

IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE

v.

JACLYN M. BREZA,

Defendant.

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Case No.: 1004000016

Submitted: December 5, 2011

Decided: December 20, 2011

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Wilmington, Delaware 19899
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MEMORANDUM OPINION DENYING DEFENDANT’S
MOTION TO SUPPRESS

Defendant Jaclyn M. Breza (“Defendant”) is charged by information with Driving Under the Influence of Alcohol in violation of 21 *Del. C.* § 4177(a); Disorderly Conduct in violation of 11 *Del. C.* § 1301; and Disregarding a Stop Sign in violation of 21 *Del. C.* § 4164(a). On August 9, 2011, Defendant filed a Motion to Suppress Evidence arguing that there was no reasonable articulable suspicion justifying the stop, and that the State lacked probable cause required to arrest Defendant for the charged offenses.

On December 5, 2011, hearing was held on Defendant’s Motion to Suppress. At the hearing, Defendant withdrew the reasonable articulable suspicion argument. Accordingly, the hearing proceeded and argument was heard only on the probable cause issue. At the conclusion of the hearing, the Court reserved decision. This is the Court’s decision after hearing on Defendant’s Motion to Suppress Evidence.

I. The Facts

On March 31, 2010 at approximately 10:40pm, Middletown Police Officer Timothy Hoffecker (“Hoffecker”) was on duty working in the Uniform Patrol Division of the Middletown Police Department. Specifically, Hoffecker was sitting in his marked police cruiser on North Cox Street watching the intersection of North Cox Street and East Lake Street. Hoffecker estimated that he was parked about fifty (50) feet away from the intersection. Hoffecker testified that this intersection is located in New Castle County, Delaware. Hoffecker testified that the intersection of North Cox Street and East Lake Street is a four way intersection, with four stop signs controlling all four approach points. Hoffecker testified that this intersection was well lit by street lights on telephone poles. Further, Hoffecker testified that he had a clear and unobstructed view of the intersection of North Cox Street and East Lake Street. Hoffecker admitted on cross-examination that this intersection is located in a “high drug area.” Finally, Hoffecker testified that at this time, traffic was light, with cars passing through the intersection at a rate of about one (1) per five (5) to ten (10) minutes.

At approximately 10:40pm, Hoffecker observed headlights traveling west on East Lake Street toward the intersection with North Cox Street. As the vehicle approached the intersection, Hoffecker observed that it was a black two door sedan. Hoffecker testified that the vehicle did not come to a complete stop at the stop sign. The vehicle proceeded through the intersection toward the following intersection with North Broad Street. Hoffecker was unable to observe the occupants of the vehicle, and testified that he did not recognize the vehicle. At this time, Hoffecker began following the vehicle.

Hoffecker testified that he observed the vehicle come to a stop at the intersection of East Lake Street and North Broad Street at a red light. Hoffecker testified that when the light turned

green, the vehicle turned on its left hand turn signal, and immediately turned onto North Broad Street. Next, Hoffecker testified he observed the vehicle driving on North Broad Street for approximately one tenth (1/10) of a mile. At the first intersection, the intersection of North Broad Street and East Main Street, the vehicle stopped at a red light controlling the intersection, turned on its left hand turn signal, and made a left hand turn when the light turned green. Hoffecker admitted on cross examination that with the exception of observing the vehicle run the stop sign controlling the intersection of East Lake Street and North Cox Street, he did not observe the vehicle driving erratically.

Immediately after the vehicle made the left hand turn onto East Main Street, Hoffecker turned on his emergency lights and pulled the vehicle over. Hoffecker testified that the vehicle traveled approximately 200 feet and then pulled into the Valero gas station located at 38 East Main Street. Hoffecker further testified that rather than pull into one of the many open parking spots in this parking lot, the driver of the vehicle drove the vehicle up to the front door of the gas station before coming to a complete stop. Hoffecker estimated that driving to the front door of the gas station required the driver to drive an additional thirty (30) to forty (40) feet past the open parking spots. Hoffecker testified that a black man exited the vehicle from the front passenger seat, but re-entered the vehicle after Hoffecker instructed him to remain inside the vehicle.

