IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Apellant,	)	
	)	ID No. 0904016108
v.	)	
	)	
RUSSELL W. STEWART,	)	
	)	
Defendant-Below	)	
Appellee.	)	

Submitted: December 10, 2011
Decided: January 31, 2011

On Appeal from The Court of Common Pleas
Of the State of Delaware
In and For New Castle County

MEMORANDUM OPINION

Paul R. Wallace, Esquire, Sonia Augusthy, Esquire, Department of Justice, Wilmington, Delaware, Attorneys for Appellant

Santino Ceccotti, Esquire, Wilmington, Delaware, Attorney for Appellee

JOHNSTON, J.

The State of Delaware has appealed the March 12, 2010 decision of the Court of Common Pleas. The decision granted defendant Russell Stewart's motion to suppress the evidence gathered by Delaware State Police Trooper Robert Downer during his encounter with defendant on April 19, 2009. As a result of that encounter, defendant was charged with Driving Under the Influence of Alcohol.

The State contends that the Court of Common Pleas' decision to grant defendant's motion to suppress constituted legal error.

FACTUAL AND PROCEDURAL CONTEXT

On April 19, 2009, Trooper Downer was dispatched to the Sunoco gas station located at 412 North 6th Street in Odessa, Delaware. A Sunoco employee reported that a man was sleeping in a vehicle.

Trooper Downer arrived at the Sunoco around 7:50 p.m. He noticed a grey Jeep Liberty with its engine running parked in front of the Sunoco entrance. Trooper Downer testified that there were two males in the vehicle, and defendant, the driver, was "slumped over, [and] he was kind of like nodding off to sleep and you could see he was trying to open his eyes and then he would kind of fade off."

Trooper Downer explained that he approached the vehicle to "contact [defendant] to make sure he's okay because honestly, I don't know at that

point." He approached the vehicle, and observed the passenger drinking a beer. When the passenger noticed Trooper Downer, he attempted to conceal the alcohol. Trooper Downer asked defendant if he was okay. Trooper Downer testified that defendant "kind of open[ed] his eyes, slowly open[ed] his eyes [and] look[ed] across" at him. Defendant's eyes were bloodshot and glassy. Defendant responded "yes" to the question—an answer that Trooper Downer described as "slurred [and] sleepy." Trooper Downer noticed an odor of alcohol emanating from the vehicle, and saw several empty beer cans behind the driver and passenger seats.

Trooper Downer explained that "all of those factors [] indicated that he had been drinking. Now, I wasn't positive, obviously, [] but it indicated something wasn't right." Trooper Downer asked defendant to step out of the vehicle. After determining that defendant appeared to be intoxicated, Trooper Downer arrested him. Defendant was charged with Driving Under the Influence of Alcohol.

On March 1, 2010, the Court of Common Pleas heard argument in consideration of defendant's motion to suppress. Defendant asserted that Trooper Downer lacked reasonable articulable suspicion to detain defendant. Additionally, defendant argued that the Community Caretaker Doctrine did not justify the detention. Defendant's counsel asked Trooper Downer if he

was "familiar with the Community Care doctrine."[1] Further, in his closing, defendant's counsel stated that Trooper Downer was "not familiar with the Community Care doctrine . . . [and] in this case [it] was very clear that [he] had a complaint of a sleeper, [he] did not have a complaint of an erratic driver or a medical emergency or a drinking driver."[2]

On March 12, 2010, the Court of Common Pleas granted defendant's motion to suppress. The court explained that the issue before it was whether Trooper Downer had reasonable suspicion to seize defendant by asking him to step out of the vehicle. The court concluded that Trooper Downer did not observe any violation of a criminal statute, and therefore, he had no justification to seize defendant.

Assuming, *arguendo*, there was a violation, the Court of Common Pleas found that the totality of circumstances did not amount to reasonable suspicion that defendant committed the violation. The court reasoned that Trooper Downer could "only realistically attribute the odor of alcohol to the vehicle as a whole and not specifically to the Defendant." The court asserted that Trooper Downer could not determine whether the empty beer cans had been recently consumed. Additionally, the court was not

[1] *State v. Stewart*, C.A. No. 0904016108, at 12 (Del. Com. Pl. Mar. 12, 2010) (TRANSCRIPT).
[2] *Id*. at 28.

convinced that Trooper Downer could characterize defendant's speech as slurred after he provided, as the court described it, a one-word response—"yes."[3] The court found that defendant's bloodshot, glassy eyes and slurred speech—if it was slurred, at all—may have been the result of defendant waking from sleep. The court indicated that it was Trooper Downer's responsibility to eliminate possible innocent explanations by questioning defendant, and by failing to do so, he did not have reasonable suspicion of criminal activity.

