IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

EVAN M. TAYLOR,	)	
	)	
Appellant,	)	
	)	
v.	)	**C.A. Number: CPU4-11-004627**
	)	
JENNIFER K. COHAN, Director, DIVISION OF MOTOR VEHICLES, DELAWARE DEPARTMENT OF TRANSPORTATION,	)	
	)	
Appellee.	)	

Submitted: February 20, 2012
Decided: April 5, 2012

On Appeal from the Department of Public Safety – Division of Motor Vehicles
*Decision **AFFIRMED***

Richard Ferrara, Esquire
Ferrara & Haley
1716 Wawaset Street
Wilmington, Delaware 19806

Attorney for Appellant

Frederick H. Schranck, Esquire
Deputy Attorney General
Delaware Department of Transportation
P.O. Box 778
Dover, Delaware 19903
Attorney for Appellee

DAVIS, **J.**

Evan M. Taylor brings this appeal from an administrative decision, dated June 9, 2011, of the Department of Public Safety – Division of Motor Vehicles (the "Division") revoking his driving privileges pursuant to 21 *Del. C.* § 2742(c)(2). A hearing officer of the Division ordered revocation based on evidence presented at a hearing that demonstrated Mr. Taylor was driving under the influence of alcohol on March 9, 2011. Mr. Taylor appeals the decision of the

Division, claiming the hearing officer erred in admitting into evidence over an objection the intoxilyzer calibration certification sheets signed by the Cynthia McCarthy, a State chemist for the State of Delaware. Mr. Taylor also contends the hearing erred below because the arresting officer, Officer Michael Wolfrom from the Newark Police Department, did not possess the requisite probable cause to transport Mr. Taylor to the police station for additional testing.

The Court holds that the hearing officer below erred in admitting the intoxilyzer calibration certification sheets signed by Ms. McCarthy.[1] Even excluding the intoxilyzer calibration certification sheets, however, this Court concludes -- based on the entire record below -- that the hearing officer's decision is otherwise free of errors of law and adequately supported by facts (i) proving that Officer Wolfrom had probable cause to charge Mr. Taylor with the offense of operating a motor vehicle while intoxicated and (ii) proving, by a preponderance of the evidence, that Mr. Taylor committed the offense. Accordingly, the decision below is **AFFIRMED**.

Factual and Procedural Background

Officer Michael Wolfrom is a police officer employed by the Newark Police Department. Officer Wolfrom is also a graduate of the Delaware State Police Academy. Officer Wolfrom testified at the hearing, held on June 9, 2011, that he is certified and received training through the Delaware State Police Academy on administering the National Highway and Traffic Safety Administration's field sobriety tests. Officer Wolfrom also testified that he is certified to operate the Intoxilyzer 5000.

On March 9, 2011, Officer Wolfrom was on duty in Newark, Delaware. At the time, Officer Wolfrom was performing stationary radar speed enforcement on East Delaware Avenue and Library Avenue. Officer Wolfram observed a red Honda Civic travelling at a speed of 42

[1] *State v. Greene*, No. 1012002257, (Del. Super. Ct., February 7, 2012)

miles per hour in a 25 mile per hour speed zone. Officer Wolfram got behind the Honda Civic and observed the car make a right turn from Library Avenue onto Ogletown Road without properly signaling the turn. Officer Wolfram then activated his emergency equipment and the Honda Civic pulled into a gas station parking lot.

Officer Wolfrom testified that he next made contact with Mr. Taylor who was the operator of the Honda Civic. Upon contact with Mr. Taylor, Officer Wolfrom immediately detected a strong odor of alcohol emanating from the person of Mr. Taylor. Officer Wolfrom also observed that Mr. Taylor had glassy eyes.

Officer Wolfrom asked Mr. Taylor where Mr. Taylor was heading. Mr. Taylor replied that he was heading to Wilmington. Officer Wolfrom then asked Mr. Taylor where Mr. Taylor was coming from and Mr. Taylor stated the Del Rose Café. Officer Wolfrom testified that he knows that the Del Rose Café is located in Wilmington. Officer Wolfrom noted that Mr. Taylor subsequently became confused and stated that he meant that he was coming from Mojo's on Main Street in Newark and not the Del Rose Café.

