IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN

AND FOR THE NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
Appellant,	)	
	)	I.D. No. 0506005562
v.	)	
	)	
TRINA M. CRESPO,	)	
	)	
Appellee-Defendant Below.	)	

Date Submitted: January 11, 2009
Date Decided: April 17, 2009

MEMORANDUM OPINION

Upon Appeal from the Court of Common Pleas.
REVERSED.

Paul R. Wallace and Sean P. Lugg, Deputy Attorneys General, Department of Justice, Wilmington, Delaware, for the State of Delaware.

Louis B. Ferrara, Ferrara & Haley, Wilmington, Delaware, for the Appellee-Defendant Below.

SLIGHTS, J.

I.

This appeal from the Court of Common Pleas, pursuant to 10 DEL. C. § 9903, requires the Court to consider the propriety of a forcible withdrawal of blood from a woman suspected of driving under the influence of alcohol or drugs.[1] The subject of the search, the Appellee, Trina M. Crespo ("Ms. Crespo"), was stopped by the Delaware State Police after an officer observed her striking a cement median with her vehicle while making a left hand turn and subsequently failing to respond to the officer's efforts to conduct a vehicle stop. Following a brief investigation at the scene, Ms. Crespo was taken into custody and transported to the police station for further investigation. While at the police station, she was asked to submit to a withdrawal of her blood for chemical testing. When she refused, the investigating officer restrained her arm while a licensed phlebotomist drew a blood sample from her. She was later charged with driving while under the influence of alcohol, in violation of 21 DEL. C. § 4177(a). The trial court suppressed the blood test results after finding that, in the context of investigating a first offense of driving under the influence of alcohol, the

[1] The Court notes that the "primary purpose of [10 DEL. C. §9903] is to afford the State the opportunity to have reviewed by this Court adverse rulings of law made by lower courts–not for the purpose of having an appellate decision in the specific case in which the question arose, but for the purpose of having the question finally decided for future case–all with due regard for the double jeopardy guarantee." *State v. Bogard*, 1991 WL 72567, at *1 (Del.) (citing *State v. Clark*, 270 A.2d 371, 372-73 (Del. 1970)). It is in this limited context that the Court has reviewed the issues presented in this appeal.

police officer violated both the Delaware and United States constitutions by using unlawful force and unlawful protocols to draw Ms. Crespo's blood for testing. In the absence of the blood test results, the trial judge found Ms. Crespo "not guilty."

For the reasons that follow, the Court concludes that the forcible extraction of a suspect's blood at a police station for a first offense driving under the influence charge is not *per se* unreasonable, even in the absence of an administrative policy or protocol governing the extraction. In addition, the Court concludes that the trial court erred in determining that the extraction of Ms. Crespo's blood in this case was unlawful. Accordingly, the decision of the Court of Common Pleas granting Ms. Crespo's motion to suppress the blood test results is hereby REVERSED.[2]

II.

A. The Investigation and Arrest

On the evening of May 26, 2005, Corporal Jose Eschenwald of the Delaware State Police was on routine patrol in New Castle County, Delaware.[3] At

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[2] The Court does not remand this case for further proceedings in accordance with this opinion because jeopardy attached when Corporal Eschenwald began his trial testimony on behalf of the State. *See State v. Weil*, 1995 WL 790948, at *2 (Del. Super) (finding that jeopardy attached when the first witness began to testify). Indeed, the trial court found Ms. Crespo "not guilty." Accordingly, "where a Defendant has been acquitted, even as a result of an erroneous evidentiary ruling, retrial is barred by the Double Jeopardy Clause." *Id.* (citing *U.S. v. Scott*, 437 U.S. 82, 98 (1978)).

[3] Trial Tr. at 7 (February 26, 2007).

approximately 11:00 p.m., he observed a blue Mercury Mystique strike the cement median as it turned from Ruthar Drive onto Harmony Road, causing the front and rear driver's side tires to deflate.[4] Despite the two flat tires, the Mystique did not stop and instead continued to travel at a speed of approximately twenty-five to thirty miles per hour.[5] Corporal Eschenwald turned his patrol vehicle around, activated the emergency lights and siren and attempted to stop the Mystique.[6] Ms. Crespo, the operator of the Mystique, testified at the suppression hearing that she did not stop because, although she noticed that a car was following her, she was not aware that it was a marked police vehicle and she did not see or hear the officer's emergency equipment.[7] She also testified that even though she was aware that her tires were flat she elected not to stop because it was dark and, as a female traveling alone at night, she felt it would be unsafe.[8]

Corporal Eschenwald followed the Ms. Crespo's vehicle for approximately a

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[4] *Id*. at 8.

