SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

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Re: State of Delaware v. Milin M. Iyer
ID No. 0904004949

Submitted: November 30, 2010
Decided: February 23, 2011

On State's Appeal from a Decision of the Court of Common Pleas
Granting Defendant's Motion to Suppress.
REVERSED AND REMANDED.

Dear Counsel:

INTRODUCTION

The State has appealed a decision of the Court of Common Pleas granting Defendant-Below Milin M. Iyer's ("Defendant") motion to suppress the results of an Intoxilyzer test in a prosecution in that Court for Driving

Under the Influence. At bottom, this appeal requires a legal determination of whether, in the absence of admissible field test results, Defendant's watery and glassy eyes, odor of alcohol, admission to consuming alcohol prior to the accident, and involvement in a single vehicle accident are facts that were sufficient to establish probable cause to take Defendant into custody for the completion of the Intoxilyzer test.

In resolving this issue, the Court must first determine the applicable standard of review for a State's appeal from a Court of Common Pleas determination on the issue of probable cause. This Court concludes that this appeal must be reviewed pursuant to a two-fold standard of review, in which 1) the factual determinations of the Court of Common Pleas are reviewed for an abuse of discretion and will not be overturned unless clearly erroneous, and 2) the legal determinations of the Court of Common Pleas relating to probable cause are reviewed *de novo*. Given this standard, the Court views the facts with deference to the findings of the Court of Common Pleas; at the same time, the standard of review does not entail this Court viewing the facts or the evidence in a light most favorable to either party. Nonetheless, when asserting the existence of probable cause, the State is not required to disprove any putative innocent explanations proffered by a defendant, notwithstanding the lower court's apparent reliance on the fact that the State had not disproved the possibility that Defendant may have consumed alcohol after the accident. Instead, consistent with Delaware case precedent, the standard for probable cause continues to require only a fair probability, under the totality of the circumstances, that a crime has been committed.

In light of the law, the facts of this case, and the parties' submissions, this Court accepts the factual findings of the Court of Common Pleas, but holds that the Court of Common Pleas erroneously determined that probable cause was not extant in this case. Accordingly, the decision of the Court of Common Pleas is **REVERSED** and this case is remanded for proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from a single vehicle accident on March 22, 2009 in which Defendant overturned his Acura sedan in the middle of a roadway.[1] Corporal Michael Santos of the New Castle County Police Department approached Defendant after the accident and later testified at the suppression hearing that Defendant was cooperative and was not injured.[2] Corporal Santos testified that, at that time, he "detect[ed] an odor of alcohol emanating from [Defendant's] breath;" Corporal Santos described the odor as "moderate."[3] Corporal Santos testified that he then asked Defendant if he had been drinking, and Defendant replied that he had indeed been drinking while out with friends at Pike Creek several hours earlier that evening.[4] Corporal Santos stated that Defendant "was easily understandable, his speech was not slurred" but "his eyes were a little watery and glassy."[5] Corporal Santos further testified that, while Defendant's clothes were "orderly," Defendant's eyes were "[w]atery, glassy, maybe a little bit bloodshot;" Corporal Santos qualified these observations by noting that "there was no ambient light other than what was provided by the fire department vehicles right there."[6] Corporal Santos stated that Defendant told him that he left his lane of travel to avoid striking another vehicle, and this caused him to lose control of the vehicle.[7] However, Corporal Santos also testified that he believed that Defendant's "[f]ailure to negotiate [the] slight bend in the roadway. . .possibly speed, and impairment" caused the accident.[8]

Based on Corporal Santos' observations of Defendant, he decided to administer "SFST's" [standard field sobriety tests].[9] The first test was the Horizontal Gaze Nystagmus [HGN] test, in which Defendant was requested to follow Corporal Santos' pen with his eyes; the pen was placed "about six to

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[1] Transcript of Nonjury Trial of April 14, 2010 at 20-22 [hereinafter "Tr. at ___]. After overturning, "the majority [of Defendant's vehicle was] in the proper lane of travel but [the] tail of the vehicle [was] partially in the opposing lane of travel." *Id.* at 24-25.
[2] *Id.* at 23.
[3] *Id.* at 26.
[4] *Id.* at 62-63.
[5] *Id.* at 26.
[6] *Id.* at 27.
[7] *Id.*
[8] *Id.* at 85.
[9] *Id.*

eight inches away from [Defendant's] face. . . ."[10] Corporal Santos testified that he observed six "clues" indicative of impairment; according to Corporal Santos, four "clues" is considered impairment.[11]

There was significant dispute in the court below and in the papers filed in connection with this appeal as to whether this test was administered properly; Defendant asserts that, under the National Highway Traffic Safety Administration [NHTSA] guidelines, Corporal Santos was required to hold the pen twelve to fifteen inches from Defendant's face, rather than the six to eight inches the pen was actually held from Defendant's face.[12] During the course of the hearing, the Court determined that it would hear Corporal Santos' testimony on the HGN test only for purposes of establishing Corporal Santos' observations; the Court would not consider the HGN test for expert purposes because of the admitted deviation from the NHTSA guidelines with respect to the distance the pen was held from Defendant's face.[13]

Corporal Santos testified that he then asked Defendant to perform the "walk and turn" test.[14] This test required Defendant to stand "motionless, feet side by side, arms down by [his] side" an walk "heel to toe" in a straight manner for nine steps, then turn clockwise and return nine steps.[15] Corporal Santos testified that there are eight "clues" for impairment in the "walk and turn" test, and an individual is considered to have failed the "walk and turn" if two such clues are observed.[16] Corporal Santos stated that Defendant exhibited six "clues," as follows:

> He started to walk-my initial thing was he started to walk prematurely, not following my directions. He failed to properly touch the heel of his foot that moved forward in front of the one foot to the toe that's already on the ground. He stepped off line of the imaginary line that I told him to visualize, and I guess to maintain some sort of balance in staying on line he raised his arms a little bit. He actually took ten steps and he did properly turn clockwise.[17]

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[10] *Id.* at 31-34.
[11] *Id.* at 39.
[12] *Id.* at 36
[13] *Id.* at 37-38.
[14] *Id.* at 40.
[15] *Id.* at 41.
[16] *Id.* at 42.
[17] *Id.* at 43.

