, however, and the missing evidence

[30] *McCrey v. State*, 941 A.2d 1019, 2008 WL 187947, at *2 (Del. Jan. 3, 2008) (TABLE).
[31] 373 U.S. 83 (1963). *Brady* requires the prosecution to turn over potentially exculpatory evidence to the defendant upon request.
[32] *Wainer v. State*, 869 A.2d 328, 2005 WL 535010, at *2 (Del. Feb. 15, 2005) (TABLE).
[33] *McCrey v. State*, 941 A.2d 1019, 2008 WL 187947, at *2 (Del. Jan. 3, 2008) (TABLE).
[34] Id.

does not substantially prejudice the defendant's case, a *Deberry* instruction is not necessary.[35]

At the suppression hearing, the trial judge concluded that he would reach the same conclusion regardless of whether or not he gave a curative instruction for the video of the portable breathalyzer test.[36] Upon review of the record in this case, the Court is satisfied that the court below did not commit legal error by failing to give clear exculpatory weight to the video footage of the breathalyzer test. First, there is no evidence that the State breached any duty to preserve a video recording of the portable breathalyzer test when it inadvertently failed to collect such a recording in the first place. Neither the State nor the defense have asserted that Delaware State Police have an affirmative duty to video record all driving under the influence investigations, nor have they directed the Court to any authority suggesting that such a duty exists. A defendant is not entitled to a *Deberry* instruction for a police officer's failure to preserve his field notes taken during a DUI stop.[37] Similarly, the Delaware Supreme Court held that a defendant was not entitled to a *Deberry* instruction where police had videotaped a strip search for the

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[35] *Id.* at *3; *see also Lunnon v. State*, 710 A.2d 197, 200-201 (Del. 1998) (holding that a missing evidence instruction was not necessary because the State did not act negligently or in bad faith in failing to preserve evidence and that the defendant was not substantially prejudiced by the missing evidence).

[36] *See* Trial Tr., Feb. 14, 2012, at 111 ("[T]here's enough independent evidence that the Court can make other determinations, so my determination would not change whether I use the *Deberry* or not in this case. I don't think this is a case where the type of evidence is that important.").

[37] *State v. Noonan*, 2007 WL 1218032, at *2-*3 (Del. Ct. Com. Pl. Jan. 31, 2007).

purpose of officer protection and the videotape was destroyed pursuant to administrative policy.[38] The Court could therefore conclude that the State had no duty to preserve evidence that it failed to collect, and thereupon end its inquiry regarding the missing evidence instruction.

Even assuming that there was such a duty, however, the Court is not convinced that any consequences should flow from the lack of video footage of the portable breathalyzer test. There is no evidence in the record of either bad faith or negligence on the State's part. Rather, it appears from the record that the officers involved in this investigation sought to make the video in an effort to be more cautious than necessary, and the MVR unit in Trooper Carbine's vehicle simply malfunctioned. Furthermore, as the trial judge noted, it is not certain that the missing video would have had significant probative value in this case, and the trial judge determined that the other available evidence, especially the testimony of Lawrence Hamby of the Ferris School for Boys, was reliable. Finally, as the trial judge correctly determined, there was ample other evidence available, including the position of Defendant's vehicle on the curb as described by Mr. Hamby, and the fact that Defendant failed the alphabet test, the "finger to nose" test, and the

[38] *Turner v. State*, 894 A.2d 407, 2006 WL 453247, at *2 (Del. Feb. 24, 2006) ("The videotape recording at issue here was made pursuant to an administrative procedure adopted for purposes of officer safety and for responding to complaints of police impropriety. The recording was not made with the purpose of gathering evidence for a criminal prosecution. There is no allegation of bad faith in this case. […] While there may be circumstances where a duty to preserve this kind of tape arises, the facts and circumstances of this case do not support that conclusion.").

HGN test, to support both a finding of probable cause and to sustain Defendant's conviction. As such, the Court finds no legal error in the analysis of the court below in failing to give clear exculpatory effect to the video of the portable breathalyzer test.

Defendant's second argument, that Sgt. Tsai and Trooper Crisman illegally compelled him to participate in field sobriety testing because of his status as a Delaware State Police officer, is without merit. *Laphen v. State*, a decision of the Court of Common Pleas, requires investigating officers to request, rather than demand, a suspect's participation in field sobriety testing.[39] Specifically, the *Laphen* decision prohibited police from suggesting that the suspect will be penalized for refusing to comply with the officer's request that the suspect submit to field sobriety testing. The *Laphen* court elaborated, "anything spoken, suggested or implied that changes a request into a demand or a claim of lawful authority, crosses the line of appropriate police conduct toward an as yet uncharged suspect."[40]

Here, the record does not support DeLoach's assertion that he was forced against his will to submit to field sobriety testing. Although DeLoach testified at trial that he felt like he "had" to agree to do the tests or risk facing an internal affairs investigation and possibly losing his job, he never suggested that either Sgt.

[39] *Laphen v. State*, Cr. A. #96-05-007101 (Del. Ct. Com. Pl. Dec. 23, 1996) (DiSabatino, C.J.).
[40] *Id.* at 3.

Tsai or Trooper Crisman threatened him with legal or penal consequences for refusing to do the testing. DeLoach further admitted that he knew, as a police officer, that citizens of the State of Delaware are not required to engage in field sobriety testing in the course of an investigation for driving under the influence. While the Court does not doubt that DeLoach felt significant pressure to submit to field sobriety testing at the order of one of his police superiors, the kind of personal pressure DeLoach experienced is not the type of coercive threat that converts the officers' request into a "display of lawful authority" for purposes of *Laphen*. Stated differently, the fact that DeLoach may have felt personal and professional pressure to submit to field sobriety testing does not mean that the officers compelled him in the legal sense to submit to field sobriety testing. As such, the Court finds no legal error in the trial court's conclusion that the *Laphen* decision does not apply to the facts of this case.

Conclusion

For all of the foregoing reasons, Appellant's conviction under 21 Del. C. §4177 is hereby **AFFIRMED**.

IT IS SO ORDERED.

/s/ Peggy L. Ableman
Peggy L. Ableman, Judge

Original to Prothonotary
cc: All counsel via File & Serve