[5] According to Corporal Eschenwald's trial testimony, the speed limit in the area is forty-five miles per hour. *Id*. at 16.

[6] *Id*. at 8.

[7] *Id*. at 49.

[8] *Id* at 45-47.

mile and a half to two miles.[9] As he did so, Ms. Crespo drove into the Brook Haven neighborhood and stopped in the driveway of a residence at 9 Brookmead Road.[10] Corporal Eschenwald pulled into the driveway behind Ms. Crespo, exited his vehicle and approached the driver's side of Ms. Crespo's vehicle.[11] The engine was still running and Ms. Crespo was seated in the driver's seat.[12] Corporal Eschenwald asked Ms. Crespo for her license, registration and proof of insurance.[13] In response, Ms. Crespo advised Corporal Eschenwald that she could not be subject to a traffic stop because she was on private property, and she refused to provide the requested documents.[14] Corporal Eschenwald detected a strong odor of alcohol, and noted that Ms. Crespo's eyes were extremely glassy and bloodshot, and her speech was mumbled and slurred.[15] He asked Ms. Crespo where she had been that evening, and she responded that she was coming from Delaware Park and that she was drunk.[16]

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[9] *Id*. at 8.

[10] *Id*. at 9.

[11] *Id*. at 10.

[12] *Id*. at 11.

[13] *Id.*

[14] *Id*. at 12.

[15] *Id*. at 12-13.

[16] *Id*. at 12.

Corporal Eschenwald asked Ms. Crespo to exit her vehicle and to submit to a series of field sobriety tests.[17] Upon emerging from her vehicle, Ms. Crespo nearly fell down and used her vehicle door for support.[18] Even as she held onto the door, she was unsteady on her feet, forcing Corporal Eschenwald physically to hold her up to prevent her from falling.[19] Ms. Crespo refused to perform any field sobriety tests, repeating that she was under no obligation to submit to such testing because she was on private property.[20] Although Ms. Crespo claimed to be at her uncle's address, the residents of 9 Brookmead Road told Corporal Eschenwald that they did not know Ms. Crespo.[21] As it turned out, Ms. Crespo's uncle lived several houses away.[22]

In Corporal Eschenwald's opinion, Ms. Crespo was highly impaired.[23] Accordingly, he took her into custody and transported her to Troop Six (the "Troop").[24] Upon arriving at the Troop, Ms. Crespo continued to refuse to cooperate

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[17] *Id*. at 13.

[18] *Id*. at 14.

[19] *Id*.

[20] *Id*. at 13.

[21] *Id*. at 15.

[22] *Id.*

[23] *Id*. at 14.

[24] *Id*. at 73.

with the investigation by refusing voluntarily to submit to an Intoxilyzer breath test.[25] Consequently, without informing her of the penalty for refusing to submit to a chemical breath or blood test (and thereby invoking the Delaware implied consent statutes),[26] Corporal Eschenwald told Ms. Crespo that a phlebotomist would be summoned to the Troop to draw a sample of her blood.[27]

The blood draw took place at 12:39 a.m., approximately one hour after Corporal Eschenwald observed Ms. Crespo driving her vehicle.[28] A phlebotomist from Omega Medical Services, with whom the State Police regularly works, responded to the Troop at Corporal Eschenwald's request.[29] Per State Police protocol, Corporal Eschenwald took a sealed blood kit from the Troop's temporary evidence locker, inspected it to make certain that nothing was missing, and gave it to the phlebotomist.[30] The phlebotomist used an iodine swab to clean the site of the blood draw and then, using a tourniquet, drew Ms. Crespo's blood into a sealed vial.[31]

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[25] *Id*.

[26] 21 DEL. C. § 2740 et seq.

[27] Trial Tr. at 78.

[28] *Id*. at 75.

[29] *Id*. at 74.

[30] *Id*. at 90.

[31] *Id.* at 74-75 and 83-84.