Corporal Santos testified that he next administered the "one-legged stand" test, in which Defendant was to stand with his arms by his side and "pick up either foot, whatever foot he wanted to pick up and extend it out above the ground in front of him about six inches."[18] According to Corporal Santos, there are four clues of impairment with this test, and the existence of two clues is an indication of impairment.[19] Corporal Santos testified that "as [Defendant] was standing there, the first ten seconds he swayed, would raise his arms to maintain his balance and he placed his foot, placed his foot down, I guess, to maintain that balance;" this behavior demonstrated three "clues" for impairment.[20]

On cross examination, Corporal Santos testified that he did not know whether or not Defendant consumed alcohol from the time of the accident until the time the police responded to the accident.[21] Equally, however, Corporal Santos testified that he did not find any alcoholic beverages on Defendant's person or near Defendant's car, nor did Defendant state at any time that he had consumed alcohol after the accident.[22]

Corporal Santos testified that, at that time, he advised Defendant that he suspected Defendant may be under the influence of alcohol and asked if Defendant would submit to a preliminary breathalyzer test ("PBT").[23] Without testifying as to the numerical result of the PBT, Corporal Santos testified that the PBT indicated that Defendant was impaired.[24] Consequently, Defendant was advised that he was being taken into custody and transported to police headquarters for the Intoxilyzer test.[25]

In granting Defendant's motion to suppress evidence, the Court of Common Pleas held as follows:

> The facts in the record indicate that Officer Santos was dispatched to an accident on Millcreek Road which is now described as a secondary road that lacked businesses or significant traffic in the early morning hours. There is no testimony in the record as to

[18] *Id.* at 44-45.
[19] *Id.* at 46.
[20] *Id.*
[21] *Id.* at 83.
[22] *Id.* at 85.
[23] *Id.* at 47.
[24] *Id.* at 48.
[25] *Id.* at 49.

when the accident occurred or how long it took to report the accident.

The State argues that the Court should focus on the type of accident and the nature of the accident for the basis that that enhances, at least an indication, that the defendant may have been impaired and a finding of probable cause looking at the physical observation.

The State also points to the fact that there are several field tests which was administered by the officer notwithstanding there are indications that the test had failed to comply strictly with the NHTSA standards. As I have stated before, no Court in this jurisdiction have concluded that a failure to strictly comply with NHTSA invalidate the test. But, there is sufficient case law that says that the weight and the value to be given to the test is for the fact finder and whether that test had been administered in accordance with the NHTSA standard.

Here the State relies upon the HGN test. The officer testified that on balance he is now aware that NHTSA requires that the stimulus be placed twelve to fifteen inches but he used six to eight. I am not certain what that does with the test but I'm certain that NHTSA would not have included that it needed twelve to fifteen without some reliable data. So, in the absence of the performance of the deviation of the test I find that there's no value to the HGN test.

The officer testified that he administered the walk and turn and that he cannot point to any significant gap in the walk and turn or he did not take notice of the amount or length of the gap. NHTSA permits one half inch, an inch of the walk and turn, there's no indication that he, in fact, gave that any consideration, therefore I give no value to the walk and turn test.

On the balance test, he indicated that he was swaying but there is no indication when the swaying or how much time or how far he placed his hands for balance so that test is given little value.

The officer did testify that he administered the PBT and the PBT, in fact, indicated that there was the presence of alcohol. The physical observation of the defendant is that his speech was good, there was an explanation for the accident, there was a moderate odor of alcohol, there was no balance problem during the course of the proceeding and there further is no indication of whether there was after consumption of alcohol following the accident.

> Therefore, based on all the testimony in the record I conclude that the officer lacked probable cause to take the defendant into custody, the motion to suppress is hereby granted.[26]

In turn, the State entered *nolle prosequi* on the instant charges given that the suppressed evidence was necessary to the State's case.[27]

The State has taken an appeal from the Court of Common Pleas' decision granting Defendant's motion to suppress, pursuant to 10 Del. C. § 9902(b)-(c).[28] At the conclusion of oral argument on the instant appeal, this Court requested the parties to submit supplemental briefing limited to the issue of the appropriate standard of review.

THE PARTIES' CONTENTIONS

I. The State's Contentions.

The State asserts that the Court of Common Pleas erred in three ways: 1) by discounting the field tests that were administered in accordance with NHTSA standards; 2) by discounting the fact that Defendant flipped his vehicle in determining probable cause; and 3) by finding that Defendant may have consumed alcohol after the accident in the absence of any factual support.[29] With respect to the Court of Common Pleas' determination that the HGN test would be given no value, the State contends that the proper foundation requirements, pursuant to *Zimmeran v. State*,[30] were met in this case because Corporal Santos testified that he understood the rationale of the HGN test and understood how to exclude false positives.[31] The State argues that the Superior Court has previously found probable cause under very comparable circumstances: when a defendant had bloodshot eyes, an odor of alcohol, was involved in a single vehicle accident, and admitted to the consumption of alcohol prior to the accident, all facts which correspond to

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[26] *Id.* at 103-04.
[27] *Id.* at 104.
[28] "The State shall have an absolute right of appeal to an appellate court from an order entered pursuant to subsection (b) of this section and if the appellate court upon review of the order suppressing evidence shall reverse the dismissal, the defendant may be subjected to trial."
[29] State's Opening Br. at 7-14.
[30] 693 A.2d 311 (Del. 1997).
[31] Tr. at 35.

the instant case.[32] Finally, the State argues that the police are not required to eliminate all possible innocent explanations in determining probable cause.[33] With respect to the Court of Common Pleas' observation that there was "no indication of whether there was after consumption of alcohol following the accident," the State asserts that there is no evidence that Defendant consumed alcohol after the accident.[34] Thus, according to the State, the issue of post-accident alcohol consumption was a factor that was erroneously given apparently important weight by the Court of Common Pleas when deciding the motion to suppress.[35] The State contends that requiring it to "prove this negative" as a prerequisite to establishing probable cause is a misapplication of Delaware law.[36]

The State contends that the evidence is to be viewed in the light most favorable to the State, notwithstanding the fact that this is an appeal taken by the State.[37] It is the State's position that, "because the question is how did the officer act in relation to the facts as he knew them. . .at the time, the State should be given the benefit of the doubt [of] looking at the facts in the light most favorable to the State to determine whether or not that act, under the 4th Amendment, was reasonable or unreasonable."[38] The State submits that this Court reviews the evidence in a light most favorable to the State when assessing whether such evidence supports the lower court's factual findings.[39]

