IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE,	*	Case No. 0901012687
	*	Cr.A. No. 09-08-1077
v.	*	
	*	
TERRY L. BEHELER,	*	
	*	
Defendant.	*	

Upon Defendant's Motion to Suppress

Submitted: March 5, 2010

Decided: April 22, 2010

Defendant's Motion is GRANTED.

Nicole S. Hartman, Esquire, Department of Justice, 102 West Water Street, Dover, Delaware, 19904, Attorney for the State of Delaware

John R. Garey, Esquire, 48 The Green, Dover, Delaware 19901, Attorney for the Defendant.

Reigle, J

The defendant, Terry L. Beheler, was charged with Driving a Vehicle under the Influence of Alcohol ("DUI") in violation of Del.Code Ann. tit. 21 § 4177(a) (1) and Failure to Drive on the Right Side of the Roadway in violation of Del.Code Ann. tit. 21 § 4114. The defendant, through counsel, moved to suppress evidence obtained after his seizure and removal from the scene of the traffic stop on the grounds that the officer failed to have "probable cause" to believe that he was driving under the influence of alcohol. A hearing was held on December 14, 2009. Closing arguments followed.[1]

Facts

Officer Robert B. Costlow of the Milford Police Department testified at the suppression hearing that he had been an officer for two years prior to the date of the hearing, but only for one year at the time of his arrest of Mr. Beheler. He testified that he was on patrol shortly before 2:44 a.m. on January 17, 2009 when he saw a pick-up truck on Airport Road in Kent County, Delaware. The vehicle turned right onto Bowman Road in a wide looping turn which resulted in the vehicle being on the wrong side of Bowman Road for approximately two tenths of a mile. Officer Costlow also testified that the driver used his turn signal, that the turn movement was not jerky and that Bowman Road was narrow with no lines painted on it. Officer Costlow stopped the driver of the vehicle for driving in the wrong lane.

Officer Costlow testified that Mr. Beheler, who he identified in the courtroom, was the driver. He smelled a moderate odor of alcohol which was slightly masked by coffee on the defendant's breath when he was approximately one to two feet away from him. There were no other occupants in the vehicle. Mr. Beheler admitted to Officer

[1] The State was given additional time to provide a transcript of a bench ruling in *State v. Ploud*, a Superior Court case from March 9, 2009, to support its argument but was unable to meet the Court's deadline of March 5, 2010.

Costlow that he had consumed alcohol at the Milford Moose Lodge. Officer Costlow testified that Mr. Beheler's appearance was orderly, his face and speech were normal but that his eyes were watery.

Officer Costlow further testified that he conducted three "pre-exit" tests while Mr. Beheler was in the vehicle and that the purpose of such tests was to gauge the amount of intoxication to see if it was necessary to have the defendant exit the vehicle. First, he asked him to say the alphabet starting with the letter "E" and ending with the letter "P." Second, he asked him to count from the number "79" to the number "64" backwards. Third, he asked him to perform a "finger dexterity test." Officer Costlow testified that Mr. Beheler passed all three of the tests but that he had gone over on the count test by two numbers.

At this point, Officer Costlow had Mr. Beheler step out of the motor vehicle. He testified that Mr. Beheler lost his balance, spilled his coffee on himself and fell slightly into the motor vehicle. When questioned about the road conditions, Officer Costlow explained that the road was asphalt with a grass border and that it was slightly elevated. He also agreed on cross-examination that the vehicle was parked on an angle and that the vehicle was a four wheel drive vehicle that was elevated from the ground. He also testified that the area was unlit except for the headlights.

Officer Costlow testified that he was trained on the use of horizontal gaze nystagmus test ("HGN") at the Delaware State Police Academy and that he was certified to perform such tests. He defined nystagmus as an involuntary jerking of the eyes and testified that the National Highway Traffic Safety Association ("NHTSA") enumerates certain clues regarding nystagmus as an indication of alcohol influence. He set forth

three clues that could be considered to determine a subject's intoxication. They were: lack of a smooth pursuit of the eye, distinct nystagmus at maximum deviation and the onset of nystagmus early.

Officer Costlow testified that he administered the test to the defendant two times for each eye and that he did the right and left eyes separately. He was unable to specifically recall whether he asked Mr. Beheler about prior brain trauma but testified that it was part of his habit to do so. He did not know the margin of error for the test. He gave the defendant instructions to complete the test and performed the test on the defendant using a flashlight held at an angle. He stated that he had no problem seeing the defendant's eyes. He testified that the defendant failed by six clues.

At this point, counsel for Mr. Beheler objected to the introduction of the results of the HGN test as performed by Officer Costlow on the grounds that the State had failed to lay a proper foundation under the requirements of *State v. Zimmerman*, 693 A.2d 311 (Del. 1997). Specifically, he asserted that equal tracking and correlation of the eyes was not addressed and that the officer had failed to explain what they demonstrated regarding impairment. He also asserted that the test should not have been performed on an incline.

The State asserted that the requirements of *Zimmerman* had been met. The Court reserved decision on the question of foundation and proceeded with the testimony.

Officer Costlow testified that he administered a Portable Breath Test ("PBT") to Mr. Beheler. Officer Costlow testified that he used standard operating procedures for the test. He used a new straw and directed the defendant to blow a deep breath into the straw on the top of the machine. He testified that the defendant failed the test.