During these initial stages of the stop, Officer Wolfrom asked Mr. Taylor how much Mr. Taylor had to drink that night. Mr. Taylor admitted to consuming alcohol and replied that he had a couple of beers earlier.

Officer Wolfrom then began to conduct field sobriety tests on Mr. Taylor. Officer Wolfrom first administered the Horizontal Gaze Nystagmus test (the "HGN test"). Officer Wolfrom testified that he used standard operating procedures when performing the HGN test. Officer Wolfrom stated that he observed six clues when performing the HGN test.

Next, Officer Wolfrom had Mr. Taylor perform the walk and turn test. Officer Wolfrom testified that Mr. Taylor exhibited two clues while performing the walk and turn test. During the

instructional phase of this test, Mr. Taylor lost his balance while his feet where in the heel/toe position. In addition, Mr. Taylor did not touch his heel to his toe between the eighth and ninth step during the return portion of the test. Officer Wolfram stated that Mr. Taylor failed to touch his heel to toe by a distance greater than instructed.

After the walk and turn test, Officer Wolfrom had Mr. Taylor perform the one-legged stand test. Upon completion of the instructions, Mr. Taylor successfully completed this test.

Officer Wolfrom asked Mr. Taylor if he would take a "preliminary breath test." Mr. Taylor advised Officer Wolfrom that he did not want to take this test.

At that point, Officer Wolfrom placed Mr. Taylor under arrest for suspicion of driving under the influence of alcohol. Officer Wolfrom then transported Mr. Taylor back to the Newark Police Department station for an intoxilyzer machine test.

Mr. Taylor consented to testing on the intoxilyzer machine at the station. Officer Wolfrom testified that he followed standard procedures prior to and during Mr. Taylor's test on the intoxilyzer machine. After a twenty-five (25) minute observation period without a disqualifying incident, Officer Wolfram had Mr. Taylor perform the test. The intoxilyzer reading from the test indicated that Mr. Taylor had a blood alcohol content of 0.188.

At the hearing, Officer Wolfrom presented the calibration certification sheets for the relevant intoxilyzer machine, showing that calibration certifications were performed by Ms. McCarthy. Officer Wolfrom testified that the first sheet demonstrated that a calibration certification was conducted on January 31, 2011 and the second sheet demonstrated that a calibration certification was performed on March 22, 2011. According to the calibration certification sheets, Ms. McCarthy certified the machine as operating properly both on January 31, 2011 and March 22, 2011. Mr. Taylor's counsel objected to admission of the calibration

certification sheets on various grounds, including the ground that there was no evidence that Ms. McCarthy was qualified as an expert witness for purposes of determining whether the intoxilyzer machine was properly calibrated. The hearing officer overruled these objections and admitted the calibration certification sheets.

Subsequent to the hearing, the hearing officer ruled that Officer Wolfrom had probable cause to arrest Mr. Taylor. In addition, the hearing officer found, by a preponderance of the evidence, that Mr. Taylor was in violation of 21 *Del. C.* § 4177. The hearing officer memorialized his ruling in a document entitled "State of Delaware Department of Public Safety Division of Motor Vehicles Driver Improvement Unit Hearing Disposition" (the "Disposition").[2]

Mr. Taylor filed a timely appeal from the final decision of the Division.

Parties Contentions

Mr. Taylor raises two arguments in this appeal. First, Mr. Taylor argues that Officer Wolfrom did not have sufficient probable cause to transport him to the Newark Police Department station for testing on the intoxilyzer machine. Second, Mr. Taylor argues that the hearing officer erred by failing to exclude the intoxilyzer calibration certification log sheets as evidence at the hearing. The Division, represented by a deputy attorney general, submits that the decision of the hearing officer should be affirmed. In addition, the Division argues that even if the intoxilyzer result is excluded, the totality of the record supports the hearing officer's conclusions below.