II. Defendant's Contentions.

Defendant responds that the Court of Common Pleas properly considered the State's evidence and correctly discounted the results of those tests not performed in accordance with NHTSA standards.[40] Defendant contends that, under *Zimmerman v. State*,[41] a proper foundation must be laid prior to the admission of HGN test results, and Corporal Santos' admitted

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[32] State's Opening Br. at 8.
[33] *Id.* at 12.
[34] *Id.* at 15.
[35] State's Reply Br. At 4.
[36] State's Opening Br. at 15.
[37] *Id.* at 7.
[38] Hearing Transcript of Oct. 29, 2010 at 5-6.
[39] State's Opening Br. at 7.
[40] Appellee's Answ. Br. at 7.
[41] 693 A.2d 311 (Del. 1997).

failure to comply with the NHTSA guidelines of twelve to fifteen inches should consequently prove fatal to the admissibility of the instant HGN test results.[42] More generally, with respect to the totality of the field tests administered, Defendant relies on *State v. Ministero*[43] for the proposition that the Court must first determine reliability and admissibility of the field tests based on whether or not such tests were conducted in accordance with NHTSA.[44] As noted by Defendant, *Ministero* held that, "[b]ecause the field tests were not conducted within the NHTSA guidelines, the trial court was free to disregard them when assessing if probable cause existed. . . ."[45] According to Defendant, the Court of Common Pleas found that the field tests were not performed in compliance with NHTSA standards, and, consequently, the Court of Common Pleas was free to discount or disregard the test results.[46]

Defendant further asserts that the Court of Common Pleas properly considered the circumstances of Defendant's single vehicle accident, and assigned it an appropriate weight given Defendant's allegedly reasonable explanation and the absence of any evidence contradicting Defendant's explanation of the accident.[47] With respect to the State's contentions about the issue of alcohol consumption after the accident, Defendant asserts that "the issue of post accident consumption was not critical to the probable cause decision" and that "[t]here is nothing in the record to indicate that the trial judge's remarks about post-accident consumption were anything more than dicta."[48]

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[42] Tr. at 34.
[43] 2006 WL 3844201 (Del. Super. Ct. 2006) (affirming the Court of Common Pleas' decision that the State lacked probable cause to arrest the defendant because the Court of Common Pleas properly discounted the results of field tests that were not performed in compliance with NHTSA standards.).
[44] Appellee's Answ. Br. at 7.
[45] *Ministero*, 2006 WL at *4.
[46] *Id.* at 8.
[47] Appellee's Answ. Br. at 10. In Defendant's supplemental memorandum on the applicable standard of review, Defendant did not directly address the State's contention that the evidence should be viewed in the light most favorable to the State on this appeal. Def's Supplemental Memo. of Nov. 30, 2010.
[48] *Id.* at 11.

STANDARD OF REVIEW

I. The Standard of Review for the Factual Findings of the Court of Common Pleas.

When reviewing decisions of the Court of Common Pleas, this Court sits as intermediate appellate Court; consequently, this Court's purpose on such appeals mirrors that of the Supreme Court of Delaware.[49] With respect to the Court of Common Pleas' factual findings, this Court reviews such findings for an abuse of discretion; the lower court's factual findings will be upheld if such findings are not "clearly erroneous."[50] Moreover, this Court will accept the factual findings of the Court of Common Pleas if the findings are "sufficiently supported by the record and are the product of an orderly and logical deductive process."[51] If the factual findings of the Court of Common Pleas are so supported, such findings must be accepted by this Court, "even if, acting independently, it would have reached a contrary conclusion."[52] This deferential standard of review applies to "historical

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[49] *See State v. Richards*, 1998 WL 732960, *1 (Del. Super. Ct. 1998) (citations omitted); *DiSabatino v. State*, 808 A.2d 1216, 1220 (Del. Super. Ct. 2002). *See also Casey v. State*, 2000 WL 33179628, *2 (Del. Super. Ct. 2000) ("When reviewing an appeal from the Court of Common Pleas, this Court assumes the same appeal posture as that of the Supreme Court.").

[50] *See, e.g.*, *Lopez-Vazquez v. State*, 956 A.2d 1280, 1285 (Del. 2008) ("To the extent the trial judge's decision is based on factual findings, we review for whether the trial judge abused his or her discretion in determining whether there was sufficient evidence to support the findings and whether those findings were clearly erroneous.") (citations omitted).

[51] *Oneko v. State*, 957 A.2d 2, *1 (Del. 2008) (citation omitted).

[52] *Id.*; *see also State v. Ministero*, 2006 WL 3844201, *5 (Del. Super. Ct. 2006) ("Regardless of whether this Court would have ruled in the same fashion, because the record supports the trial court's decision that the test performed by the trooper did not clearly comply with requirements of the NHTSA standards, the trial court's assessment of the weight to give the HGN test results based on the testing conditions must be accepted by this Court, as it was not clearly erroneous."); *Steelman v. State*, 2000 WL 972663, *1 (Del. Super. Ct. 2000) ("When addressing appeals from the Court of Common Pleas. . .the [Superior Court's] role is to 'correct errors of law and to review the factual findings of the court below to determine if they are sufficiently supported by the record and are the product of an orderly and logical deductive process.'") (citations omitted); *State v. Karg*, 2001 WL 660014, *1 (Del. Super. Ct. 2001) ("When the factual findings of the court below are sufficiently supported by the record and are the product of an orderly and logical deductive process, they must be accepted notwithstanding the fact that the Superior Court may have reached opposite conclusions.") (citations omitted).

facts," which includes "facts that are based on credibility determinations [and] also to findings of historical fact that are based on physical or documentary evidence or inferences from other facts."[53]

II. The Standard of Review for Legal Determinations of the Court of Common Pleas.

With respect to questions of law, this Court reviews the Court of Common Pleas' determinations *de novo*.[54] A determination of probable cause is "grounded, first, in the events leading up to the arrest and, second, in the decision whether those events amount to probable cause as a matter of law."[55] The first stage involves "only a determination of historical facts" and is subject to the "clearly erroneous" standard, as set forth *supra*, while the second stage is "a mixed question of law and fact."[56] In turn, "[o]nce the historical facts are established, the issue is whether an undisputed rule of law is or is not violated."[57] Put another way, "the trial court's findings of historical fact are reviewed under the 'deferential "clearly erroneous"' standard, but its conclusion as to probable cause, or more specifically its application of the law of search and seizure to those historical facts, is considered *de novo*."[58] Therefore, this Court's review of the Court of Common Pleas' determination of probable cause based on the historical facts is *de novo*.[59]