On cross-examination, Officer Costlow testified that he generally gauges the fifteen minute time period as the time it generally takes to interview a suspect. He agreed with defense counsel that he took the defendant in to custody at 2:51 a.m. as this was stated in his police report. He also agreed that he called the initial traffic stop of the defendant in to his dispatcher at 2:44 a.m. Based upon those times, Officer Costlow acknowledged that he had given the PBT to the defendant within seven minutes of stopping him, which did not allow for a fifteen minute observation period. Officer Costlow further agreed that the fifteen minute observation period is required as part of the standard operating procedures for the PBT unit because it is necessary to establish that the defendant did not drink any alcohol within fifteen minutes prior to the test. He agreed that residual alcohol in the mouth can skew the results.

Defense counsel objected to the introduction of the results of the PBT on the grounds that the officer failed to follow standard operating procedures for the test.

Arguments

Defense counsel argued that there was insufficient "probable cause" for Officer Costlow to take Mr. Beheler into custody. He asserted that once you eliminate the results of the HGN test on the grounds that there was an improper foundation and eliminate the PBT results on the grounds that standard operating procedures were not followed, there was insufficient basis for the officer to believe that the defendant was under the influence of alcohol while driving. He argued that the driving behavior was not erratic, the smell of alcohol was moderate, the pre-exit tests were passed and there was an innocent explanation for Mr. Beheler's loss of balance when exiting the motor vehicle due to the height of the vehicle and the slant of the road.

The State responded that even if the PBT results were eliminated, a sufficient foundation for the results of the HGN was laid for it to be considered under *Zimmerman.* Further, the State argued that the failure of the HGN coupled with other factors supported a finding of "probable cause" by the officer under the "totality of the circumstances" test set forth in *State v. Maxwell*, 624 A.2d. 926 (Del. 1993). The State submitted that Mr. Beheler had unusual driving for which he was cited, watery eyes, a moderate odor of alcohol, admissions of drinking and mistakes on the counting test. The State also submits that he lost his balance and fell onto the motor vehicle and that this factor should be considered. The State argued that hypothetically innocent explanations for facts do not preclude their use as factors in determining probable cause under *State v. Godwin,* 2006 WL 2095427 (Del.Com.Pl.), *citing State v. Maxwell* at 930.

Discussion

An officer must possess "probable cause" that an offense of Driving under the Influence has been committed to remove a defendant from the scene to conduct further tests. *See generally* Del.Code Ann. tit. 21 § 2740. A police officer has "probable cause" to believe a defendant has driven under the influence of alcohol when he possesses information which would warrant a reasonable man to believe that such a crime was committed. In order to establish probable cause, the State must present facts which viewed under the totality of the circumstances demonstrate that there is a fair probability that the defendant has committed a crime. *State v. Maxwell* at 930 (*citations omitted).* Therefore, this Court must give each factor its specific weight, under the specific circumstances and consider all of the factors in their totality.

The first factor considered is the HGN test. Delaware Courts have held that the results of an HGN test may be considered scientific evidence for establishing probable cause and as substantive evidence of intoxication, if a proper foundation is laid. However, the trier of fact is still permitted to give the evidence its proper weight. *Zimmerman* at 314 *citing State v. Ruthhardt* at 356.

The officer testified that he had been trained to conduct HGN tests at the police academy but he had no further training and limited experience in field testing subjects for HGN. The State did not go through all of the factors set forth in *Zimmerman.* The officer did not testify that he ascertained whether the defendant wore hard contact lenses before he began the test. The area was not well lit. The officer was unable to testify to the test's margin of error. Although the officer testified that he used the NHTSA standards, he did not specifically testify that the defendant stood at attention with his feet together and arms to the side. He also was unable to explain other possible causes of nystagmus that might be masked. These omissions caused the Court to afford little weight to the officer's opinion regarding the results of the HGN test.

The second factor considered is the PBT. In *State v. Blake,* 2009 WL 3043964 (Del.Com.Pl.), the Court held, "any question as to the PBT's proper foundation may only go to the weight placed on the test result, rather than its admissibility."

The officer acknowledged that he did not follow standard operating procedures in giving the test to the defendant because he did not observe him for the required period before administering the test. In addition, the State did not present testimony regarding the calibration of the PBT. For these reasons, this Court affords little weight to the results of the PBT.

Finally, the Court must look at all of the factors under the "totality of the circumstances" test to determine if the officer possessed "probable cause" to seize the defendant. The officer testified that Mr. Beheler's driving was not erratic and that he passed his field sobriety tests that he was asked to perform. Mr. Beheler lost his balance coming out of the truck, however, it was dark, the road was slanted and the truck was elevated. The defendant's breath smelled moderately of alcohol and he had watery eyes. Mr. Beheler admitted to consumption of alcohol. The officer testified that the defendant failed the HGN test and the PBT, however, both tests are scientific and because the proper standards were not followed, both were given little weight by the Court.

The case of *State v. Hunter*, 2006 WL 1719966 (Del.Com.Pl.), is illustrative of the standard required under the "totality of the circumstances" test. In Hunter, the Court held that the smell of alcohol, the defendant's glassy eyes, an admission of drinking alcohol and the presence of empty bottles and cans in the motor vehicle was insufficient to overcome the defendant's exceptional performance on his field sobriety tests. *Hunter* at 2. The facts of this case are analogous similar to *Hunter.*

Decision

The Court concludes that there was insufficient "probable cause" under the "totality of the circumstances" test. The State lacked "probable cause" to seize the defendant for driving under the influence of alcohol. Therefore, the defendant's motion to suppress any evidence as a result of this seizure is GRANTED.

IT IS SO ORDERED.

Anne Hartnett Reigle

Anne Hartnett Reigle
Judge