Corporal Eschenwald testified that he held Ms. Crespo's arm during the procedure to ensure the safety of all involved in the event that Ms. Crespo became physically combative during the procedure.[32] According to Corporal Eschenwald's recollection, only he and the phlebotomist were present during the blood draw procedure.[33]

Once the blood draw was completed, Corporal Eschenwald followed Delaware State Police evidence protocol for storage of blood samples by labeling the vial with evidence stickers, filling out the necessary portions of the Delaware State Police Chemical Test Report (the "Report"), and placing the vial and all copies of the Report back into the blood kit.[34] Corporal Eschenwald locked the sealed blood kit in the temporary evidence refrigerator and then placed Ms. Crespo under arrest for driving under the influence of alcohol ("DUI"), in violation of 21 DEL. C. § 4177(a).[35]

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[32] Corporal Eschenwald testified that this was his general practice during a blood draw procedure, and he made a point of distinguishing the practice of holding a suspect's arm during the blood draw from physically restraining a suspect's entire body during the procedure. *Id*. at 82.

[33] According to Ms. Crespo's post-trial affidavit, Corporal Eschenwald and another female officer physically restrained her during the blood draw procedure by "pinn[ing her] to the chair," causing her pain both during the procedure and the days that followed. App. to Appellee's Answering Br. at A146 (March 28, 2007) (Aff. Of Trina M. Crespo). Counsel for Ms. Crespo questioned Corporal Eschenwald extensively at trial on this matter and, as stated, he did not recall another officer being present during the procedure. Trial. Tr. at 80. Corporal Eschenwald did note, however, that if a female officer had been present at the Troop at the time of the blood draw, in accordance with standard procedure, he would have asked that officer to be present during the procedure. *Id*. at 79.

[34] *Id.* at 76-77 and 85-93.

[35] *Id*. at 76.

Corporal Eschenwald noted that throughout his interaction with Ms. Crespo, she continuously used abusive and profane language and behaved in a belligerent and uncooperative manner.[36]

On June 21, 2005, Josefina Joy Tengonciang ("Tengonciang"), a Forensic Chemist employed by the Delaware State Police Crime Laboratory, analyzed Ms. Crespo's blood sample in accordance with the Standard Operating Procedure for Blood Alcohol Analysis approved by the Delaware State Police Crime Laboratory.[37] Ms. Crespo's blood sample tested positive for a blood alcohol content of 0.22, or 22 grams of alcohol per 100 milliliters of blood.[38]

B. The Motions To Suppress and The Trial

On September 10, 2005, Ms. Crespo was charged with driving a vehicle under the influence of alcohol or drugs by Information filed in the Court of Common Pleas. On April 28, 2006, she filed a motion to suppress her blood test results on the grounds that the initial vehicle stop and detention was not supported by reasonable, articulable

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[36] *Id*. at 78.

[37] App. to Appellee's Answering Br. at A153 (Delaware State Police Chemical Test Report). In her second motion to suppress, Ms. Crespo alleged that the blood kit had been tampered with after it was sealed but before it was opened for analysis by the Medical Examiner's office. App. to Appellee's Answering Br. at A136 (Defendant's brief in support of her second Motion to Suppress). She argued that this fact rendered the results of the blood analysis inherently unreliable. *Id*. at A138. Because the trial court did not address that issue in its decision on the motion to suppress, the Court will not address it here.

[38] *Id*.

suspicion and that her subsequent arrest was not supported by probable cause.[39] The suppression hearing commenced on the day of trial, February 26, 2007. After hearing testimony from Corporal Eschenwald, Ms. Crespo,[40] and Ms. Crespo's husband regarding the events leading up to Corporal Eschenwald's decision to take Ms. Crespo into custody, the trial court determined that Corporal Eschenwald's initial detention of Ms. Crespo was supported by reasonable, articulable suspicion that she was operating her vehicle while under the influence of alcohol or drugs, and that Ms. Crespo's subsequent arrest was supported by probable cause.[41] Accordingly, Ms. Crespo's first motion to suppress was denied.[42]

The trial began immediately upon the conclusion of the first suppression hearing. The State's only witnesses were Corporal Eschenwald and Tengonciang, both of whom addressed the procedure for obtaining and sealing Ms. Crespo's blood evidence and other aspects of the investigation.[43] When the State rested its case, the Court asked Ms. Crespo if she wished to present any evidence, to which her counsel

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[39] App. to Appellee's Answering Br. at A002 (Defendant's Motion to Suppress).

[40] Ms. Crespo's testimony at the suppression hearing was limited to the events leading up to the stop of her vehicle. She did not testify at trial and did not address the events that occurred at the Troop.

[41] Trial. Tr. at 70-73.

[42] *Id*.