In the context of an arrest for driving under the influence, probable cause exists when

> the totality of the circumstances presented reveals that based upon [the police officers'] observations, their training, their experience, their investigation, and rational inferences drawn therefrom, the

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[53] *Lopez v. State*, 861 A.2d 1245, 1248-49 (Del. 2004) (citations omitted).
[54] *See, e.g.*, *Lopez-Vazquez v. State*, 956 A.2d 1280, 1285 (Del. 2008) ("To the extent that we examine the trial judge's legal conclusions, we review the trial judge's determinations *de novo* for errors in formulating or applying legal precepts.") (citations omitted).
[55] *Lopez v. State*, 861 A.2d 1245, 1248 (Del. 2004) (citation omitted).
[56] *Id.* (citation omitted).
[57] *Id.* (citation omitted).
[58] *McDonald v. State*, 947 A.2d 1073, 1082 (Del. 2008) (citations omitted).
[59] *Lopez v. State*, 861 A.2d 1245, 1248 (Del. 2004) (citation omitted). Although "probable cause" is considered "incapable of precise definition," in essence, it is "a reasonable ground for belief of guilt, that is particularized with respect to the person to be arrested." *Id.* (citing *Maryland v. Pringle*, 540 U.S. 366, 371 (2003)).

> police possessed a quantum of trustworthy factual information, "*sufficient in themselves* to warrant a [person] of reasonable caution" to conclude that probable cause existed to believe [the defendant] was driving under the influence of alcohol at the time of the accident.[60]

To satisfy the standard for probable cause, the State must establish "only the probability, and not a prima facie showing of criminal activity."[61] Even when "any one [fact], considered in isolation" is insufficient, if, "under the totality of the circumstances," the collective facts suggest "a fair probability that the defendant has committed a crime," then the State has established sufficient probable cause.[62]

Although the State submits that this Court reviews the Court of Common Pleas' determination of the facts relating to the existence of probable cause "in a light most favorable to the State,"[63] this Court does not agree. The State relies upon *Evon v. State*[64](and other cases) in support of its contention that the evidence is to be viewed in the light most favorable to the State when deciding this appeal. In *Evon*, the defendant appealed her conviction of driving under the influence, challenging the existence of probable cause to transport her to the police station.[65] This Court stated that "the Court determines whether there are errors of law and whether the

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[60] *State v. Maxwell*, 624 A.2d 926, 931 (Del. 1993) (holding that a finding of probable cause is not dependent on the elimination of all possible innocent explanations); *see also State v. Ministero*, 2006 WL 3844201, *2 (Del. Super. Ct. 2006) ("Thus, in cases in which a defendant is suspected of. . .Driving Under the Influence of Alcohol, the police must present evidence that, under the totality of the circumstances, there is a fair probability that the defendant was driving a vehicle while under the influence of alcohol.") (citations omitted).
[61] *Maxwell*, 624 A.2d at 928 (quoting *Illinois v. Gates*, 462 U.S. 213, 235 (1983)).
[62] *Id.* at 930 (citations omitted).
[63] State's Opening Br. at 7. During oral argument (but not explicitly in its supplemental memorandum), the State maintained that, notwithstanding the fact that Defendant prevailed below, the evidence should be viewed in the "light most favorable" to the State when evaluating the existence of probable cause. Hearing Transcript of Oct. 29, 2010 at 5-6. ("[T]he State suggests that because the question is how did the officer act in relation to the facts as he knew them, as he knew them at the time, that the State should be given the benefit of the doubt, that same light in the most favorable-looking at the facts in the light most favorable to the State to determine whether or not that act, under the 4th Amendment, was reasonable or unreasonable.").
[64] 1999 WL 743435 (Del. Super. Ct. 1999).
[65] *Id.*

evidence supports the lower court's factual findings, viewing the evidence in a light most favorable to the State."[66]

In support of this standard of review, *Evon* cited *Anderson v. State*, a case in which the defendant appealed his conviction of driving under the influence based on an alleged lack of probable cause and erroneous admission of Intoxilyzer test results.[67] In *Anderson*, the Court held that, when deciding appeals from Court of Common Pleas decisions, this Court "reviews to see if alleged errors of law occurred and whether the evidence supports the factual findings viewed in a light most favorable to the State."[68] Critically, however, *Anderson* cited *Shipowski v. State*[69] as authority for this statement, but a key distinction between *Anderson* and *Shipowski* is that, in *Shipowski*, the defendant had challenged the sufficiency of the evidence following his conviction of driving under the influence; *Shipowski* was not a case in which the defendant was challenging the lower court's determination of probable cause.[70]

In *Shipowski*, the defendant had alleged that there was insufficient evidence that his blood alcohol content was above the legal limit at the relevant time because the blood alcohol content test results were admitted without proof that the test was administered within four hours of the accident.[71] The *Shipowski* Court stated that "[i]n addition to correcting errors of law, this Court's scope of review extends to whether the factual findings made by the jury viewed in a light most favorable to the State are supported by the evidence."[72] Further, *Shipowski* relied on the Supreme Court of Delaware decision of *Henry v. State*, in which the defendant appealed his conviction of, *inter alia*, assault with intent to commit murder.[73] In *Henry*, the defendant also challenged the sufficiency of the evidence underlying his conviction; the Supreme Court articulated the applicable standard of review as follows:

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[66] *Id.* at *3.
[67] 1995 WL 717245 (Del. Super. Ct. 1995).
[68] *Id.* at *2. This standard of review applies in both criminal and civil cases appealed from the Court of Common Pleas. *Compare Baker v. Connell*, 488 A.2d 1303, 1309 (Del. 1985) (citing *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972)), *and Anderson*, 1999 WL at *2.
[69] 1989 WL 89667 (Del. Super. Ct. 1989).
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] 298 A.2d 327 (Del. 1972).

