IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
v.	)	Case No.: 0105024376
	)	
NICOLE A. LITTLE,	)	
	)	
Defendant.	)	

Date Submitted: May 21, 2002
Date Decided: May 22, 2002

Bernard Pepukayi, Esq.
Deputy Attorney General
Department of Justice
State Office Building
820 North French Street
Wilmington, DE 19801
Attorney for State

Edmund D. Lyons, Jr., Esq.
The Lyons Law Firm
1526 Gilpin Avenue
P. O. Box 579
Wilmington, DE 19899
Attorney for Defendant

FINAL OPINION AND ORDER

Trial in the above captioned matter took place on April 16, 2002. The Court reserved decision on defendant's Motion to Suppress ("the Motion"). The Motion was withdrawn except paragraph 2 wherein the defendant, ("Little" or "the defendant") alleged the field coordination tests administered to her on May 23, 2001 by Delaware State Police Trooper Jeffrey P. Whitmarsh ("Whitmarsh") constituted a compelled search in violation of the Fourth Amendment to the United States Constitution and Article I Section 6 of the Delaware Constitution.

For the reasons set forth below, the Court denies the Motion to Suppress and following trial which has now been completed enters a

finding of guilt beyond a reasonable doubt for a violation of 21 Del. C. § 4177(a). The Court ruled on the companion speeding charge heard at trial, 21 Del. C. § 4169(b) and entered a finding of guilt and has sentenced the defendant.

The Facts

Whitmarsh was on routine patrol on the date charged in the Information May 23, 2001 at 12:23 a.m. on Route 2 in Green Valley Circle. Whitmarsh was stationary in his motor vehicle and observed a motor vehicle, Jeep Wrangler, driven by the defendant. His radar unit, a Stalker, was in the stationary mode and was both internally and externally calibrated and otherwise working properly.[1] Whitmarsh detailed in the trial record the necessary tuning fork external calibration for both the 40 and 25 miles per hour calibrations as well as the successful internal calibration performed on May 23, 2001 before the Stalker unit was used to clock the defendant.

The defendant was clocked traveling 67 miles per hour on Whitmarsh's Stalker radar screen in a 45-mile per hour posted speed limit on a public road identified in the Information.

Whitmarsh thereafter traveled in his patrol car, performed a U-turn and stationed himself directly behind the defendant's vehicle. Whitmarsh previously observed the defendant swerve "within her lane"

[1] A foundation at trial was laid the Stalker unit was in working order and that Whitmarsh was competent to operate it.

but then crossed the "white lines" of the roadway after moving over to the shoulder. Whitmarsh activated his emergency equipment and stopped the defendant.[2]

Whitmarsh exited his motor vehicle and made contact with the defendant. Little had an open Budweiser container in the front seat; her eyes were glassy; Little had a distinct odor of alcoholic beverage; and made an admission of drinking alcoholic beverages before she left her brother's house and directly after she left a drinking establishment. Little informed Whitmarsh, "I brought a beer for the ride home." When Little was requested to retrieve her driver's license, insurance card and registration it took her "five tries" to retrieve the same according to Whitmarsh.

The defendant then exited her motor vehicle after being instructed to stay inside her motor vehicle until Whitmarsh called the traffic stop in to RECOM.

At this point, Whitmarsh advised Little that he was going to perform some field tests. Defendant failed the alphabet test; failed the counting test; and also failed to follow the instructions on both tests. Both are NHTSA approved field coordination tests. Of the six (6) clues possible for the HGN test, Whitmarsh testified the defendant exhibited all six (6) clues after having unsuccessfully performed the HGN.

[2] Whitmarsh believed Little's exit was a "quick stop."

The defendant refused the Walk and Turn test and One Legged Stand test. The defendant also failed the portable breath test after agreeing to perform this field sobriety test.

Based upon the defendant's performances on the field coordination tests, and his observations, Whitmarsh believed the defendant was driving a motor vehicle under the influence of alcoholic liquor. 21 Del. C. § 4177(a). Whitmarsh testified at trial that he believed he asked the defendant to perform the field coordination field tests and that he did not compel her to perform the tests without her consent. Whitmarsh testified that when the defendant indicated she no longer wished to perform the last two (2) field coordination tests and that she declined, Whitmarsh did not request her to perform these remaining field coordination tests.

Whitmarsh testified the defendant was taken by to the Troop for the purpose of administering an Intoxilyzer 5000. The defendant was observed at the Troop for 20 minutes at 01:25 hours, did not eat, drink or belch. Cpl. Timothy Obe, Jr. actually administered the test. Obe is a Corporal with the Delaware State Police and is a certified Intoxilyzer operator. The calibration logs were stipulated into evidence by the State and defense with no objection. The BAC reading for this defendant after the formal observation period was .159.