[43] *Id*. at 73-113.

responded, "No, Your Honor. I don't. I am comfortable that we have a satisfactory record."[44] Ms. Crespo then moved for a second time to suppress evidence, this time directed to the results of the blood test. Specifically, she alleged that the amount of force used to obtain her blood sample was excessive, and that the use of force to obtain a blood sample from a DUI suspect in a non-medical environment is a violation of 21 DEL. C. §2742, which requires police officers to take "reasonable steps [when] conduct[ing]...chemical testing...without...consent."[45] The trial court reserved decision pending further briefing by the parties and oral argument.[46]

Oral argument was held on June 4, 2007. Ms. Crespo reiterated her position that the withdrawal of her blood was performed in an unlawful manner because: (1) the amount of physical force used to restrain her during the blood draw procedure was unreasonable; (2) the State police failed to maintain an administrative policy that governs the withdrawal of blood samples from individuals suspected of driving under the influence of alcohol; (3) the procedure was not performed in a medical environment; and (4) the extreme measures taken to extract the blood sample were not

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[44] *Id*. at 129. Although she chose not to present evidence at trial, as discussed below, Ms. Crespo did supply an affidavit with her post-trial brief in which she addressed in detail the facts discussed by Corporal Eschenwald in his trial testimony. App. to Appellee's Answering Br. at A145 (Defendant's brief in support of her second Motion to Suppress). She also supplied photographs that were never entered into evidence. *Id*. at A 149.

[45] *Id*. at 116-18.

[46] *Id*. at 123.

reasonable given that the police were investigating a misdemeanor first offense DUI.[47] The State responded that under the implied consent statutes, a DUI suspect may be forced to submit to a blood draw at the Troop (with or without an administrative policy) as long as the means used to obtain the sample are reasonable under the circumstances.[48] In this case, the State argued that Corporal Eschenwald employed reasonable means to secure Ms. Crespo's blood sample.

The trial court released its written opinion granting Ms. Crespo's motion to suppress on December 20, 2007. The court held that "absent a policy by the Delaware State Police governing the forced extraction of blood, forcing the Defendant to give her blood at a police station for a first offense charge of Driving While Under the Influence of Alcohol is unreasonable pursuant to 21 DEL. C. § 2742."[49] Finding the remaining evidence insufficient to prove beyond a reasonable doubt that Ms. Crespo was driving under the influence, the Court found her "not guilty."[50] This appeal by the State followed.

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[47] *Id*. at 8-17.

[48] *Id*. at 19-24.

[49] *State v. Crespo,* Ct. Com. Pl., C.A. No. 0506005562, Smalls, C.J. (Dec. 20, 2007), Op. at 14.

[50] *Id*.

III.

A. Standard of Review

When reviewing decisions of the Court of Common Pleas in criminal cases, the Court's review is governed by statute,[51] and its processes model those of our Supreme Court.[52] The standard of review of a trial court's decision to grant a motion to suppress is well settled:

> We review the grant or denial of a motion to suppress for an abuse of discretion. To the extent that we examine the trial judge's legal conclusions, we review the trial judge's determinations *de novo* for errors in formulating or applying legal precepts. To the extent the trial judge's decision is based on factual findings, we review for whether the trial judge abused his or her discretion in determining whether there was sufficient evidence to support the findings and whether those findings were clearly erroneous.[53]

B. The Competent Evidence Did Not Justify Suppression Of The Blood Test Results

The State argues that the opinion of the trial court is based upon factual findings unsupported by the evidentiary record in this case. After a thorough review of the record, the Court must agree.

The trial court recounted the events surrounding the blood draw as follows:

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[51] 10 DEL. C. § 9903; 11 DEL. C. § 5301(c)).

[52] *Layne v. State*, 2006 WL 3026236, at *1 (Del. Super.).

[53] *Lopez-Vazquez v. State*, 956 A.2d 1280, 1284 (Del. 2008).

> Crespo, who is 5'3" tall and weighs approximately 125 pounds, was seated in a wooden chair. She repeatedly refused to submit to blood being drawn. Corporal Eschenwald testified that he and another female officer held Crespo down by her upper arms and elbows preventing her from moving and directed the phlebotomist to draw blood. After the blood was drawn, Crespo was arrested for Driving Under the Influence pursuant to 21 DEL. C. §4177(a).
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> At trial Corporal Eschenwald testified it was his normal practice to hold down suspects forcing them to submit to a blood withdrawal in order to secure the safety of everyone present. Additionally, he testified no prior approval from a supervisor was required before forcing a suspect to submit to extraction of the blood. Corporal Eschenwald also testified he did not believe excessive force was used in holding Crespo down or that Crespo complained of any pain during the procedure.[54]