> The appellant seeks to have this appeal decided upon an extremely limited and straightened version of the facts put forward in a form most favorable to him. We may not do so, but must decide on the basis of the entire record taken in a light favorable to the State, since the jury obviously accepted the State's version.[74]

Taken together, the foregoing cases demonstrate that the appropriate standard of review for the instant appeal does not entail viewing facts or evidence in the light most favorable to the State. As a threshold matter, this case is distinguishable from cases where a defendant appeals a conviction in that this is an appeal taken by the State following the decision of the Court of Common Pleas to grant Defendant's motion to suppress. As articulated by the Supreme Court in *Henry*, evidence is properly viewed in the light most favorable to the State on a defendant's appeal from a conviction challenging the sufficiency of the evidence. This Court's language in *Evon* and *Anderson*, both cases in which a defendant appealed on the issue of probable cause following a conviction, traces its roots to *Shipowski*, which in turn traces its origin to *Henry*, but the procedural posture of these two sets of cases is markedly different; *Shipowski* and *Henry* are cases in which the defendants appealed on the ground of sufficiency of the evidence supporting their convictions,[75] while *Evon* and *Anderson* addressed the lower court's determination on probable cause. This is an important distinction. Indeed, in this case, such a challenge to the sufficiency of the evidence would be inapplicable, as Defendant has not been convicted of the instant charge. Instead, the State challenges the lower court's application of the facts of this case to the legal standard for probable cause.

Supreme Court of Delaware jurisprudence does not utilize the "light most favorable" standard when considering appeals on the issue of probable cause; to the contrary, the Supreme Court has distinguished when the two-fold abuse of discretion and *de novo* standard of review applies versus when the evidence should be viewed in the "light most favorable" to the State.[76] In *Lopez v. State*, a case in which the defendant appealed his conviction of, *inter alia*, trafficking in cocaine, the Supreme Court addressed both a challenge to the existence of probable cause and a challenge to the

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[74] *Id.* at 328.

[75] *See also Casey v. State*, 2000 WL 33179684 (Del. Super. Ct. 2000) (viewing the evidence in the "light most favorable" to the State in a defendant's appeal challenging the sufficiency of the evidence.).

[76] *See, e.g.*, *Lopez v. State*, 861 A.2d 1245 (Del. 2004)

sufficiency of the evidence supporting defendant's conviction.[77] With respect to the issue of probable cause, the Supreme Court applied the two-fold standard:

> Findings of historical fact are subject to the deferential "clearly erroneous" standard of review. This deferential standard applies not only to historical facts that are based upon credibility determinations but also to findings of historical fact that are based on physical or documentary evidence or inferences from other facts. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Once the historical facts are established, the issue is whether an undisputed rule of law is or is not violated. Accordingly, appellate courts review de novo whether there is probable cause for an arrest, as a matter of law.[78]

At the same time, in considering a defendant's challenge to the sufficiency of the evidence supporting the defendant's conviction, the Supreme Court stated:

> [Defendant's] claim, also raised by [Defendant] for the first time in this direct appeal, is that there was insufficient evidence presented at trial to convict him of Trafficking in Cocaine. In reviewing a challenge to the sufficiency of the evidence, this Court must determine, viewing the evidence in the light most favorable to the State, whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[79]

The Supreme Court's application of the separate standards in the same appeal, coupled with its instruction on when the "light most favorable" view applies, is telling. The case law discloses that the evidence is to be viewed in the light most favorable to the State when deciding a defendant's appeal challenging the sufficiency of the evidence, but not when deciding an appeal on the issue of probable cause. Consequently, this Court concludes that the "light most favorable" standard applied correctly in *Henry* and *Shipowski* was erroneously included in the standard of review contained in *Evon* and *Anderson*; this Court declines to follow that aspect of the holdings of *Evon* and *Anderson.* That is, the evidence is properly viewed in the light most favorable to the State on a defendant's appeal challenging the sufficiency of

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[77] *Id.*
[78] *Id.* at 1248-49.
[79] *Id.* at 1250.

the evidence supporting his conviction, but this standard does not apply when considering an appeal on a lower court's determination of probable cause.

It is also widely held in other jurisdictions that, on a defendant's appeal challenging the sufficiency of the evidence, the evidence should be viewed in the light most favorable to the State.[80] Thus, it is not surprising that Delaware's application of this standard of review is longstanding and well established.[81] Similarly, when deciding a defendant's motion to dismiss, the evidence is also to be viewed in the light most favorable to the State.[82] Finally, when deciding a defendant's motion to suppress grounded on the defendant's allegation that his or her statements were not voluntary, the evidence the light most favorable to the State.[83]

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[80] *See* 5 Am. Jur. 2d *Appellate Review* § 627 (citations omitted) (illustrating the widespread application of the "light most favorable" standard on appeals challenging the sufficiency of the evidence supporting a conviction).

[81] *See, e.g.*, *Wisniewski v. State*, 51 Del. 84, 87 (Del. 1957) ("Since defendant was convicted in the Court below, the substantial facts are set forth in the light most favorable to the State."); *Miller v. State*, 310 A.2d 867, 870 (Del. 1973) ("The appellant having been convicted, we must consider the facts in the light most favorable to the State").

[82] *See, e.g.*, *State v. Baker*, 679 A.2d 1002, 1006 (Del. Super. Ct. 1996) ("The procedure whereby the Court can consider a motion to dismiss prior to trial has been compared to a civil motion for summary judgment. In effect, if there are genuine issues of material fact, a jury must decide the issue involved.") (citations omitted); *see also* 75A Am. Jur. 2d *Trial* § 773 ("In considering a motion to dismiss a criminal charge, it is generally held that the facts and evidence must be considered in the light most favorable to the state.").

[83] *See, e.g.*, *DeJesus v.* State, 655 A.2d 1180, 1196 (Del. 1995) ("The prosecution must prove by a preponderance of the evidence that a confession sought to be used at trial was voluntary. In our review, however, we view the evidence in the light most favorable to the State.") (citations omitted), *superseded by statute on other grounds*, 11 Del. C. § 301, *as recognized in Wright v. State*, 953 A.2d 188, 191-92 (Del. 2008); *Harris v. State*, 622 A.2d 1095, *2 (Del. 1993) ("The question of voluntariness of an admission is a question of fact to be determined from the totality of the circumstances. The Superior Court must view the evidence in a light most favorable to the State and, unless its findings are clearly erroneous, its ruling regarding the voluntariness of [the defendant's] statements must be affirmed.") (quoting *Marine v. State*, 607 A.2d 1185, 1199-1200 (Del. 1992)). When determining if a defendant's statement was voluntary, the State bears the burden of proof, although the evidence is viewed in the light most favorable to the State. *See State v. Walker*, 2005 WL 1653948, *2 (Del. Super. Ct. 2005) ("The burden is on the State to show that the statement was voluntary by a preponderance of the evidence when that evidence is viewed in a light most favorable to the State.").

