IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

ALLAN D. TESTERMAN,	:	
		C.A. No. 03-10-110
Appellant,	:	
	:	
vs.	:	
MICHAEL SHAHAN, Director, Delaware Division of Motor Vehicles,:		
Appellee.	:	

Submitted July 1, 2004
Decided August 4, 2004

Edward C. Gill, Esquire, appearing for Defendant below, Appellant.
James J. Hanley, Esquire, Deputy Attorney General, appearing for the State, Appellee.

APPEAL FROM ORDER OF DIVISION OF MOTOR VEHICLES

This is an appeal by defendant Allan D. Testerman from the Division of Motor Vehicles' revocation of his license pursuant to 21 *Del. C.* § 2742.

BACKGROUND

On March 12, 2003, Allan D. Testerman ("Testerman") was arrested and charged with driving a motor vehicle under the influence of alcohol in violation of 21 *Del. C.* § 4177, and an improper lane change. He refused to take an intoxilizer test after the arresting officer explained that refusal to take the test would result in the automatic one-year suspension of his license under the implied consent provisions of Delaware

law. The Division of Motor Vehicles ("DMV") revoked defendant's driver's license pursuant to 21 *Del. C.* § 2742. Testerman subsequently requested a DMV hearing to contest the revocation. A DMV hearing was held on September 11, 2003. At the conclusion of the hearing, the hearing officer revoked Testerman's license pursuant to 21 *Del. C.* § 2742. The hearing officer held: (1) the police officer had probable cause to believe Testerman violated 21 *Del. C.* § 4177; (2) the State proved by a preponderance of the evidence that Testerman violated 21 *Del. C.* § 4177; and (3) Testerman refused to submit to an intoxilizer test after being informed of the penalty of revocation for such a refusal. Testerman appealed DMV's ruling to this Court.

STANDARD OF REVIEW OF DMV ORDER

Appeals from orders issued by the DMV are reviewed by this Court on the record. *Civil Rules Governing the Court of Common Pleas,* 72.1(a) and 72.1(g); *Shahan v. Landing*, 643 A.2d 1357, 1359 (Del. 1994). As a result, the appropriate scope of review is limited to correcting errors of law and determining whether the record below supports the lower court's findings of fact and conclusions of law. *Mills v. Voshell*, 1993 WL 543997 (Del. Super. Ct.) *citing Eskridge v. Voshell,* 593 A.2d 589 (Del. 1991).

THIS COURT'S EARLIER FINDINGS

On December 8, 2003, in the criminal proceedings regarding this same incident, this Court heard Testerman's motion to suppress the officer's testimony subsequent to the stop. At the suppression hearing, the Court ruled that the police officer had reasonable articulable suspicion to stop the defendant's vehicle, and the requisite probable cause to arrest Testerman for driving under the influence of alcohol. The

Court also ruled that the police had the authority to stop Testerman even though they were out of their jurisdiction at the time of the stop. The Court then denied the motion to suppress, and a jury trial followed. Testerman was found guilty of the illegal lane change charge but the jury was hung on the DUI charge, and the Court declared a mistrial. Testerman subsequently pled to an amended charge of reckless driving.

ISSUES ON APPEAL

Testerman raises five issues in this appeal. The first three question the legitimacy of the actual stop of Testerman's car and the subsequent arrest. The last two issues are regarding the DMV's handling of Testerman's appeal.

A. Legitimacy of the stop and subsequent arrest

At the DMV hearing, and again in the present appeal, Testerman raised the following issues: (1) Did the officer have the authority to make a stop of Defendant's vehicle when he was outside of his jurisdiction from the time he observed Testerman's vehicle until the time he pulled him over and eventually arrested him? (2) Did the officer have reasonable articulable suspicion to pull Defendant's vehicle over for driving two feet over the fog line and then overcorrecting and going six inches over the center line? (3) Did the officer have the necessary probable cause to arrest Defendant for DUI?

Testerman raised and argued each of these issues at the suppression hearing before this Court on December 8, 2003. This Court found that the officer did have the authority to stop the defendant even though he was outside his jurisdiction, that there was reasonable articulable suspicion to stop the defendant's vehicle, and that there was probable cause to arrest Testerman for driving under the influence of alcohol. Since these issues previously have been addressed and ruled upon by this Court in the

criminal proceeding, the appellant cannot now ask the Court to revisit them in the administrative appeal. Where an issue was decided in an earlier proceeding, the doctrine of collateral estoppel precludes the Court from revisiting the issue. *Shahan v. Landing,* 643 A.2d 1357, 1359 (Del. 1994). The Delaware Supreme Court explained, "[c]ollateral estoppel 'is based on the consideration that the proper administration of justice will be served best by limiting parties to one trial of one issue.'" *Id. citing Lewis v. Hanson,* 128 A.2d 819, 834 (Del. 1957). In the present case, this Court previously ruled on these identical issues raised by the same defendant at his criminal suppression hearing. No appeal was taken of this Court's rulings on those issues, and they are final. The hearing officer's prior rulings on the issues of the legitimacy of the stop and arrest were in accord with this Court's. This Court is bound by its prior final rulings on those issues.