After reviewing the record, it is clear that the trial court based most, if not all, of its factual findings upon Ms. Crespo's March 28, 2007, post-trial brief and the affidavit of Ms. Crespo attached thereto. As discussed below, virtually none of the facts recited in the trial court's opinion can be traced to evidence received during the suppression hearing or the trial. This alone creates a basis for concern given that the trial court's factual findings not only informed its ruling on the second motion to suppress, they also led the trial court to enter a verdict of not guilty. Ms. Crespo's affidavit, like all affidavits, is an "*ex parte* statement by a witness whose demeanor cannot be observed and who is not subject to cross-examination."[55] In this case, as

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[54] *Crespo*, Op. at 4.

[55] *Lynch v. Athey Products, Corp.*, 505 A.2d 42, 45 (Del. Super. 1985).

was her constitutional right, Ms. Crespo chose not to testify at trial so that she could offer her side of the story regarding the circumstances surrounding the blood draw. Instead, she waited long after the evidence closed to submit an affidavit in which she challenged key aspects of the evidence the State offered against her at trial.[56] Her affidavit, if offered at trial, would have constituted inadmissible hearsay.[57] As the evidence treatises explain, the "main justification" for excluding such statements is the "lack of any opportunity for the adversary to cross-examine" and the resulting negative impact on the statement's reliability.[58] The trial court abused its discretion when it relied - - and relied so heavily - - upon Ms. Crespo's post-trial, hearsay affidavit to reach its factual findings.[59] As discussed below, the trial court's reliance

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[56] *See U.S. v. Richardson*, 2009 WL 668706, at *2 (S.D.Ga.) (noting that where "Defendant did not testify at the evidentiary hearing, and the statements made in [his] affidavit were not subject to cross-examination," the only testimony before the court was that which took place during the hearing).

[57] D.R.E. 801(a); *State v. Husser*, 1994 WL 555354, at *1 n.2 (Del. Super) (noting that the "defendant chose not to testify at the suppression hearing. Without his testimony, as a self-serving statement and not as an admission against interest, the defendant's affidavit is inadmissible hearsay."). Similarily, Ms. Crespo's affidavit, which offers only self-serving information for the sole purpose of supporting a motion to suppress evidence, would not qualify for any of the recognized exceptions to the hearsay rule.

[58] *See* 2 McCormick on Evidence § 245 (Kenneth S. Broun ed., 2006). Interestingly, when both Ms. Crespo and Corporal Eschenwald *did* testify and offered conflicting testimony at the pre-trial suppression hearing, the trial court found Corporal Eschenwald's testimony to be more credible, concluding, contrary to Ms. Crespo's testimony, that the officer did have his emergency equipment activated as he followed Ms. Crespo into Brook Haven. Trial Tr. at 71-72.

[59] *Husser*, 1994 WL 555354, at *5 (Del. Super)("[e]ven if the Court were to consider [Ms. Crespo's] statement, it is of little value because of [her] decision to forego cross-examination.").

upon Ms. Crespo's affidavit, and other matters outside of the evidentiary record, significantly affected its ultimate legal determinations.

The trial court began its relevant factual findings by making certain observations regarding Ms. Crespo's physical stature. Upon review, the Court has been unable to find any description of Ms. Crespo's physical attributes in the trial record. While the trial judge would have had ample opportunity to observe Ms. Crespo during trial, the only evidence regarding her height and weight come from her self-serving, inadmissible, post-trial affidavit.[60] These findings, of course, were relevant to the trial court's conclusion that the officer's use of physical force was not reasonable, in part, because of Ms. Crespo's relatively small physical stature.

The trial court found that Corporal Eschenwald and another female officer "held Ms. Crespo down" during the blood draw procedure.[61] This finding is not supported by the trial record. Indeed, when Corporal Eschenwald was asked at trial how many people were present for the procedure, he responded, "I remember myself and the phlebotomist and the defendant was there, and that was it."[62] The only evidence suggesting that a female officer was present, again, comes from Ms.

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[60] App. to Appellee's Answering Br. at A145 (Aff. Of Trina M. Crespo).

[61] *Crespo*, Op. at 4.

[62] Trial Tr. at 79.