The Court must take care, however, to distinguish when the evidence is appropriately viewed in the light most favorable to the State. When deciding appeals challenging the sufficiency of the evidence, motions to dismiss, and motions to suppress alleging that a defendant's statement was involuntarily given, the Defendant is seeking some affirmative relief. Thus, the defendants in those proceedings are properly viewed as the movants, and the State is the non-moving party. Consequently, it is appropriate that the State, as the non-moving party, receive the benefit of a favorable view of the evidence.

Conversely, in this case, it would be illogical to view the evidence in the light most favorable to the State. As a threshold matter, the State is the appellant, and the defendant is effectively a non-moving party. As the effective movant in this case, the State is not entitled the benefit of a more favorable view of the evidence. More significantly, however, the concept of viewing the evidence in the light most favorable to the State simply does not comport with the established standard of review for appeals of a lower court's determination on the existence of probable cause. That is, the foregoing cases disclose a two-fold standard of review: abuse of discretion for factual findings of the lower court, and a *de novo* review of the lower court's application of the relevant facts to the legal standard for probable cause.[84] The legal standard is the same in both the trial and appellate courts; to establish probable cause, the police must demonstrate that a "reasonable person would believe a fair probability existed" that the defendant has committed a crime."[85] There is no room in this standard of review for the Court to view the evidence in the light most favorable to the State.

In short, when reviewing a decision of the Court of Common Pleas as to whether the factual findings were "clearly erroneous" and whether such findings were properly applied to the legal standard for probable cause, this

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[84] *See supra* text accompanying note 78; *see also* 24 C.J.S. *Criminal Law* § 2376 ("An appellate court accords deference to the trial judge's factual findings, but independently reviews the correctness of the judge's application of constitutional principles to the facts found."); *id.* ("Determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search should generally be reviewed de novo on appeal; in conducting de novo review, the reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers.") (citations omitted).

[85] *State v. Trager*, 2006 WL 2194764, *5 (Del. Super. Ct. 2006) (citations omitted).

Court does not view the evidence in the light most favorable to the State. Rather, this Court utilizes the foregoing two-fold standard of review, evaluating "whether the trial judge abused his or her discretion in determining whether there was sufficient evidence to support the findings and whether those findings were clearly erroneous."[86] Put another way, this Court will not disturb the factual findings of the Court of Common Pleas if such findings are "sufficiently supported by the record and are the product of an orderly and logical deductive process."[87] Provided the factual findings of the Court of Common Pleas are so supported, this Court will apply such findings in reaching the legal conclusion on the existence of probable cause. Thus, the facts are not to be viewed in the light most favorable to either party, but are instead viewed with deference to the conclusions of the Court of Common Pleas.[88]

DISCUSSION

I. The Factual Findings of the Court of Common Pleas Were Not Clearly Erroneous.

As stated, based on Corporal Santos' apparent deviations from NHTSA guidelines in administering the field tests, the Court of Common Pleas assigned "no value" to the HGN field test, "no value" to the "walk and turn" field test, "little value" to the balance test.[89] The Court of Common Pleas acknowledged that the PBT indicated the presence of alcohol, but juxtaposed this finding with the facts that Defendant's "speech was good, there was an explanation for the accident, there was a moderate odor of alcohol, there was no balance problem during the course of the proceeding and there further [was] no indication of whether there was after consumption of alcohol following the accident."[90]

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[86] *Lopez-Vazquez v. State*, 956 A.2d 1280, 1285 (Del. 2008) (citations omitted).
[87] *Steelman v. State*, 2000 WL 972663 (Del. Super. Ct. 2000) (citations omitted).
[88] *See, e.g.*, *Burrell v.* State, 953 A.2d 957, 960 (Del. 2008) ("A deferential standard of review is applied to factual findings by a trial judge. Those factual determinations will not be disturbed on appeal if they are based upon competent evidence and are not clearly erroneous."); *Oneko v. State*, 957 A.2d 2, *1 (Del. 2008) ("Findings of the Court of Common Pleas that are supported by the record must be accepted by the Superior Court even if, acting independently, it would have reached a contrary conclusion.") (citation omitted)
[89] Tr. at 103-04.
[90] *Id.* at 104.

The probative value to assign the various field tests herein is an "inference from other facts" that is subject to review for an abuse of discretion.[91] Consequently, this Court will not disturb the findings of the Court of Common Pleas provided that such findings were not "clearly erroneous."[92]

This Court has previously held that the Court of Common pleas is free to disregard field tests when assessing whether probable cause exists if such tests were not conducted in accordance with NHTSA guidelines.[93] Likewise, this Court has also held that it is "within the appropriate discretion of the Court of Common Pleas judge to determine what weight to give the PBT results based on [the officer's] testimony."[94] With respect to the field tests and the PBT results, this Court will not overturn the Court of Common Pleas' determinations "[s]o long as there is evidence in the record to support the [Court of Common Pleas'] decision."

On the instant record, this Court cannot conclude that the Court of Common Pleas' factual findings were clearly erroneous. The record contains testimony from Corporal Santos suggesting that the HGN test was performed with the stimulus placed six to eight inches from Defendant's face, rather than the NHTSA prescribed twelve to fifteen inches; Corporal Santos also testified that he gave no consideration to the "gap" in the "walk and turn" test, and Corporal Santos could not clarify the extent to which Defendant was "swaying" during the balance test.[95] Thus, the Court of Common Pleas' determinations regarding the field tests and the PBT results are "sufficiently supported by the record and are the product of an orderly and logical deductive process."[96] Accordingly, this Court will not overturn the Court of Common Pleas' factual findings.