The court also addressed the Community Caretaker Doctrine. The court concluded that, because Trooper Downer was not familiar with the Community Caretaker Doctrine, it was of "no significance" to the motion to suppress.[4]

The State appeals the Court of Common Pleas's decision.

DISCUSSION

A. Standard of Review

The parties dispute the applicable standard of review. The State argues that the Court of Common Pleas made a legal determination, and therefore, the standard of review is *de novo*. Defendant responds that

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[3] The court noted that Trooper Downer testified that there was "a little more" to the conversation, but the court did not consider whether the additional conversation led him to believe that defendant's speech was slurred, because he could not recall any specifics.
[4] *State v. Stewart*, C.A. No. 0904016108, at 4 (Del. Com. Pl. Mar. 12, 2010).

determining whether an officer had reasonable suspicion is a question of fact, and therefore, the Court reviews for an abuse of discretion.

"The standard of review this Court applies when reviewing an appeal from the Court of Common Pleas is the same standard applied by the Delaware Supreme Court when reviewing an appeal from a decision of the Superior Court."[5] "A trial court's determination whether a peace officer possessed reasonable and articulable suspicion to detain an individual is an issue of law and fact."[6] A trial court's evidentiary analysis of a pretrial motion to suppress is reviewed for an abuse of discretion.[7] The "formulation and application of legal concepts to undisputed facts is reviewed *de novo*."[8]

Here, the facts are undisputed. Therefore, the Court reviews the Court of Common Pleas's decision to grant defendant's motion to suppress *de novo*.

<u>B. Reasonable Articulable Suspicion of Criminal Activity</u>

Parties' Contentions

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[5] *Ochoa v. State*, 2009 WL 2365651, at *2 (Del. Super.) (citing *State v. Cagle*, 332 A.2d 140 (Del. 1974)).
[6] *Jones v. State*, 745 A.2d 856, 860 (Del. 1999).
[7] *Virdin v. State*, 780 A.2d 1024, 1030 (Del. 2001) (citing *Seward v. State*, 723 A.2d 365, 370 (Del. 1999)).
[8] *Id*. (citing *Jones*, 745 A.2d at 860 (Del. 1999)).

The State argues that the totality of the circumstances amounted to reasonable suspicion that defendant was driving under the influence of alcohol, including: the phone call regarding defendant; defendant struggling to remain conscious; the passenger sipping and concealing a beer; the odor of alcohol emanating from the vehicle; the empty beer cans behind the driver and passenger seats; defendant's slurred speech; and defendant's bloodshot, glassy eyes. The State contends that the Court of Common Pleas focused on a possible innocent explanation for each fact, improperly discounting the probative value of the totality of the circumstances.

Defendant responds that Trooper Downer lacked individualized suspicion that he was intoxicated. Defendant asserts that Trooper Downer improperly imputed to defendant circumstances suggesting that the passenger was intoxicated. Additionally, defendant contends that Trooper Downer lacked reasonable suspicion that defendant was intoxicated because Downer did not question defendant as to whether he had been drinking, and instead, relied on a hunch.

Analysis

The 4th Amendment to the United States Constitution and Article I, Section 6 of the Delaware Constitution protect individuals from

unreasonable seizures of their persons and effects. In *Terry v. Ohio*,[9] the United States Supreme Court held that a police officer may seize an individual for investigatory purposes if the detention is supported by "a reasonable and articulable suspicion of criminal activity."[10] The Supreme Court defined the standard as the ability to "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion."[11]

The Court finds that the Court of Common Pleas erred as a matter of law by holding that the totality of the circumstances, based upon undisputed facts, did not amount to reasonable articulable suspicion that defendant was driving under the influence of alcohol. There were several circumstances that aroused Trooper Downer's suspicion: a Sunoco employee reported that a man was sleeping in a vehicle; defendant "slumped over . . . nodding off to sleep . . ." in the driver's seat of a vehicle with its engine running; the passenger drinking a beer and subsequently attempting to conceal it; the odor of alcohol emanating from the vehicle; the numerous empty beer cans behind the driver and passenger seats of the vehicle; defendant's slurred speech; and defendant's bloodshot and glassy eyes. Because the totality of

[9] 392 U.S. 1 (1968).
[10] *Id*. at 21.
[11] *Id*.

these circumstances created reasonable articulable suspicion that defendant was driving under the influence of alcohol, Trooper Downer's detention of defendant was justified.

