IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CURTIS S. WAYNE,	)	
	)	
Petitioner Below-	)	
Appellant,	)	
v.	)	C.A. No. 02-07-325
	)	
DIVISION OF MOTOR VEHICLES,	)	
	)	
Respondent Below-	)	
Appellee.	)	

Submitted: October 8, 2003
Decided: January 22, 2004

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DECISION AFTER APPEAL FROM DIVISION OF MOTOR VEHICLE'S PROBABLE CAUSE DETERMINATION HEARING

Curtis Wayne, petitioner-below appellant (hereinafter "Wayne") brings this appeal from a decision of the Division of Motor Vehicles, dated July 3, 2002 revoking his license pursuant to 21 Del. C. § 2742(c). The hearing officer concluded there was reasonable articulable suspicion to stop the vehicle of 21 Del. C. § 4177, and enter an order revoking Wayne's license.

Wayne asserts two issues for review in this appeal. First, Wayne alleges police officer lacked probable cause to stop his vehicle. Secondly, he argues that there was no basis to arrest the appellant for driving under the influence of alcohol. Wayne does not argues there was not a preponderance of the evidence to support a conclusion that he had violated § 20-57(a) of the Code of the City of Newark; therefore, that argument has been waived.

The standard and scope of review on appeal from an administrative decision of the Division of Motor Vehicles to the Court of Common Pleas "is limited to correcting errors of law and determining whether substantial evidence exists to support the hearing officer's findings of fact and conclusions of law." *Howard v. Voshell*, Del. Supr., 621 A.2d 804 (1992); *Eskridge v. Voshell*, Del. Supr., 593 A.2d 589 (1991). If substantial evidence exists in the record below this Court "may not re-weigh and substitute its own judgment for that of the Division of Motor Vehicles." *Barnett v. Division of Motor Vehicles*, Del. Super., 514 A.2d 1145 (1986); *Janaman v. New Castle County Board of Adjustment*, Del. Super., 364 A.2d 1241, 1242 (1976). However, when the facts have been established the hearing officer, his evaluation of their legal significance may be scrutinized upon appeal. *Voshell v. Addix*, Del. Supr., 574 A.2d 264 (1990).

FACTS

The facts here indicate that on the evening of December 26, 2001, Officer Bradshaw of the City of Newark Police Department was on patrol traveling southbound on South Chapel Creek in Newark, when he observed a red Honda Prelude. The vehicle was directly in front of him and he observed it cross over the

center double-yellow line. He testified the driver's side of the vehicle completely crossed the yellow lines into the opposite lane of travel and then crossed back into its lane of travel moving to the right until the passenger's side tires touched the white line which separated the shoulder from the travel lane. He continued to follow the vehicle and observed it successfully stop at a stop sign. Officer Bradshaw then decided to make a traffic stop. He testified he followed the vehicle approximately a half-mile until it was safe to make the stop. Once he activated his emergency lights, the vehicle swerved to the left and then came back to the right. The vehicle pulled over approximately two and a half, to three feet from the curb.

Wayne was smoking a cigarette when the officer approached the vehicle. When his license registration and proof of insurance was requested, he put out his cigarette and began to look through his glove compartment. He pulled out numerous papers but dropped several. After the cigarette was extinguished, Officer Bradshaw testified he detected an odor of alcohol coming from the vehicle. When asked how much he had to drink that night, Wayne responded, "not that much." He was then requested to perform field tests, which he consented.

While in the vehicle, Wayne was first asked to count backwards from 55 to 37. He counted from 55 to 40, then jumped back to 49 and continued to 47. The officer did not state whether he considered this to be a failure. Wayne was also asked to perform the alphabet test, which he did slowly, but successfully. Officer Bradshaw then asked Wayne to exit the vehicle for further field tests. Upon exiting the vehicle, the officer testified

Wayne nearly stumbled into the roadway. He was approximately three feet from Officer Bradshaw when the officer noticed a strong odor of alcoholic beverage coming from his breath. The officer further testified Wayne's eyes were watery and glassy.

Officer Bradshaw testified that each test was explained and demonstrated to Wayne. After each explanation, Wayne was asked whether he had any physical limitations that would prevent him from performing the tests. Each time Wayne answered no. Wayne did explain to Officer Bradshaw that he had undergone surgery for cancer, but that would not prohibit him from performing the tests. Additionally, there is no testimony in the record that Wayne was unable to perform physical tests due to the surgery.