Then, Hoffecker then approached the vehicle and identified himself to the driver. At trial, Hoffecker identified Defendant as the driver of the vehicle. Hoffecker admitted on cross examination that he realized he knew Defendant at this time. Hoffecker testified that in addition to the man in the front passenger seat of the vehicle, there was another black man in the back seat of the vehicle. Hoffecker testified that Defendant provided a Maryland drivers' license and her other papers without difficulty. Additionally, Defendant explained to Hoffecker that there was

previously an issue with her Maryland drivers' license, but she had recently gotten the issue fixed.

Despite providing this explanation, Hoffecker testified that from the beginning of the traffic stop through the time of arrest, Defendant screamed, yelled, used profanity, and claimed that the reason for the stop was that Defendant was a white woman in the car with two black men. Hoffecker testified that Defendant repeatedly argued that Hoffecker had "profiled" Defendant and made other similar arguments that the stop was pretextual.

Hoffecker further testified that Defendant's eyes were "glassy, watery, and bloodshot" at this time. Also, Hoffecker detected an odor of alcohol emanating from inside the vehicle and Defendant appeared to be very nervous. Hoffecker testified that he identified the passengers and then returned to his vehicle to run their names through the police computer system. Hoffecker testified that when he ran the passengers' names and Defendant's name through the system he learned that the passengers each had criminal histories, so Hoffecker called the Middletown Police Department dispatch to request assistance.

At approximately 10:47pm, Corporal Mark Miller ("Miller") arrived at 38 East Main Street. Miller is also a Middletown police officer. Hoffecker and Miller approached the vehicle. Hoffecker asked Defendant to exit the vehicle. Hoffecker then attempted to ask Defendant general questions such as who was in the vehicle, why they were in the vehicle, and where they were going. Hoffecker testified that rather than answer these questions, Defendant continued to yell at him. Hoffecker testified that he detected an odor of alcoholic beverages coming from Defendant. However, Defendant denied consuming alcohol and told Hoffecker that the reason she smelled like alcohol was because she was wearing perfume. Hoffecker testified that Defendant had trouble completing sentences, gave conflicting statements, and would not "answer

a question straight.” However, on cross-examination, Hoffecker admitted the Defendant’s speech was not mumbled or slurred and could not recall any specific things Defendant said to support his testimony that Defendant’s speech was “confused.”

Next, Miller began questioning Defendant, and Hoffecker moved to the vehicle to question the remaining two male occupants. Miller testified that he has been a police officer for eleven (11) years. Miller testified that he received training in DUI Investigations during his training at the police academy. Specifically, Defendant received certificates indicating that he successfully completed police training in NHTSA DUI Detection and HGN Certification on October 12 and 13, 2001 and on October 15, 2001.¹ Miller further testified that during his time as a police officer, he has conducted approximately one hundred and fifty (150) DUI investigations.

Miller testified that Defendant was very upset and was yelling at he and Hoffecker. Miller testified that Defendant said that she “didn’t like authority.” Miller testified that there was a strong odor of alcoholic beverages coming from Defendant’s person. Miller testified that Defendant used profanity and had glassy eyes. On cross examination, however, Miller admitted that he did not check off either “watery eyes” or “bloodshot eyes” when he completed an alcohol incident report (“AIR”) in this matter. Miller further admitted that he did not list anything under the heading “unusual actions” in the AIR. Miller also admitted that he reported that Defendant’s speech was fair in the AIR.

Miller then conducted field sobriety testing on Defendant. First, Miller performed the Horizontal Gaze Nystagmus (“HGN”) test. Miller testified that the HGN test looks for three clues in each of the subject’s eyes for a total of six clues. Miller testified that these three clues are lack of smooth pursuit, onset of nystagmus prior to forty-five (45) degrees, and nystagmus at

¹ State’s Exhibits # 3, 4.

maximum deviation. Miller testified that nystagmus is the involuntary twitching of the eyes that is made more pronounced by alcohol intoxication. Miller testified that if a subject displays four (4) or more clues, the subject has failed the HGN test.

Miller testified that he gave Defendant detailed instructions before he performed the HGN test. Specifically, Miller testified that he told Defendant to stand still, and look at a pen that Miller would hold ten (10) to twelve (12) inches away from Defendant's face. Further, Miller instructed Defendant to hold her head still and follow the pen with her eyes. Finally, Miller checked to make sure that Defendant was not wearing glasses or contacts and that she did not have any eye or head injuries. Miller testified that Defendant informed him that she was not wearing same, and did not have any head or eye injuries.