The Court of Common Pleas erred as a matter of law by discounting the probative value of the totality of the circumstances by focusing on a possible innocent explanation for each fact. Further, the court erred as a matter of law by requiring Trooper Downer to negate possible innocent explanations to establish reasonable suspicion. In *Maxwell v. State*,[12] the Delaware Supreme Court held that the "possibility that there may be a hypothetically innocent explanation for each of several facts revealed during the course of an investigation does not preclude a determination that probable cause exists for an arrest."[13] "A finding of probable cause does not require the police to uncover information sufficient to prove a suspect's guilt beyond a reasonable doubt or even to prove that guilt is more likely than not."[14] The Court's reasoning in *Maxwell* applies to an officer's determination that reasonable suspicion exists for a detention. In *Moore v. State*,[15] the Delaware Supreme Court held that a "determination that

[12] 624 A.2d 926 (Del. 1993).
[13] *Id*. at 930 (citing *Jarvis v. State*, 600 A.2d 38, 41-42 (Del. 2001)).
[14] *Id*. at 929-30.
[15] 997 A.2d 656 (Del. 2010).

reasonable suspicion exists . . . need not rule out the possibility of innocent conduct."[16]

The Court of Common Pleas determined that it may have been only the passenger who consumed alcohol, the empty beer cans may have been consumed at an earlier date and time, and defendant's slurred speech and bloodshot, glassy eyes may have been caused by defendant waking up from sleep. Indeed, these justifications are conceivable and perhaps, reasonable. However, these possible innocent explanations do not preclude a determination that reasonable suspicion for a detention existed. Trooper Downer was not obligated to question defendant in an effort to eliminate possible innocent explanations that may have justified defendant's conduct.

Finally, in arriving at its conclusion that Trooper Downer lacked reasonable suspicion, the Court of Common Pleas erred as a matter of law by considering whether Trooper Downer *actually* observed a violation of a criminal statute. The court held that Trooper Downer did not observe a violation of a criminal statute, and therefore, he lacked reasonable suspicion of criminal activity. The proper analytical framework was for the Court to determine whether Trooper Downer had reasonable suspicion that defendant was engaged in criminal activity. It is not a prerequisite to detention that a

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[16] *Id*. at 667 (quoting *United States v. Arzivu*, 534 U.S. 266, 277 (2002)); *see also Illinois v. Wardlow*, 528 U.S. 119, 125 (2000).

law enforcement officer personally observe a crime in progress. An officer may have reasonable suspicion that an individual is engaged in criminal activity even if, as it later turns out, that individual did not violate a criminal statute. The salient question is whether the totality of the circumstances demonstrates a reasonable articulable suspicion that a crime "had just been, was being, or was about to be committed."[17] A reasonable articulable suspicion must be based on specific and articulable facts, together with rational inferences drawn from those facts.[18]

Further, defendant's conduct—sitting in the driver's seat of a vehicle with its engine running, intoxicated and asleep—*could* indeed be criminal activity in and of itself. Specifically, assuming that defendant was intoxicated, sleeping in the driver's seat of a running vehicle could be considered "driving" pursuant to 21 *Del. C.* § 4177, the criminal statute governing driving under the influence of alcohol.

Section 4177(a) provides, in pertinent part: "No person shall drive a vehicle . . . [w]hen the person is under the influence of alcohol." Section 4177(c)(3) defines "drive" as "driving, operating, or having actual physical

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[17] *Backus v. State*, 845 A.2d 515, 517 (Del. 2004) (quoting *Robertson v. State*, 596 A.2d 1345, 1350 (Del. 1991)).
[18] *Backus*, 845 A.2d at 1350.

control of a vehicle." In *Bodner v. State*,[19] the Delaware Supreme Court explained that "drive, operate, and actual physical control[] are not synonymous, but define different physical actions."[20] The Court cited *McDuell v. State*,[21] in which it described "drive" and "operate":

