IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
vs.	)	**Case No.: 0902007337**
	)	
JOSEPH FRANCISCO,	)	
	)	
Defendant.	)	

Submitted: April 19, 2010
Decided: July 23, 2010

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DECISION AFTER TRIAL

Defendant Joseph Francisco is charged by information with Driving Under the Influence of Alcohol in violation of 21 *Del. C.* § 4177(a); and Speeding, in excess of posted limit, in violation of 21 *Del. C.* § 4169(b). Trial was held on April 19, 2010. The Court reserved decision. This is the Court's decision after trial.

FACTS

On February 10, 2009, at approximately 12:30am, Corporal Robert J. Kunicki (hereinafter "Corporal Kunicki") of the Delaware State Police was parked on a short dirt road perpendicular to the westbound side of Lancaster Pike in New Castle County, Delaware, conducting speed enforcement on Lancaster Pike. Corporal Kunicki testified he observed a silver BMW, sport utility vehicle traveling west on Lancaster Pike which appeared

to be traveling faster than the posted speed limit of fifty (50) miles per hour. Corporal Kunicki testified he was using a laser device known as the "Lidar" to measure the speed. The State, however, indicated it was not proceeding on the speed offense. Based upon his observation and measuring the speed, Corporal Kunicki pursued the vehicle, turning on his emergency lights and siren, and stopped the vehicle on the right shoulder of Lancaster Pike. Joseph Francisco (hereinafter "Defendant") was identified as the operator of the vehicle.

Corporal Kunicki testified upon approaching the vehicle, he detected a moderate odor of alcohol emanating from the Defendant's breath, and observed Defendant's eyes were glassy and bloodshot. However, the Defendant produced the required documents without difficulty.

Corporal Kunicki asked said Defendant out of his vehicle to perform field sobriety tests. Corporal Kunicki administered the following; (1) the Alphabet test; (2) the Counting test; (3) the Horizontal Gaze Nystagmus (hereinafter "HGN") test; (4) the Walk-and-Turn test; (5) the One-Legged Stand test; and (6) the Portable Breath Test (hereinafter "PBT").

Corporal Kunicki first instructed the Defendant to perform the Alphabet test. He asked the Defendant to state the letters "E" through "P." The Defendant performed this test correctly. Corporal Kunicki next administered the counting test. He was instructed to count backwards from seventy-three (73) to fifty-eight (58). The Defendant stated "sixty" (60) when he should have stated "fifty" (50). Corporal Kunicki then administered the HGN test. During the test, Corporal Kunicki testified he observed all six clues, which indicated presence of alcohol. The Defendant was administered the Walk-and-Turn test, which he performed without difficulty. The One-Legged-Stand test was terminated when the

Defendant informed Corporal Kunicki he had "bad knees." Finally, Corporal Kunicki administered a PBT. The exact reading is not provided, but Corporal Kunicki testified the result was "failure."

Following field tests, the defendant was taken into custody and transported to Delaware State Police Troop Six. The defendant stated to the officer that he had consumed two vodka tonics between 10:30 p.m. on April 18, 2009 and 12:00 a.m. that evening, while at Gallucios.

DISCUSSION

The provisions of 21 *Del. C.* § 4177(a)(1) provide: "[n]o person shall drive a vehicle ... when the person is under the influence of alcohol."[1] In order to find a defendant guilty under this statute the State is required to prove beyond a reasonable doubt[2] that, "First, [ ] the defendant drove a motor vehicle at or about the time and place charged; [and] Second, that the defendant was under the influence of alcohol when he drove the motor vehicle."[3]

Chemical testing is not required to prove that Defendant was under the influence of alcohol.[4] The provision of 21 *Del. C.* § 4177(c)(5) provides; "'[w]hile under the influence' shall mean 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."[5]

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[1] 21 *Del. C.* § 4177(a)(1).
[2] 11 *Del. C.* § 301.
[3] *Bennefield v. State*, 2006 WL 258306 at *3 (Del.Super.2006) (citing *Lewis v. State*, 626 A.2d 1350 (Del.1993); *State v. Baker*, 720 A.2d 1139, 1142 (Del.1998)).
[4] *State v. Mealy*, 2010 WL 175623 at *3 (Del.Com.Pl.)(citing 21 *Del. C.* §4177(g)(2) ("Nothing in this section shall preclude conviction of an offense defined in this Code based solely on admissible evidence other than the results of a chemical test of a person's blood, breath or urine to determine the concentration or presence of alcohol or drugs.")).
[5] 21 *Del. C.* § 4177(c)(5).