Miller testified that he performed the HGN test in a lit parking lot next to the 38 East Main Street parking lot and also used his flash light during the test. Miller testified that before conducting the HGN test, he shut off the emergency lights in his patrol car because they could interfere with the results of the test. Finally, Miller testified that he performed the HGN test and Defendant exhibited all six (6) possible clues. Accordingly, Miller testified that Defendant failed the HGN test.

Finally, Miller testified that he instructed Defendant to perform the "finger touch" test. Miller testified that this is a counting, dexterity, and divided attention test. Miller testified that he instructed Defendant to touch her thumb to each finger in her hand starting with her pinky. Miller testified that he instructed Defendant to count from one to ten. More specifically, Miller instructed Defendant to touch her pinky and say one (1), then her ring finger and say two (2), then her middle finger and three (3); then her pointer finger and numbers four (4) through seven (7), then her middle finger again and eight (8), then her ring finger and nine (9), and finally her

pinky again and ten (10). Miller testified that Defendant did not complete this test according to his instructions because Defendant performed “multiple touches” on both her pinky and middle finger. After this field test, Miller placed Defendant under arrest.

II. Discussion

On motions to suppress evidence, the State bears the burden to establish probable cause by a preponderance of the evidence.² In order to meet this burden, the totality of the facts and circumstances within the officer’s knowledge at the time of the arrest must be sufficient to warrant a person of reasonable caution to believe that criminal activity has been or is presently being committed.³ “Probable cause is an elusive concept which avoids precise definition...It lies somewhere between suspicion and sufficient evidence to convict.”⁴ The possibility of hypothetically innocent explanations for each of the facts revealed during the investigation does not preclude a finding of probable cause.⁵

As such, in driving under the influence (“DUI”) cases brought pursuant to 21 *Del. C.* § 4177, the arresting officer must have had probable cause to believe that the Defendant drove the vehicle while under the influence of alcohol.⁶ “Under the influence” means that “the person is, because of alcohol or drugs or a combination of both, less able than the person would ordinarily have been, either mentally or physically, to exercise clear judgment, sufficient physical control, or due care in the driving of a vehicle.”⁷ Probable cause to arrest for DUI is frequently based on

² *Bease v. State*, 884 A.2d 495, 498 (Del. 2005).

³ *Id.* (citing *State v. Maxwell*, 624 A.2d 926, 928 (Del. 1993)).

⁴ *Maxwell*, 624 A.2d at 929 (citations omitted).

⁵ *Id.* at 930.

⁶ *Lefebvre v. State*, 19 A.3d 287, 292 (Del. 2011).

⁷ *Id.* (citing 21 *Del. C.* § 4177(c)(5)).

the observations of the arresting officer, and commonly includes the quality of the driver's performance on field sobriety tests.⁸

The HGN test is a reliable indicator of impairment and may be used in assessing probable cause.⁹ Further, performance on memory tests like the finger counting test may be used to determine whether probable cause exists.¹⁰

In *Bease v. State*, the Delaware Supreme Court found that there was probable cause to arrest the defendant for DUI because the defendant committed a traffic violation by making an improper lane change, smelled of alcohol, admitted to drinking the night before, had bloodshot and glassy eyes, and had rapid speech.¹¹ In *Higgins v. Shahan*, the Court found that there were sufficient facts supporting the officer's probable cause determination because there was an accident which the officer believed was the defendant's fault, the defendant had glassy and bloodshot eyes, the defendant smelled of alcohol, admitted to drinking before the accident, and refused to submit to field sobriety testing.¹²

A traffic violation combined with odor of alcohol does not alone constitute probable cause to arrest for DUI.¹³ However, when combined with poor performance on field sobriety tests, a traffic violation and odor of alcohol may constitute probable cause.¹⁴ If probable cause exists before field testing is performed, favorable or mixed results on the field tests do not negate probable cause.¹⁵ Accordingly, in *Lefebvre v. State*, the defendant committed a traffic offense, had a strong odor of alcohol, had glassy and bloodshot eyes, a flushed face, admitted to drinking,

⁸ *Lefebvre*, 19 A.3d at 293.

⁹ *State v. Ministero*, 2006 WL 3844201, *5 (Del. Super. Dec. 21, 2006).

¹⁰ *Id.* at *3.

¹¹ *Bease v. State*, 884 A.2d at 499-500.

¹² *Higgins v. Shahan*, 1995 WL 108699, *3 (Del. Super. Jan. 18, 1995).

¹³ *Lefebvre*, 19 A.3d at 293.