Standard of Review

The Court of Common Pleas' authority to review license revocation decisions made by the Division of Motor vehicles is provided by 21 *Del. C.* § 2744. This Court reviews appeals

[2] Appellee's Appendix to the Answering Brief at A52-A56 (hereinafter cited as "Appendix at A__").

from the Division on the record made below.[3] The scope of review of an appeal from the Division is limited to correcting errors of law and determining whether substantial evidence exists on the record to support both the findings of fact and the legal conclusions reached by the hearing officer.[4]

Findings of fact will not be overturned on appeal as long as they are sufficiently supported by the record and are the product of an orderly and logical deductive process.[5] Substantial evidence is more than a "scintilla but less than a preponderance of the evidence."[6] Substantial evidence requires such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[7] This Court will not disturb the factual findings on appeal unless they are not supported by substantial evidence, or are not the product of an orderly and logical deductive process.[8]

Discussion

The Court will initially address Mr. Taylor's argument that the hearing officer erred in admitting into evidence the intoxilyzer calibration certification sheets. Mr. Taylor's argument here is sustainable and correct. After the hearing in this case, on February 7, 2012, the Superior Court for the State of Delaware issued its opinion in *State v. Greene*.[9] In *Greene*, the Superior Court held that Ms. McCarthy "must, at the least, have been qualified in some prior proceeding as an expert in intoxilyzer calibration certification before an admission of her certificates."[10]

[3] Ct. Com. Pl. Civ. R. 72.1
[4] *Eskridge v. Voshell*, 593 A.2d 589 (Del. Super. 1991).
[5] *Id.*
[6] *Howard v. Voshell*, 621 A.2d 804 (Del. Super 1992).
[7] *Id.*
[8] *Id.*
[9] *State v. Greene*, Case No. 1012002257.
[10] *Id.*, slip op. at 8.

The facts are clear that Ms. McCarthy had not been qualified as an expert on this particular subject until a time after June 9, 2011.[11] Under *Greene*, therefore, the hearing officer should have excluded the log sheets. By not excluding the intoxilyzer calibration certification sheets, the hearing officer committed an error of law. As set forth below, however, the Court holds that, based on the entire record, the failure to exclude the log sheets does not mean that the decision by the hearing officer must be reversed.

The Division has statutory authority to revoke a person's driver's license following an arrest for driving under the influence. In order to revoke a person's driver's license, evidence must be presented to the Division that: (1) proves the police officer had probable cause to charge the defendant with the offense of operating a motor vehicle while intoxicated and (2) proves by a preponderance of the evidence that the defendant committed the offense.[12]

In Delaware, a person operating a motor vehicle on a roadway is "deemed by statute 'to have given consent to chemical tests, including a test of the breath to determine the presence of alcohol or drugs.'"[13] Because such testing constitutes a search, a police officer must have probable cause to believe a person was driving under the influence of drugs or alcohol before requiring the person to submit to chemical testing.[14] An officer has probable cause when the officer has information which would warrant a reasonable man in believing that a crime has occurred.[15]

The Supreme Court of the State of Delaware, most recently in *Lefebvre v. State*, described probable cause as "'an elusive concept which…lies somewhere between suspicion and

[11] *Id.*, slip op. at 3 n. 2; *see also* Transcript of Record, *State v. Spruill*, Case No. 1103002449 (Del. Super. Ct., September 29, 2011) (Ms. McCarthy qualified as expert).
[12] *Fletcher v. Shahan*, 2002 WL 499883 (Del. Super. Mar. 6, 2002).
[13] *Lefebvre v. State*, 19 A.3d 287, 292 (Del. 2011) (quoting from *Bease v. State*, 884 A.2d 495, 497-98 (Del. 2005)).
[14] *Id.*
[15] *State v. Trager*, 2006 WL 2194764 (Del Super. 2006) (citing *State v. Maxwell*, 624 A.2d 926 (Del. 1993)).