> The words "operating" and "driving" are not synonymous; they have well-recognized statutory distinctions. Of the two terms, the latter is generally accorded a more limited meaning. The term "driving" is generally used to mean . . . steering and controlling a vehicle while in motion; the term "operating . . ." is generally given a broader meaning to include starting the engine or manipulating the mechanical or electrical devices of a standing vehicle.[22]

The *McDuell* Court reasserted the definition of "actual physical control" that it crafted in *State v. Purcell*[23]: "exclusive physical power and present ability to operate, move, park or direct whatever use or non-use was to be made of the motor vehicle at the moment."[24] Further, the Court supplemented its definition with a jury instruction:

> . . . In considering whether or not the defendant was in physical control of the motor vehicle while under the influence of alcohol, you may consider defendant's location in or by the vehicle, the location of the ignition keys, whether the defendant had been a passenger in the vehicle before it came to rest, who owned the vehicle, the extent to which the vehicle was operable, and if inoperable, whether the vehicle might have

[19] 752 A.2d 1169 (Del. 2000).
[20] *Id*. at 1172.
[21] 231 A.2d 265 (Del. 1967).
[22] *Id*. at 267.
[23] 336 A.2d 223, 225 (Del. 1975)
[24] *Bodner*, 752 A.2d 1169, 1172.

> been rendered operable without too much difficultly so as to be a danger to persons or property. You may consider these as well as any other facts or circumstances bearing on whether or not the defendant was then in physical control of a motor vehicle which was or reasonably could become a danger to persons or property while the defendant was under the influence of alcohol.[25]

Based on the Delaware Supreme Court's definition of "actual physical control," there is probable cause to believe that defendant violated Section 4177. The facts indicate that defendant probably had the "present ability to operate, move, park or direct whatever use or non-use was to be made of the motor vehicle at the moment," behavior consistent with the definition of "drive" in Section 4177.

C. The Community Caretaker Doctrine

Parties' Contentions

Defendant argues that the State did not fairly present the Community Caretaker Doctrine to the Court of Common Pleas, and therefore, it waived the argument on appeal. The State responds that the issue was not only presented to the court during argument, but the court addressed the issue in its written decision. Therefore, the State contends, the Community Caretaker Doctrine was fairly presented to the court.

Analysis

[25] *Id*. at 1174 (*accord State v. Starfield*, 481 N.W.2d 834 (Minn. 1992)).

Supreme Court Rule 8 provides, in pertinent part, that "[o]nly questions fairly presented to the trial court may be presented for review . . .." In *Wainwright v. State*,[26] the Delaware Supreme Court explained that "in the exercise of its appellate authority, [it] will generally decline to review contentions not raised below and not fairly presented to the trial court for decision."[27]

There is not, however, a Superior Court Rule of Criminal Procedure that governs the issue of waiver when this Court exercises its appellate jurisdiction.[28] Therefore, the Court analyzes whether the State has waived its right to present the Community Caretaker Doctrine according to Supreme Court Rule 8.

The Court finds that the State fairly presented the Community Caretaker Doctrine. Defendant's counsel raised the issue at the March 1, 2010 argument during his cross-examination of Trooper Downer and closing argument, and the Court of Common Pleas addressed it in its written decision.

CONCLUSION

[26] 504 A.2d 1096 (Del. 1986).
[27] *Id*. at 1100.
[28] Additionally, there is not a Superior Court Rule of Civil Procedure that addresses waiver which would apply by analogy.

Defendant was properly detained upon reasonable articulable suspicion that he was driving under the influence of alcohol. The Court of Common Pleas erred as a matter of law: by determining that the totality of the circumstances, demonstrated by undisputed facts, did not amount to reasonable articulable suspicion; by discounting the probative value of the totality of the circumstances by focusing on a possible innocent explanation for each factor; and by concluding that Trooper Downer did not have reasonable suspicion because defendant did not actually violate a criminal statute. Because the Community Caretaker Doctrine was fairly presented to the Court of Common Pleas, the State did not waive its right to present the issue on appeal.

THEREFORE, the Court of Common Pleas's decision to grant Defendant's Motion to Suppress is hereby **REVERSED AND REMANDED** for further proceedings consistent with this opinion.

The State also argues that the Community Caretaker Doctrine justifies Trooper Downer's detention of defendant. Because the Court concludes that Trooper Downer had reasonable articulable suspicion to detain defendant, the Court need not resolve the issue at this juncture.

IT IS SO ORDERED.

/s/ *Mary M. Johnston*

The Honorable Mary M. Johnston