¹⁴ *Id.* at 295.

¹⁵ *Id.*

was somewhat argumentative with the officer, and said that she was not good at the one leg stand test sober.¹⁶ However, the defendant in that case had fair speech, passed the alphabet, counting, finger dexterity, one leg stand, and walk and turn tests without issue, and exited her car without losing her balance.¹⁷ The Court noted that probable cause had already been established by a totality of the circumstances before performance of the field tests, and the positive performance on the tests did not negate the prior probable cause.¹⁸

III. Opinion and Order

In this case, the State has met its burden to establish probable cause to arrest Defendant for DUI by a preponderance of the evidence. Hoffecker testified that he observed Defendant fail to come to a complete stop at a stop sign; Defendant screamed, yelled and used profanity throughout the traffic stop; there was an odor of alcoholic beverages emanating from the vehicle while Defendant was in the vehicle and then from Defendant's person when she exited the vehicle; and Defendant had trouble completing sentences, gave conflicting statements, and yelled at Hoffecker instead of answering his questions. Miller testified that there was a strong odor of alcohol coming from Defendant's person; Defendant exhibited six (6) of six (6) possible clues in failing the HGN test, and was unable to follow Miller's instructions during the finger counting test.

This case is similar to *Bease*, where Defendant made an improper lane change, smelled of alcohol, admitted to drinking, had bloodshot and glassy eyes, and rapid speech. Here, Defendant similarly committed a moving violation, smelled of alcohol, had bloodshot and glassy eyes, and displayed a combative attitude toward police. Unlike *Bease*, Defendant did not admit to drinking.

¹⁶ *Lefebvre*, 19 A.3d at 293.

¹⁷ *Id.*

¹⁸ *Id.* at 295.

Nonetheless, the Court is satisfied that Miller and Hoffecker had probable cause to arrest Defendant for DUI here because also unlike *Bease*, Defendant failed the HGN test¹⁹ and was unable to follow simple instructions in the finger counting test. Therefore, the State has presented an arguably stronger case for probable cause than in *Bease*, where there were no field sobriety tests.

Moreover, the fact that Defendant only committed one moving violation or instance of erratic driving, provided police her drivers' license and other documents without noted difficulty, explained that there was a recently fixed issue with her Maryland drivers' license, explained that the odor of alcohol was caused by perfume, and the absence of information regarding bloodshot and glassy eyes from Miller's AIR do not defeat this finding of probable cause. In *Lefebvre*, the Delaware Supreme Court held that when probable cause was established before the performance of field sobriety tests, positive performance on subsequently conducted field sobriety tests does not negate the earlier finding of probable cause.²⁰ If probable cause cannot be negated by the positive performance of an alphabet, counting, finger dexterity, one leg stand and walk and turn test in a case where the defendant had fair speech, it would be inapposite to conclude that a failed HGN field sobriety test coupled with inability to follow simple instructions on the finger counting test, an odor of alcohol emanating from Defendant's person, a moving violation, and an aggressive and combative attitude toward police could be overcome based on Defendant's fair

¹⁹ At hearing on the Motion to Suppress, Miller testified on direct examination as to Defendant's results on the HGN test without defense objection. At closing, Defendant argued for the first time that the Court should decline to consider the HGN results because Miller did not testify on direct examination that he was required and actually performed two passes with the pen, or that he was required and actually held the pen at maximum deviation. The Court finds that Defendant waived this objection by failing to timely raise this issue at trial. *See, Probst v. State*, 547 A.2d 114, 119 (Del. 1988) (holding that appellate courts in Delaware generally do not review contentions not raised and not fairly presented to the trial court for decision, except for plain error).

²⁰ *Lefebvre*, 19 A.3d at 295.

speech, ability to retrieve her documents, and minor inconsistencies in Miller's AIR. Probable cause is evaluated based on the totality of the circumstances available to the arresting officers.²¹ The Court finds that based on the totality of the circumstances known to the officers at the time of arrest in this case, there was probable cause to arrest Defendant.

THEREFORE, Defendant's Motion to Suppress is hereby **DENIED**. The Criminal Clerk shall schedule this matter for trial at the earliest convenience of the Court and Counsel.

IT IS SO ORDERED this 20th day of December, 2011.

/s/ John K. Welch
John K. Welch
Judge

cc: Ms. Diane Healy, Case Manager
Criminal Division, CCP

²¹ *Maxwell*, 624 A.2d at 928.