Crespo's post-trial affidavit.[63] Nor does the evidence support a finding that Ms. Crespo was "held down" during the blood draw.[64] Corporal Eschenwald testified that he restrained Ms. Crespo's arm during the procedure to keep it from moving when the phlebotomist's needle was inserted, but he was clear that the restraint went no further than that.[65]

The trial court's findings regarding Delaware State Police practices or protocols for blood draws also were not linked to the evidentiary record.[66] Corporal Eschenwald was never asked whether the Delaware State Police maintain a procedure for drawing blood from a DUI suspect, nor did Corporal Eschenwald testify that he was not required to obtain prior approval from a supervisor in order to conduct a forced blood draw.[67] And, contrary to the trial court's findings, Corporal Eschenwald was never asked to opine whether *vel non* the force he used to secure Ms. Crespo's blood sample was excessive, nor was he asked whether *vel non* Ms. Crespo complained of pain

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[63] App. to Appellee's Answering Br. at A146 (Aff. Of Trina M. Crespo).

[64] *Crespo*, Op. at 4.

[65] Trial Tr. at 82.

[66] The Court is not clear from where the trial judge obtained these facts, as they do not appear in the trial record or in the post-trial submissions.

[67] *Crespo,* Op. at 4.

during the procedure.[68]

The trial court also made unsupported factual findings with regard to the health and safety risks posed to Ms. Crespo by the withdrawal of her blood in a non-medical environment. Specifically, the trial court noted that Ms. Crespo's blood was extracted in "an area frequented by many individuals from various walks of life. The existence of infectious diseases and viruses which can be present in this environment and go undetectable for many months clearly gives basis for serious concern."[69] The trial court made no reference to the record in support of these findings of fact and this Court can find no support for these findings in its own review of the record. Although Corporal Eschenwald did testify that the Intoxilyzer Room was not sterilized prior to the blood draw, this testimony provided no basis for the trial court to reach its sweeping conclusions regarding the presence of infectious diseases or viruses within the Troop, or the relative safety risks posed by drawing blood in this environment versus others.[70] Indeed, as this and other courts have noted, "blood is commonly withdrawn in non-sterile environments using medically acceptable procedures," for

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[68] *Crespo,* Op. at 4.

[69] *Id.*

[70] Trial Tr. at 81.

example in libraries and schools.[71] In the absence of any specific supporting evidence in the record, there can be no presumption that withdrawal of a DUI suspect's blood in a non-medical environment poses an unreasonable risk of harm to the health or safety of that suspect.[72]

Because many of its key factual findings were based either on incompetent evidence or no evidence at all, the Court must conclude that the trial court's findings were not "the result of a logical and orderly deductive process."[73] As discussed below, however, even if the facts determined by the trial court were properly supported, the Court is satisfied that Ms. Crespo's blood sample was lawfully obtained and that the trial court's determination to the contrary was erroneous as a matter of law.

C. Ms. Crespo's Blood Sample Was Lawfully Obtained

The State alleges that the trial court abused its discretion by suppressing the results of Ms. Crespo's blood alcohol analysis based on its finding that the forced extraction of Ms. Crespo's blood at the Troop for a first offense DUI charge was

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[71] *State v. Cardona*, 2008 WL 5206771, at *8. *See also State v. Daggett,* 640 N.W.2d 546, 551 (Wis. Ct. App. 2001) (declining to find that blood drawn in a police station posed a risk to the defendant's health and safety when "nothing in the record suggests that the [police station] in which this test occurred was unsafe or unsanitary").

[72] *See Id.* at *7-8 (Del. Super.).

[73] *Darst v State*, 2001 WL 312456 at *2 (Del. Super.) (internal citations omitted).

unreasonable under 21 DEL. C. §2742. According to the State, in finding that the blood was unlawfully drawn, the trial court failed to consider Delaware's statutory DUI chemical testing scheme and the Federal and/or State constitutional implications of a forcible physical evidence extraction. The Court agrees.

In Delaware, any person who operates a motor vehicle within the State is deemed to have given "constructive consent…to submit to testing for alcohol or other drugs"[74] in instances where "an officer has probable cause to believe the person was driving…a vehicle in violation of § 4177."[75] A person who is required to submit to chemical testing under § 2740 "*may be informed* that if testing is refused, the person's driver's license and/or driving privilege shall be revoked for a period of at least one year."[76] After being informed of the penalty, a person may refuse to submit to testing and "the test *shall not be given*."[77] An officer may, however, without consent, "take *reasonable steps* to conduct such test[s] without informing the person of the penalty of revocation for such refusal and thereby invoking the implied consent

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[74] *Seth v. State,* 592 A.2d 436, 443 (Del. 1991).