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[91] *Lopez v. State*, 861 A.2d 1245, 1248 (Del. 2004) (citation omitted).
[92] *See Lopez-Vazquez v. State*, 956 A.2d 1280, 1285 (Del. 2008) ("[W]e review [the trial court's factual findings] for whether the trial judge abused his or her discretion in determining whether there was sufficient evidence to support the findings and whether those findings were clearly erroneous.") (citations omitted).
[93] *Ministero*, 2006 WL at *4 ("Because the field tests were not conducted within the NHTSA guidelines, the trial court was free to disregard them when assessing if probable cause existed to arrest [the defendant].").
[94] *Id.*
[95] Tr. at 103-04.
[96] *Oneko v. State*, 957 A.2d 2, *1 (Del. 2008) (citation omitted).

II. Under the Facts as Determined by the Court of Common Pleas, the State Nevertheless Established Sufficient Probable Cause as a Matter of Law.

After discounting the various field tests and PBT, the Court of Common Pleas found that the instant circumstances did not establish sufficient probable cause. Given this Court's holding in Section I, *supra*, these historical facts have been established by the Court of Common Pleas and will not be overturned; the only remaining issue is "whether an undisputed rule of law is or is not violated."[97] This Court's review of this issue is *de novo*.[98]

The remaining inquiry for this Court is if, under the totality of the circumstances as the Court of Common Pleas found them to be, there was sufficient probable cause to take Defendant into custody. As explained by the Supreme Court of Delaware, the standard for determining probable cause is whether,

> based upon [police officers'] observations, their training, their experience, their investigation, and rational inferences drawn therefrom, the police possessed a quantum of trustworthy factual information, "*sufficient in themselves* to warrant a [person] of reasonable caution" to conclude that probable cause existed to believe [the defendant] was driving under the influence of alcohol at the time of the accident.[99]

In this case, the established facts include the following: Corporal Santos arrived at the scene of Defendant's overturned sedan; Defendant appeared "cooperative," "coherent," and "alert;" when standing "a foot and a half" to "two feet" way from Defendant, Corporal Santos detected a "moderate" odor of alcohol on Defendant's breath; Corporal Santos described Defendant's eyes as "watery, glassy, maybe a little bit bloodshot;" and, finally, when asked by Corporal Santos if he had been drinking, Defendant responded that he had been "out with some friends in Pike Creek earlier that

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[97] *Lopez v. State*, 861 A.2d 1245, 1249 (Del. 2004) (citation omitted).
[98] *Id.* (citation omitted).
[99] *State v. Maxwell*, 624 A.2d 926, 931 (Del. 1993); *see also State v. Ministero*, 2006 WL 3844201, *2 (Del. Super. Ct. 2006) ("Thus, in cases in which a defendant is suspected of, and charged with, Driving Under the Influence of Alcohol, the police must present evidence that, under the totality of the circumstances, there is a fair probability that the defendant was driving a vehicle while under the influence of alcohol.") (citations omitted).

evening"[100] and had been drinking "several hours" prior to the accident.[101] With respect to the accident, Defendant told Corporal Santos that he left the roadway to avoid striking a vehicle that had entered his lane of travel and subsequently lost control of the vehicle.[102] Corporal Santos testified under cross-examination that he had no reason to disbelieve Defendant's representation that another vehicle was involved in causing the instant accident.[103] At the same time, Corporal Santos also expressed his belief that Defendant's impairment, failure to negotiate a bend in the roadway, and "possibly" speed were the causes of the accident.[104] With respect to the issue Defendant's possible post-accident alcohol consumption, Corporal Santos testified that he did not find any alcoholic beverages on Defendants person or near Defendant's car, nor did Defendant state at any time that he had consumed alcohol after the accident.[105]

In *Maxwell v. State*, the police responded to a single vehicle accident; witnesses to the accident informed the police that the defendant informed them that he was the driver of the vehicle and that he had been drinking.[106] The police determined that the defendant lost control of the vehicle while attempting to turn, and the police observed a strong odor of alcohol and several containers of beer in the vehicle.[107] The Supreme Court of Delaware held that, even if any of these facts considered in isolation were insufficient to establish probable cause, the totality of the circumstances presented "a quantum of trustworthy factual information, '*sufficient in themselves* to warrant a [person] of reasonable caution' to conclude that probable cause existed to believe that [the defendant] was driving under the influence of alcohol at the time of the accident."[108]

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[100] Tr. at 22-26.
[101] Tr. at 63.
[102] *Id.* at 27.
[103] *Id.* at 80.
[104] *Id.* at 85.
[105] *Id.* at 85.
[106] *Maxwell*, 624 A.2d at 930-31.
[107] *Id.* at 931.
[108] *Id. See, e.g.*, *Glass v. State*, 543 A.2d 339 (Del. 1988) (holding that a "single vehicle accident, the odor of alcohol on the defendant's breath. . .and the defendant's confused and disoriented state, provided a sufficient basis for the police officer to conclude that probable cause existed to arrest the defendant and take the blood sample."); *Blossom v. Shahan*, 2006 WL 1791211, *3 (Del. Com. Pl. 2006) (holding that the defendant's flushed complexion, glassy eyes, awkward behavior, and admission to consuming alcohol prior to being stopped by the police were sufficient to establish probable cause.).

Perhaps most analogous to the instant facts is the Supreme Court's holding in *Bease v. State*.[109] Therein, the defendant was initially stopped for committing an improper lane change, but the officer detected an odor of alcohol while standing "approximately two feet away" from the defendant; moreover, the officer observed the defendant's eyes to be "bloodshot and glassy," and the defendant admitted to consuming "chardonnay or beer the night before."[110] Significantly, the defendant in *Bease* failed a PBT and HGN test, but argued that the results of these tests should not be considered in determining probable cause.[111] The Supreme Court stated:

> The Superior Court carefully considered all of the pertinent evidence in this case and acceded to the defense arguments that the failed PBT and HGN tests should not be considered. Even excluding the failed PBT and HGN testing results, the record reflects sufficient other evidence to establish probable cause for the administration of the intoxilyzer test and to admit the presumptive intoxication evidence disclosed by that scientific testing. The record reflects that [the defendant] spoke in a rapid manner to [the officer], smelled of alcohol, admitted that he consumed alcoholic beverages the night before, had bloodshot and glassy eyes, and had just committed a traffic violation by making an improper lane change in an abrupt manner.
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> Based upon [the officer's] observations and the rational inferences drawn therefrom, there existed "a quantum of trustworthy factual information, 'sufficient in themselves to warrant a man of reasonable caution' to conclude that probable cause existed" to believe Bease was driving under the influence of alcohol at the time [the officer] stopped him. Accordingly, the Superior Court correctly concluded that the totality of circumstances was sufficient to establish probable cause to test [the defendant] by an intoxilyzer.[20] Consequently, [the defendant's] motion to suppress those test results was properly denied.[112]

