IN THE SUPREME COURT OF THE STATE OF DELAWARE

WADE A. BOWERSOX,	§	
	§	No. 530, 2012
Defendant Below-Appellant	§	
	§	Court Below: Superior Court
	§	of the State of Delaware in and
v.	§	for Sussex County
	§	
STATE OF DELAWARE	§	ID No. 1107022570
	§	
Plaintiff Below-Appellee	§	
	§	

Submitted: February 7, 2013
Decided: March 25, 2013

Before **STEELE**, Chief Justice, and **JACOBS** and **RIDGELY**, Justices.

O R D E R

On this 25th day of March 2013, it appears to the Court that:

(1) Defendant-below/Appellant Wade A. Bowersox was convicted by a Superior Court jury of Driving a Motor Vehicle While Under the Influence of Alcohol. Bowersox raises three claims on appeal. First, Bowersox claims the trial court committed legal error in denying Bowersox's motion to suppress evidence. Next, Bowersox claims the trial court abused its discretion in denying his motion for judgment of acquittal that should have been viewed as a motion for a new trial. Finally, Bowersox claims the trial court erred in instructing the jury on the scientific reliability of the device used to test the alcohol content of his blood. We find no merit to Bowersox's claims and affirm.

(2) At 10:30pm on July 23, 2011, Officer Jared Haddock of the Laurel Police Department received a call for assistance from Detective Derrick Calloway. Detective Calloway was pulling over Bowersox, who was driving outside of the lane and did not use a turning signal pulling into a parking lot. Det. Calloway also observed a passenger in the car not wearing a seatbelt.

(2) Officer Haddock arrived and approached Bowersox's vehicle. As he was walking to the vehicle he noted the smell of alcohol emanating from the car. Officer Haddock also observed Bowersox's eyes were glassy, bloodshot and watery. Officer Haddock asked Bowersox for his driver's license and asked Bowersox to step outside of the car. At all times while interacting with Officer Haddock, Bowersox was polite and responsive. After he exited the vehicle, Bowersox admitted to having consumed one, 18-ounce beer prior to driving the vehicle.

(3) Officer Haddock administered two field sobriety tests on Bowersox—the walk-and-turn test and the one-leg stand test. The defendant failed both tests. The defendant was then taken into custody and transported to Nanticoke Hospital to have his blood drawn. A phlebotomist drew the blood and gave the sample to Officer Haddock, who sealed it and transported it to the Laurel Police Department. Officer Haddock placed the blood sample in a "temporary refrigerator." About a week later, Det. Calloway removed the blood sample from the temporary refrigerator and moved it to the permanent, evidence storage area. About a month later, forensic chemist

Julie Willey tested the sample and determined that on the night he was pulled over, Bowersox had a blood-alcohol content of 0.10.

(4) Bowersox was indicted for Driving Under the Influence Fifth Offense and turning without signaling. The State charged Bowersox under two alternative theories. First, that Bowersox was driving under the influence of alcohol.[1] Second, that Bowersox had a blood alcohol concentration above .08 within four hours after the time of driving.[2] Bowersox's motion to suppress the blood was denied. Bowersox was convicted of driving with prohibited alcohol content, but found not guilty of driving with impaired judgment. This appeal followed.

(5) Bowersox first claims the trial court abused its discretion in denying his motion to suppress. This Court reviews a trial court's grant or denial of a motion to suppress after an evidentiary hearing for abuse of discretion.[3] A finding of probable cause to arrest for driving under the influence constitutes a legal determination and, therefore, is subject to a *de novo* review.[4] "Probable cause" is established when the totality of the circumstances present facts "which would warrant a reasonable man in believing that a crime ha[s] been committed."[5]

(6) Bowersox claims there existed insufficient evidence to establish probable

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[1] *See* 20 *Del. C.* § 4177(a)(1).
[2] *See* 20 *Del. C.* § 4177(a)(5).
[3] *State v. Abel*, ___ A.3d ___, 2012 WL 6055799, at *2 (Del. Dec. 5, 2012) (*citing Lopez-Vazquez v. State*, 956 A.2d 1280, 1284 (Del. 2008)).
[4] *See Lopez-Vazquez*, 956 A.2d at 1284-85; *State v. Maxwell*, 624 A.2d 926, 928 (Del. 1993).
[5] *Clendaniel v. Voshell*, 562 A.2d 1167, 1170 (Del. 1989) (*citing Garner v. State*, 314 A.2d 908, 910 (Del. 1973)).