The Law

"On a Motion to Suppress, the State bears the burden of establishing that the challenged search or seizure complied with the rights guaranteed [the defendant] by the United States Constitution, the Delaware Constitution, or Delaware statutory law. The burden of proof on a motion to suppress is proof by a preponderance of the evidence." *Hunter v. State,* Del. Supr., 783 A.2d 558, Steele, J. (August 22, 2001) (Mem. Op. at 5-6); *State v. Bien-Aime,* 1993 D. Supr., LEXIS 132, Del. Super., Cr. A. No. 92-08-326, Toliver, J. (March 17, 1993) (Mem. Op.) (citation omitted).

The Court must first rule on defendant's Motion to Suppress. The Court finds based upon the record for the reasons listed below that the defendant was not compelled within the meaning of the Fourth Amendment in Article I, Section 6 of the Delaware Constitution to perform the field coordination tests. The Court has scrutinized carefully the direct testimony and cross-examination of the arresting officer. The Court finds the tests were not per se unreasonable or unlawful. See, *Mason v. State,* Del. Supr., 534 A.2d 242 (1987); *State v. Laphen,* Del. CCP Cr. A. No. 96-05-0077101, DiSabatino, J. (December 23, 1996). The field coordination tests that the defendant actually performed are therefore not fruits of an unlawful search and should not be suppressed. In *Laphen v. State,* Del. CCP Cr. A. No. 96-05-007101, DiSabatino, C.J. (December 23, 1996) the Court ruled as follows:

> . . . unlike *Miranda* warnings, however, the police are not required to advise the suspect that he or she may refuse to perform field tests. All that is required is that the police request, rather than demand, that the suspect submit to the field tests. Where a suspect expresses reluctance to comply with such a request, it is likewise inappropriate for the police to suggest that the suspect will be penalized for refusal. (Emphasis supplied)

Such are the facts of the case sub judice. When the defendant refused the one-legged stand and walk and turn test, Little was allowed to decline said tests and was not compelled to perform the refused tests. There is also no evidence in the record that Whitmarsh demanded that the defendant take the field coordination tests he administered to Little on May 23, 2001. The trial record indicated Whitmarsh requested that the tests be performed, and when the defendant refused the remaining field coordination tests, Little was not required to perform the same. The Court notes that there are approximately 9 reasons that serve as valid reasons for a refusal to perform field coordination tests. Applying *Laphen* to these facts, as soon as the defendant indicated a refusal, Whitmarsh stopped administration of the field tests. Nor did the defendant invoke any of the 9 reasons when she voluntarily performed the above field coordination tests.

The Court also finds based upon the direct testimony of Whitmarsh, and the cross-examination that Whitmarsh merely requested the defendant submit to the field tests. The record does not indicate, after careful scrutiny, that the defendant was compelled to perform the

tests she voluntarily agreed to perform. The State has therefore met its burden by a preponderance of the evidence of establishing the challenged search and/or seizure complied with the U.S. Constitution, Delaware Constitution, or case or statutory law. *Hunter v. State,* Del. Supr., 783 A.2d 558 (August 22, 2001).

Opinion and Order

With regards to the trial matter, 21 Del. C. § 4177(a) provides that "no person shall drive a motor vehicle when the person is under the influence of alcohol." Subparagraph (5) of Section 4177(a) provides that when the person's alcohol concentration is, within 4 hours after the time of driving, .10 or more a defendant is guilty of the charge. The Court finds that the State has met its statutory burden of proving the instant charge beyond a reasonable doubt. 11 Del. C. § 301. *State v. Matufeske,* Del. Supr., 215 A.2d 443 (1965). The Court bases this finding of beyond a reasonable doubt on the evidence set forth in the trial record which includes failure of the field coordination tests listed above and a BAC reading of .159. As a matter of law, pursuant to 21 Del. C. § 4177(a)(5) the defendant's BAC was greater than .10 within four (4) hours of driving and the Court as of matter of law adjudicated her guilty as to Section 4177(a)(5). The State has also proven the charge of 21 Del. C. § 4177(a)(1) beyond a reasonable doubt based upon the totality of circumstances in the trial record. 11 Del. C. § 301.

The Court therefore adjudicates the defendant GUILTY of the 21 Del. C. § 4177(a) as charged by Information on May 23, 2001.

Sentencing shall be set by the Clerk of Court at the Court's earliest convenience with notice to counsel of record.

IT IS SO ORDERED this 22nd day of May, 2002.

_____
John K. Welch
Associate Judge