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[109] 884 A.2d 495 (Del. 2005).
[110] *Id.* at 499.
[111] *Id.*
[112] *Id.* (citations omitted). *See also Butler v. Shahan*, 1995 WL 108669, *3 (Del. Super. Ct. 1995) ("Here, the facts before the police officer upon which he based his probable cause determination were: an accident; appellant's bloodshot, glassy eyes; the odor of alcohol emanating from appellant; appellant's admission to having consumed alcoholic beverages before the accident; and his refusal to submit to field tests. These facts support a determination of probable cause to have arrested appellant for violating 21 Del.C. § 4177(a)."). (citations omitted).

The similarities between this case and *Bease* are striking. In both cases, the defendants were observed to emanate an odor of alcohol and to have "glassy" eyes, and both defendants admitted to consuming alcohol prior to the accident.

In *Bease*, the Supreme Court of Delaware found sufficient probable cause even when excluding the disputed results of the PBT and HGN test. This Court likewise has excluded from consideration the results of the field tests, given its acceptance of the factual findings of the Court of Common Pleas. Nonetheless, Defendant emanated an odor of alcohol, possessed watery and glassy eyes, and admitted to consuming alcohol "several hours"[113] prior to the accident. Moreover, Defendant was involved in a single vehicle accident that suggested the possibility of driving under the influence. In formulating probable cause, Corporal Santos properly considered the fact that Defendant was involved in a single vehicle accident; he was not required to disprove Defendant's proffered explanation for the accident as a requisite to finding probable cause.[114]

Finally, although Defendant contends that the Court of Common Pleas' statements regarding the possibility of post-accident alcohol consumption was mere *dictum*, this fact was noted by the Court of Common Pleas in the paragraph immediately preceding its decision to grant Defendant's motion to suppress and, significantly, in its ultimate holding.[115] Contrary to Defendant's argument, the Court of Common Pleas, in its determination that, as a matter of law, there was no probable cause herein, expressly relied on the fact that there was no indication of whether or not Defendant consumed alcohol after the accident; this Court holds that, consistent with *State v. Maxwell* and its progeny, the State was not required to disprove this hypothetical possibility as a prerequisite to establishing probable cause.[116] The police investigation of an automobile accident is not

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[113] Tr. at 63.
[114] *See*, *e.g.*, *Maxwell*, 624 A.2d at 930 ("[An investigation and elimination of possible innocent explanations], and the concomitant burden of proof which requiring such an investigation carries, is not a condition precedent to a finding of probable cause.").
[115]Tr. at 104 (". . .and there further is no indication of whether there was after consumption of alcohol following the accident.").
[116] *Maxwell*, 624 A.2d at 930 (Del. 1993) ("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 hat probable cause exists for an arrest."). *See also* Wayne R. LaFave, *Search and Seizure: The Nature of Probable Cause*,

required to eliminate possible innocent explanations for facts that militate towards the existence of probable cause; "[s]uch an investigation, and the concomitant burden of proof which requiring such an investigation carries, is not a condition precedent to a finding of probable cause."[117] The proper inquiry for the Court of Common Pleas was "whether, viewing the totality of the circumstances known to the officer at that time, a reasonable person would believe a fair probability existed that the defendant violated [the driving under the influence statute]; in conducting this inquiry, "[t]here is no factoring in of innocence or considering a possible innocent explanation for each of the objective indications of impairment."[118]

Given the foregoing, this Court holds that there was sufficient probable cause in this case. The State was required to establish that, based on Trooper Santos' "observations, [his] training, [his] experience, [his] investigation, and rational inferences drawn therefrom, [he] possessed a quantum of trustworthy factual information, '*sufficient in themselves* to warrant a [person] of reasonable caution' to conclude that probable cause existed to believe [Defendant] was driving under the influence of alcohol at the time of the accident."[119] In this case, Defendant's watery and glassy eyes, odor of alcohol, admission to drinking alcohol, and involvement in a single vehicle accident are facts that are "sufficient in themselves to warrant a [person] of reasonable caution to believe" that Defendant was driving under the influence of alcohol at the time of the accident.[120] Although the factual findings of the Court of Common Pleas were not clearly erroneous, the totality of the instant circumstances undoubtedly established a "fair probability,"[121] as a matter of law, that Defendant was driving under the

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2 SEARCH & SEIZURE § 3.2 (2010) ("The mere fact that 'innocent explanations for the activity may be imagined' is not enough to defeat the probable cause showing, and there is probable cause if a 'succession of superficially innocent events had proceeded to the point where a prudent man could say to himself that an innocent course of conduct was substantially less likely than a criminal one.'") (citations omitted).

[117] *Maxwell*, 624 A.2d at 930.

[118] *State v. Trager*, 2006 WL 2194764, *5 (Del. Super. Ct. 2006) (citations omitted).

[119] *Maxwell*, 624 A.2d at 931; *see also State v. Ministero*, 2006 WL 3844201, *2 (Del. Super. Ct. 2006) ("Thus, in cases in which a defendant is suspected of, and charged with, Driving Under the Influence of Alcohol, the police must present evidence that, under the totality of the circumstances, there is a fair probability that the defendant was driving a vehicle while under the influence of alcohol.") (citations omitted).

[120] *Maxwell*, 624 A.2d at 931.

[121] *Jarvis v. State*, 600 A.2d 38, 43 (Del. 1991) (citing *Illinois v. Gates*, 462 U.S. 213, 214 (1983)).

influence of alcohol separate and apart from the field tests and the PBT. Thus, even if all field test results were excluded from consideration, the Court of Common Pleas nonetheless erred in holding that probable cause did not otherwise exist.

CONCLUSION

For the foregoing reasons, the Court of Common Pleas decision granting Defendant's motion to suppress is **REVERSED**. This case is remanded to the Court of Common Pleas for further proceedings consistent with this opinion.

IT IS SO ORDERED.

Richard R. Cooch, R.J.

oc: Prothonotary