sufficient evidence to convict.'" In a driving under the influence situation, probable cause to arrest exists when an officer possesses "'information which would warrant a reasonable man in believing that [such] a crime ha[s] been committed.'"[16] To meet this standard, the State must:

> 'present facts which suggest, when those facts are viewed under the totality of the circumstances, that there is a fair probability' that the defendant has committed a DUI offense. That hypothetically innocent explanations may exist for facts learned during an investigation does not preclude a finding of probable cause. What is required is that the arresting police officer possess a 'quantum of trustworthy factual information' sufficient to warrant a man of reasonable caution in believing a DUI offense has been committed.[17]

No precise formula exists for determining probable cause. Instead, Delaware courts have defined and refined, through a variety of factual contexts, the boundaries of what constitutes probable cause for a DUI offense.[18] As no precise formula exists, the Supreme Court in *Lefebvre* is clearly directing trial courts to use, as guidance, other decisions on probable cause and the factual contexts in those cases when determining whether probable cause existed to arrest for a DUI offense in the trial court's case.[19]

After proving that the police officer had probable cause to charge the defendant with driving under the influence, it must be proved by a preponderance of the evidence that the defendant was driving under the influence. The Supreme Court has summarized the preponderance of the evidence standard as follows:

> [t]he side on which the greater weight of the evidence is found is the side on which the preponderance of the evidence exists. If the evidence is in even balance then the side having the burden of proving a fact by a preponderance of the evidence has failed to prove it by such preponderance.[20]

---

[16] *Lefebvre*, 19 A.3d at 292 (quoting from *Clendaniel v. Voshell*, 562 A.2d 1167, 1170 (Del. 1989)).
[17] *Id.* at 292-93 (quoting from *State v. Maxwell*, 624 A.2d 926, 929 and 930 (Del. 1993)).
[18] *Id.* at 293.
[19] *Id.* (reviewing the facts used in the probable cause analysis in *Esham v. Voshell*, 1987 WL 8277 (Del. Super. Ct. Mar. 2, 1987), *Bease v. State*, 884 A.2d 495 (Del. 2005), *Perrera v. State*, 2004 WL 1535815 (Del. June 25, 2004).
[20] *Fletcher v. Shahan*, 2002 WL 499883 (Del. Super. March 6, 2002) (quoting *Barnett v. Division of Motor Vehicles*, 514 A.2d 1145, 1147 (Del. 1986) (citations omitted)).

Officer Wolfrom had probable cause to believe Mr. Taylor was operating his motor vehicle in violation of 21 *Del. C.* § 4177.

The Court has determined that substantial evidence appears on the record to support the hearing officer's findings of fact and legal conclusions that Officer Wolfrom had probable cause to charge Mr. Taylor with the offense of operating a motor vehicle while intoxicated. Officer Wolfrom is an experienced and certified officer with respect to DUI enforcement. Mr. Taylor committed two moving violations in the presence of Officer Wolfrom – speeding and failing to signal a turn. Officer Wolfrom noted a strong odor of alcohol emanating from Mr. Taylor. Officer Wolfrom observed that Mr. Taylor's eyes were glassy. In addition, Mr. Taylor provided confusing answers to simple questions asked by Officer Wolfrom regarding where he was coming from and where he was going. Mr. Taylor admitted consuming alcohol prior to driving. While Mr. Taylor successfully completed the one legged stand test, Mr. Taylor did exhibit clues indicating impairment when performing both the HGN test and the walk and turn test. And, Mr. Taylor refused to take a "preliminary breath test."