Once outside the vehicle, Officer Bradshaw administered the horizontal gaze nystagmus ("HGN") test. Wayne constantly moved his head and had to be reminded several times not to move his head. Officer Bradshaw testified he detected all six clues and concluded Wayne failed the test. Defense counsel objected to the admission of the HGN results because "smooth pursuit" was checked on the officer's report and the officer testified there was a lack of smooth pursuit. Officer Bradshaw testified he checks "smooth pursuit" on the form when there is a lack of smooth pursuit and does so on all his reports. He further testified that even if smooth pursuit was eliminated, the appellant still failed the HGN test, based on the results. The hearing officer sustained the objection as to smooth pursuit only, but the test results were admitted.

Wayne also failed the walk-and-turn test. He did not touch heel to toe, did not walk straight, and used his arms for balance while performing the test. He was reminded halfway through the test to touch heel to toe; yet he failed to do so. He also failed the

balance test. He was unable to hold up one foot for the required period of time; also he could not maintain his balance without placing the other foot on the ground several times and at one point even rest his heel on the ground. Throughout this test, he also used his arms for balance.

The final field test, Officer Bradshaw administered was the Portable Breathalyzer Test ("PBT"), which he failed. Wayne was then taken into custody and transported to the police station. At the station, the Intoxilyzer test was administered after a thirty-minute waiting period. Officer Bradshaw testified that he used his wristwatch to calculate the time and that evidence was admitted over defense counsel's objection. The results revealed Wayne had a blood alcohol content of 0.182.

DISCUSSION

Wayne first contends the officer lacked probable cause to stop his vehicle. However, for an officer to stop a motor vehicle, he need only establish reasonable articulable suspicion that the driver of the vehicle is in violation of the law. *Delaware v. Prouse*, 440 U.S. 648 (1979). The evidence sufficient to determine whether a police officer has a reasonable articulable suspicion to justify stopping a vehicle is less than that required for probable cause. *Downs v. State*, Del. Supr., 570 A.2d 1142, 1145 (1990). This is an objective standard which requires an evaluation of the facts available to the officer at the time in question, which warrants a man of reasonable caution in the belief that the action taken was appropriate. *State v. Harmon*, 2001 WL 985082 (Del. Super.).

The facts here indicate the officer observed the vehicle cross the divider double-yellow line into the opposite lane of travel and then move back touching the line for his

shoulder. Crossing into the opposite lane of travel is a traffic violation for which the officer is authorized to make a motor vehicle stop, in violation of 21 Del. C. § 4114(a). *See Harmon*. Therefore, since the officer personally observed this traffic violation, it is clear that at the time he stopped the vehicle, he had a legal basis for the stop.

Wayne's second argument is that there was no probable cause for his arrest for violation of § 20-57(a) of the Code of the City of Newark, which is equivalent to 21 Del. C. § 4177. In order to establish probable cause, the officer is required to present facts which when reviewed under the totality of the circumstances, support a finding that there is a fair probability that the defendant committed a crime, for which he is taken into custody, *State v. Maxwell*, 624 A.2d 926 (Del. Supr., 1993). *See State v. Otto*, Del. Super., C.A. No. IK-93-04-0109, Steele, R.J. (November 12, 1993) (accident, smell of alcohol on defendant, defendant's slurred speech, blood shot eyes, and admission of visiting a bar were factors sufficient to constitute probable cause); *Glass v. State*, Del. Supr., No. 5, 1988, Walsh, J. (June 13, 1988) (accident, odor of alcohol on defendant's breath, and defendant's confused and disoriented state were sufficient to establish probable cause).

The facts established in the record are sufficient to support the hearing officer's finding of probable cause to believe Wayne violated § 20-57(a) of the Code of the City of Newark. The facts which are outlined in the record and support the determination of the hearing officer are: (1) crossing over the double-yellow line, (2) odor of alcoholic beverage coming from appellant's vehicle, (3) appellant's admission of drinking, (4) appellant nearly stumbling into roadway upon exiting vehicle, (5) strong odor of alcohol coming from appellant when standing three feet from officer, (6) appellant's watery and

glassy eyes, (7) appellant's failure of the HGN test, (8) appellant's failure of the walk and turn test, (9) appellant's failure of one-leg stand test, and (10) appellant's failure of the PBT. The totality of the circumstances in this case support the finding of the hearing officer that there was probable cause to take Wayne into custody while under the influence of alcohol.

Based on the above, I conclude that the hearing officer's decision revoking Wayne's license is supported by substantial facts and conclusions of the law and is Affirmed.

SO ORDERED this 22nd day of January, 2004

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Alex J. Smalls
Chief Judge

Wayne-OPJan04