In *Lewis v. State*, the Delaware Supreme Court held that the evidence proffered "must show that the person has consumed a sufficient amount of alcohol to cause the driver to be less able to exercise the judgment and control that a reasonably careful person in full possession of his or her faculties would exercise under like circumstances."[6] The Court in Lewis held that it is not required that a defendant be "drunk" or "intoxicated" to be found guilty of driving while under the influence.[7] Rather, "[w]hat is required is that the person's ability to drive safely was *impaired* by alcohol."[8]

In *Bennefield v. State*, the court found the defendant guilty of driving under the influence of alcohol absent chemical test results.[9] The defendant admitted to running a red light, stopped abruptly, had bloodshot and glassy eyes, admitted to consuming alcohol, asked the officer for a "break," admitted to the officer that he knew he was "over the legal limit," changed his story, had a strong odor of alcohol emanating from his person, and failed three field sobriety tests.[10] The Superior Court found this constituted sufficient evidence to support the trial court's finding that the defendant was under the influence of alcohol while operating the motor vehicle.[11]

It is undisputed that the Defendant drove a motor vehicle at or about the time and place charged. Therefore, the sole issue is whether the Defendant was under the influence of alcohol at the time when he was operating the motor vehicle.

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[6] *Lewis v. State*, 626 A.2d 1350 at 1355.
[7] *Id.*
[8] *Id.* (emphasis added).
[9] *Bennefield v. State*, 2006 WL 258306 (Del. Super.); *see also Mealy*, 2010 WL 175623 (court found impairment when defendant was found slumped over the wheel of his vehicle, made admissions to drinking, there was a strong odor of alcohol, his speech was slurred, face flushed, he had trouble balancing, failed HGN, Walk-and-Turn, and counting tests).
[10] *Bennefield*, 2006 WL 258306 at *1, 4.
[11] *Id.*

With respect to the speeding charge, 21 *Del. C.* § 4169 provides that, "any speed in excess of such limits shall be absolute evidence that the speed is not reasonable or prudent and that it is unlawful."[12] However, the State is required to prove all elements of this charge beyond a reasonable doubt.[13]

The facts which the State rely on are the field test results, physical appearance, and speeding. The intoxilyzer test was not administered. The evidence of impairment in this case includes the following: moderate odor of alcohol, glassy and bloodshot eyes, counting test failure, HGN test failure, PBT failure, and an admission to drinking two vodka tonics beginning two hours before the traffic stop, and ending approximately thirty (30) minutes before the traffic stop. However, the Defendant was coherent and lucid throughout the traffic stop and arrest, cooperated fully with police, produced documents without difficulty, had no difficulty maintaining balance throughout the encounter with the police. Additionally, his performance on the walk and turn test was adequate, and there is no evidence that he drove erratically, weaved, swerved, or otherwise displayed any indicia of impaired driving.

Evidence of impairment in this case does not rise to the level of evidence shown in *Mealy and Bennefield.* In *Mealy*, the defendant was found slumped over the wheel of his vehicle, admitted to drinking, had slurred speech, a strong odor of alcohol, trouble balancing, flushed face, and failed the HGN, Walk-and-Turn, and counting tests.[14] In *Bennefield*, the defendant slammed on his brakes when pulled over by police, admitted to drinking, admitted that he

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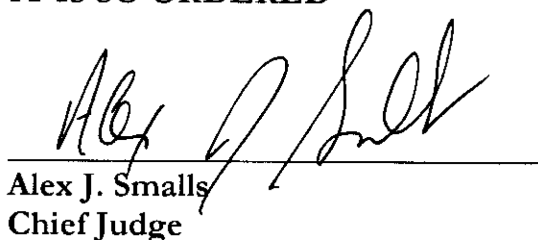
[12] 21 *Del. C.* § 4169.
[13] 11 *Del. C.* § 301.
[14] *Mealy*, 2010 WL 175623.

was over the legal limit, asked the officer for a "break," recanted his story, had a strong odor of alcohol, and failed three (3) field sobriety tests.[15] In these cases, officers observed specific indicia of impairment including trouble balancing, slurred speech, erratic driving, and unruly demeanor. In this case, there are no such observations of impairment. The Defendant was coherent, lucid, cooperative, had no difficulty maintaining balance, and there is no evidence of erratic driving related to impairment. *Therefore*, the State has failed to prove impairment beyond a reasonable doubt.

Additionally, the State has failed to prove all elements of the charge of Speeding in Excess of Posted Limits beyond a reasonable doubt. Officer Kunicki's personal observations based on his experience in conducting speed enforcement are no doubt credible. However, alone such observations do not rise to the level of proof necessary to find Defendant guilty of the offense beyond a reasonable doubt.

Based upon the Court's conclusions based upon the totality of the circumstances, I find that the State has failed to prove the instant charges beyond a reasonable doubt.[16] *Therefore*, the Defendant is NOT GUILTY of both Driving Under the Influence of Alcohol and Speeding in Excess of Posted Limits.

IT IS SO ORDERED



Alex J. Smalls
Chief Judge

Francisco-OP July 2010

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[15] *Bennefield*, 2006 WL 258306.
[16] 11 *Del. C.* § 301.