[75] 21 DEL. C. § 2740(a).

[76] 21 DEL. C. § 2742(a) (emphasis added).

[77] *Id.* (emphasis added).

law."[78] Stated differently, "a person suspected of drunk driving has *no right* to refuse testing 'unless a police officer informs him that he may lose his license for a year if he withholds consent.'"[79] This statutory scheme for testing blood alcohol content, in essence, enables an officer (1) "to require a [DUI] suspect to submit to testing, without that person's consent or a reading of the implied consent law, so long as the officer has probable cause;"[80] and (2) to take all necessary steps to secure a sample of breath or blood for testing so long as the steps taken are reasonable under the Fourth Amendment to the United States Constitution and Article One, Section 6 of the Delaware Constitution.[81]

The trial court, in denying Ms. Crespo's first motion to suppress, properly determined that Corporal Eschenwald had probable cause to arrest Ms. Crespo for driving under the influence. By choosing to operate a motor vehicle in Delaware, Ms.

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[78] *Id.* (emphasis added). The question of reasonableness under Delaware's implied consent statutes is informed by the United States Supreme Court's Fourth Amendment analysis set forth in *Schmerber v. California,* 384 U.S. 757 (1966). *See McCann v. State*, 588 A.2d 1100, 1102 (Del. 1991); *Cardona,* 2008 WL 5206771 (Del. Super.).

[79] *Seth*, 592 A.2d at 445 (quoting *McCann,* 588 A.2d at 1101).

[80] *Id.* (citing *Brank v State*, 528 A.2d 1185, 1189-90 (Del. 1987)). *See also Field v. Hall*, 1995 WL 360744 at *9 (D. Del) (holding that "a police officer who has probable cause to arrest for DUI is not required to inform the accused of the penalties under Delaware's Implied Consent Law for refusal to submit to chemical testing" because the suspect "was deemed under Delaware law to have consented to the withdrawal of blood for alcohol testing.").

[81] *Cardona*, 2008 WL 5206771, at *3.

Crespo impliedly consented to submit to chemical testing meant to determine whether she was operating her vehicle while under the influence of alcohol or drugs. Corporal Eschenwald did not inform Ms. Crespo of the penalties for refusing to comply with the implied consent statute and did not, therefore, trigger the implied consent procedures. Instead, he informed Ms. Crespo that her blood would be withdrawn by a licensed phlebotomist. Thereafter, Ms. Crespo had no right to refuse to submit to testing.[82] If "reasonable steps" were taken to secure the blood sample, then the test of Ms. Crespo's blood alcohol was in accord with Delaware's statutory testing scheme, regardless of whether she consented to the testing or not.[83]

As this Court discussed extensively in *State v. Cardona*, the factors and analysis used to determine "reasonableness" in the constitutional context inform the "reasonableness" analysis under Delaware's implied consent statutes.[84] The constitutional analysis in blood extraction cases hinges on three prongs: (1) probable cause to believe a suspect is driving under the influence; (2) a search warrant or a

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[82] *Id. See also Seth*, 592 A.2d at 445.

[83] 21 DEL. C. § 2742(a).

[84] *Cardona*, 2008 WL 5206771, at *3 (citing *Schmerber,* 384 U.S. 757 (1966)). *See also McCann*, 588 A.2d at 1102 (engaging in the constitutional reasonableness analysis outlined in *Schmerber* to determine propriety of a forcible blood draw).

recognized exception under the Fourth Amendment; and (3) reasonableness.[85] In this case, as discussed, probable cause existed to believe Ms. Crespo was driving under the influence, and Delaware's implied consent statutes provided the applicable exception to the warrant requirement.[86] Therefore, the trial court's focus properly was on the determination of whether the forced extraction of Ms. Crespo's blood comported with State and Federal notions of "reasonableness" in the search and seizure context. Unfortunately, it does not appear that the trial court considered the prevailing constitutional approach to this question in reaching its decision to grant the motion to suppress.