cause to arrest him, and therefore the blood test should have been excluded. We find no merit to this claim. Detective Calloway observed Bowersox having trouble maintaining his lane. Officer Haddock observed that Bowersox's vehicle "smelled of alcohol" and that Bowersox's eyes were watery and bloodshot. Officer Haddock administered two field sobriety tests, both of which Bowersox failed. Bowersox admitted to having consumed alcohol before driving. These facts were sufficient to establish probable cause to believe that Bowersox was driving under the influence of alcohol. Bowersox argues that it was inappropriate for Officer Haddock to state in his testimony that Bowersox was "overly nice," and that this was one factor he used to establish probable cause. Assuming, *arguendo*, that Bowersox is correct, the remaining evidence was sufficient to establish probable cause.

(7) Bowersox next claims the trial court abused its discretion in denying his motion for judgment of acquittal pursuant to Superior Court Criminal Rule 29. On appeal, Bowersox claims that he intended the motion to be one for a new trial pursuant to Rule 33. The record shows that the motion made at trial was for a judgment of acquittal under Rule 29. As a Rule 33 motion was not fairly presented to the trial court, we will review the Ruling for plain error.[6]

(8) Bowersox argues that the blood test was unreliable because it was improperly drawn and maintained. The trial court—considering Bowersox's Rule 29 motion—found that Bowersox had waived this argument by making a tactical

[6] *Jones v. State*, 16 A.3d 938, 2011 WL 1087490, at *3 (Del. Mar. 24, 2011).

decision not to object to the admissibility of the blood test on this ground during trial. When a party "consciously refrain[ed] from objecting as a tactical matter" this Court deems the claim to be waived.[7] The plain error review is reserved for claims that were not brought to the trial court's attention by oversight, not conscious strategic decision of counsel.[8]

(9) The trial court made a specific finding that Bowersox consciously chose to not object to the reliability of the blood draw, instead opting to argue to the jury that the blood was drawn and stored improperly. As the trial court said:

> The defense counsel made a tactical decision not to object to the evidence about the blood test and…expert testimony. He sought a jury decision that the test result was not accurate, as protocol was not followed. A basic defense theme against both aspects of the DUI charge was that a failure to follow protocols could compromise and invalidate the results. This strategy was successful as to the first aspect on defendant's alleged impaired judgment. …On the other hand, the defense was not successful in the second aspect[, Bowersox's blood alcohol content].

Bowersox argues that the record does not support this finding. We disagree. Because Bowersox waived this claim we cannot consider it on direct appeal.

(10) Finally, Bowersox claims that the jury instructions in this case on the blood-testing device were incorrect statements of the law. We review a trial court's

[7] *Czech v. State*, 945 A.2d 1088, 1097 (Del. 2008) (*citing Tucker v. State*, 564 A.2d 1110, 1118 (Del. 1986)).
[8] *Warner v. State*, 787 A.2d 101, 2001 WL 1512985, at *1 (Del. Nov. 21, 2001) ("[O]nly forfeited errors are reviewable for plain error").

jury instructions *de novo*.[9] Bowersox argues the following language in the jury instruction was in error:

> This Court recognizes that the blood-testing device; i.e. the gas chromatograph used in this case employs a scientifically sound method of measuring the alcohol content of a person's blood. The State is not required to prove the underlying scientific reliability of the blood-testing device, but is required to establish that the procedure and testing needs was done pursuant to proper protocol and was performed by a qualified person.

Bowersox claims this instruction relieves the State of its burden of proof. It does not. Although the instruction could have been better phrased, it clarified for the jury that the scientific basis for gas chromatography was not at issue in the trial. The instruction states in plain language that the State was required to prove the testing was done pursuant to proper protocol by a qualified person.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED.**

BY THE COURT:

/s/ Henry duPont Ridgely
Justice

[9] *Guy v. State*, 913 A.2d 558, 563 (Del. 2006) (*citing Keyser v. State*, 893 A.2d 956, 960 (Del. 2006); *Ayers v. State*, 844 A.2d 304, 309 (Del. 2004)).