Given this record, the Court holds that hearing officer did not commit error when determining that Officer Wolfrom had probable cause to believe that Mr. Taylor had committed the offense of operating a motor vehicle while intoxicated. Moreover, the Court holds that the factual findings of the hearing officer are supported by substantial evidence and are the product of an orderly and logical deductive process.[21]

[21] As suggested by the Supreme Court in *Lefebvre*, this Court reviewed other decisions involving probable cause and a DUI offense. In doing so, this Court believes that the decision here lies within the boundaries of what constitutes probable cause for committing the offense of operating a motor vehicle while intoxicated. *See, e.g., Lefebvre v. State*, 19 A.3d 287 (Del. 2011) (probable cause where passed field tests but moving violation, strong odor of alcohol, slurred speech and admission to drinking about an hour and a half before the traffic stop); *Bease v. State*, 884 A.2d 495 (Del. 2005) (probable cause where failure on alphabet test, traffic violation, odor of alcohol, rapid speech, admission to drinking, bloodshot and glassy eyes); *Maxwell v. State*, 624 A.2d 926 (Del. 1993) (probable cause where accident, odor of alcohol at scene of accident and several containers of beer in vehicle and no field tests); *State v. Iyer*, 2011 WL 976480 (Del. Super. Feb. 23, 2011) (probable cause where no admissible field tests, overturned sedan, moderate odor of alcohol, watery, glassy and "maybe a little bit bloodshot" eyes and admission of

Even absent the results from the intoxilyzer machine, the hearing officer had sufficient evidence in the record to determine that Mr. Taylor was in violation of 21 *Del. C.* § 4177.

Moreover, the Court holds that there is sufficient evidence in the record to establish, by a preponderance of the evidence, that Mr. Taylor was in violation of 21 *Del. C.* § 4177 even without consideration of the intoxilyzer result.[22] The hearing officer does not need the result of a chemical test in order to determine whether Mr. Taylor was in violation of 21 *Del. C.* § 4177. Other evidence may be used to prove that a driver was impaired by consumption of alcohol.

> The evidence 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.
>
> It is not necessary that the driver be "drunk" or "intoxicated." Nor is it required that impaired ability to drive be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to drive safely was impaired by alcohol.[23]

The Court's review of the transcript in this case and the Disposition shows that the hearing officer had available and considered multiple facts beyond the results of the intoxilyzer machine in finding by a preponderance of the evidence that Mr. Taylor was in violation of 21 *Del. C.* § 4177.[24] Officer Wolfrom observed two moving violations – speeding and failure to properly signal a right hand turn. Upon first contact with Mr. Taylor, Officer Wolfrom smelled a strong odor of alcohol emanating from Mr. Taylor. Mr. Taylor's eyes were glassy. Mr. Taylor provided confusing responses to simple questions. Upon further questioning, Mr. Taylor

---

drinking); *Blossom v. Shahan*, 2006 WL 1791211 (Del. Com. Pl. 2006) (probable cause where flushed complexion, glassy eyes, awkward behavior and admission to drinking).

[22] *See State v. Mealy*, 2010 WL 175623, at *4 (Del. Com. Pl. Jan. 20, 2010).

[23] *Lewis v. State*, 626 A.2d 1350, 1355 (Del. 1993).

[24] *See, e.g.*, Disposition, Appendix at A52-A54 and A56 ("With respect to section 2742(C), I find by a preponderance of the evidence that the defendant was…in violation of section 4177 (or the conforming local ordinance noted above), based on the following evidence: The result of a valid intoxilizer test administered to the def. was .118 BAC. The def. admitted to drinking, had two violations, seemed confused in his initial interaction with the officer. Preponderance of evidence established.").

volunteered that he had consumed "a couple of beers." Mr. Taylor only successfully completed one of three NTSHA-approved field sobriety tests, and refused to take a preliminary breath test.

Given the record on appeal, this Court does not need to rely on the evidence concerning the intoxilyzer test to reach the conclusion that sufficient evidence exists to find, by a preponderance of the evidence, that Mr. Taylor was in violation of 21 *Del. C.* § 4177. Given the standards of review on appeal, the evidence in the record is sufficient to show that Mr. Taylor had consumed a sufficient amount of alcohol to cause him 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.

Conclusion

For the reasons stated above, the decision of the Division is **AFFIRMED**.

IT IS SO ORDERED this 5th day of April, 2012.

Eric M. Davis

Eric M. Davis
Judge