B. Conduct of the DMV

Testerman's remaining two issues in this appeal involve the conduct of the DMV, which were not previously addressed by this Court. First, Testerman alleges that the DMV erred when, after telling Testerman that it would not revoke his license by letter, it unilaterally reversed its decision. Testerman claims that the DMV may not change its position without giving all parties the opportunity to be heard. Testerman cites no caselaw to support his position. 21 *Del. C.* § 2742(g) requires that a hearing be scheduled within 30 days of the filing of a request for a hearing. Testerman requested a hearing on March 20, 2003. On April 1, 2003 DMV mailed notice to Testerman that the hearing was scheduled for April 14, 2003, well within the 30 day period. On April 8, 2003 Testerman requested a continuance of the April 14 hearing. On May 2, 2003 DMV mailed a letter to Testerman stating his license would not be revoked because the

hearing wasn't scheduled within thirty days. It is clear from the record, however, that the hearing was indeed initially scheduled within thirty days of the request, and that it was continued beyond the thirty day period at Testerman's request. The May 2 letter was an apparent clerical error, immediately corrected by a May 5 letter rescheduling the hearing. While the May 5 letter may have confused Testerman, he does not claim that he detrimentally relied on the mistake. Since Testerman cannot point to any statutory violation and there is no indication that he detrimentally relied on the mistaken letter, I find this argument to be without merit.

Appellant further argues that the State violated *Court of Common Pleas Civil Rule 72* by not including the May 2, 2003 letter from the DMV in the record sent to this Court. Since I find that the content of the letter has no significance to the outcome of this appeal, the omission of the letter in the record is harmless error.

C. Proof by a Preponderance of the Evidence

The DMV may revoke the driver's license of a person charged with driving while intoxicated only if, in addition to finding probable cause to arrest, the hearing officer finds by a preponderance of the evidence that the person was in violation of § 4177. 21 *Del. C.* § 2742(f); *Clendaniel v. Voshell,* 562 A.2d 1167, 1170 (Del. 1989). In this case, the DMV hearing officer determined that the State had proved by a preponderance of the evidence that Testerman was in violation of 21 *Del. C.* § 4177. According to the hearing officer's findings of fact, the police officer observed the defendant's car drift onto the shoulder of the road and nearly strike a telephone pole. The car then jerked abruptly to the left causing the two left tires to cross the centerline. The officer pulled Testerman over as a result. When the officer approached the car, he smelled the strong odor of alcohol on Defendant's breath. The officer also reported that Testerman's eyes were

glassy, his face was extremely flushed, and his speech was slurred and mumbled. The officer conducted field sobriety tests. Testerman passed four and failed five. When exiting the vehicle, he dropped his wallet and almost fell over when he picked it up.

However, appellant asserts the hearing officer erred by considering evidence not in the record. Testerman argues that the hearing officer based her belief that he was driving under the influence of alcohol, partly on her knowledge of the location of a store. The hearing officer made note that the store Testerman told the officer he was coming from, was not in the direction from which he was traveling. The location of the store was not in evidence. Testerman argues that the hearing officer considered her own personal knowledge of the location of the store when she weighed the factors that led to her holding. Even if true, I find that the hearing officer's consideration of this fact not in evidence was harmless error. As stated above, the defendant is estopped from raising the finally determined issue of probable cause to arrest. Further, the record below contains ample sufficient evidence without, and not reliant upon, this claimed fact not in evidence to support the hearing officer's finding by a preponderance of violation of 21 *Del. C. §*4177. The hearing officer's consideration of the alleged fact not in evidence is harmless error, and it's exclusion would not have altered the ultimate conclusion.

Based upon the facts within the record, the Court finds there is substantial evidence to support the DMV's findings of fact and conclusions of law. Generally, findings of fact by an administrative agency will not be rejected so long as they are "the product of an orderly and logical deductive process." *Eskridge v. Voshell,* 593 A.2d 589 (Del. 1991). The Department of Motor Vehicles hearing officer did not commit legal

error by concluding that the State proved by a preponderance of the evidence that Testerman violated 21 *Del. C.* § 4177.

CONCLUSION

In the motion to suppress filed with this Court by appellant in his criminal DUI proceeding, this Court found there was legal reasonable articulable suspicion to stop the defendant, and probable cause to arrest the defendant for DUI. The defendant was not convicted of DUI, but ultimately pled to an amended charge. In the prior administrative DMV license revocation hearing arising from the same DUI arrest, the DMV hearing officer reached the same conclusions regarding reasonable articulable suspicion and probable cause, and revoked the defendant's license. The appellant is estopped from attacking these rulings on appeal by this Court's subsequent, final determinations of the same issues in the motion to suppress. Further, the DMV hearing officer did not abuse his discretion in finding by a preponderance of the evidence that the defendant violated 21 *Del. C. §4177*, or otherwise commit reversible error. Accordingly, the Order of the Department of Motor Vehicles is **AFFIRMED.**

IT IS SO ORDERED, this _____ day of August 2004.

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Kenneth S. Clark, Jr., Judge