A determination of "reasonableness" in the context of a physical extraction of evidence from a suspect involves a balancing of the "extent of the intrusion upon the individual's interests in personal privacy and bodily integrity" against the

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[85] *Schmerber*, 384 U.S. at 768; *Winston v. Lee,* 470 U.S. 753, 760-61 (1985). A review of the case law reveals that courts conduct a "discerning inquiry" into the propriety of the withdrawal of blood from DUI suspects for the purpose of chemical testing and, upon doing so, usually conclude that such a minimal bodily intrusion is justified, even in instances where no specific consent has been given and blood is forcibly withdrawn against a suspect's will. *See e.g. Schmerber*, 384 U.S. at 772 (upholding the constitutionality of a forced blood extraction by a physician in a medical environment adhering to "accepted medical practices"); *Breithaupt v. Abram*, 352 U.S. 432, 433 (1957) (upholding the constitutionality of a blood draw performed by a skilled technician while petitioner was unconscious and without his consent); *Seth*, 592 A.2d at 436 (upholding reasonableness of blood withdrawn from DUI suspect without his consent); *McCann,* 588 A.2d at 1100 (Del. 1991) (upholding as reasonable a forcible blood extraction from DUI suspect after officers used a stun gun to subdue him and then physically restrained him).

[86] *Cardona*, 2008 WL 5206771, at *5 (Del. Super.).

"community's interest in fairly and accurately determining guilt or innocence."[87] When considering the extent to which a blood draw intrudes upon a suspect's personal privacy and bodily integrity, the United States Supreme Court has held that blood tests are "slight intrusions of the kind which millions of Americans submit as a matter of course nearly every day."[88] In this regard, the Court explained:

> The procedure has become routine in our everyday lives. It is a ritual for those going into military service as well as those applying for marriage licenses. Many colleges require such tests before permitting entrance and literally millions of us have voluntarily gone through the same routine in becoming blood donors.[89]

In concluding that blood tests are minimal intrusions, the Supreme Court has been quick to point out that such tests are unlikely to "threaten the safety or health of an individual" when performed by a qualified individual adhering to proper procedures.[90]

Conversely, it is generally accepted that the community has a compelling interest "in the scientific determination of intoxication, one of the great causes of the moral hazards of the road."[91] The blood alcohol test is a "scientifically accurate

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[87] *Winston*, 470 U.S. at 763.

[88] *Breithaupt*, 352 U.S. at 439.

[89] *Id*. at 436,439.

[90] *Winston*, 470 U.S. at 761.

[91] *Breithaupt*, 352 U.S. at 439. *See also State v. Bell*, 1990 WL 1222908, at *1 (Del. Super. 1990) (taking note of "statistics involving the mayhem caused by drunken drivers and the State's compelling interest in convicting such drivers"); *Brank*, 528 A.2d at 1190 (noting the state's

method of detecting alcoholic content in the blood, thus furnishing an exact measure upon which to base a decision as to intoxication," and is considered a "reasonable means to make automobile driving less dangerous."[92] In the DUI context, the Supreme Court has taken note of the fact that "the percentage of alcohol in the blood begins to diminish shortly after the drinking stops, as the body functions to eliminate it from the system."[93] Under these circumstances, law enforcement officers are justified in attempting promptly "to secure evidence of blood alcohol content."[94]

The "reasonableness" analysis takes on an added layer of complexity when the police use force, over and above the extraction itself, to secure an evidentiary sample. In instances where police officers forcibly extract physical evidence from a suspect - - by physically holding him down during a blood draw, for example - - the court must also consider the reasonableness of such force.[95] When doing so, the court should consider, among other factors, "the severity of the crime at issue, whether the suspect

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legitimate interest in enforcing its driving under the influence laws in order to prevent carnage caused by drunk drivers).

[92] *Breihaupt*, 352 U.S. at 439. *See also Schmerber*, 384 U.S. at 771 (drawing blood is a reasonable method by which to measure blood alcohol content).

[93] *Schmerber*, 384 U.S. at 770-71.

[94] *Id.* (noting that blood tests are "commonplace in these days of physical examination and experience with them teaches that the quantity of blood extracted is minimal, and that for most people, the procedure involves virtually no risk, trauma, or pain.").

[95] *See Graham v. Connor*, 490 U.S. 386, 388 (1989).

poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[96] The court should also take into account the physical characteristics of the suspect (e.g. size and strength) when compared to the physical characteristics of the officers or those assisting the officers in securing the evidence.[97]

In determining whether the use of force was reasonable in Ms. Crespo's specific case, the trial court erroneously found significance in the fact that she was charged with a first offense DUI, a misdemeanor under Delaware law. Although it cited to several controlling or persuasive authorities where the use of physical force to draw blood from a felony level DUI suspect was condoned, the trial court concluded that the absence of case law upholding the same use of force against a misdemeanor-level DUI suspect suggests that such force is unreasonable.[98] In reaching this legal conclusion, the court ignored the serious and well-recognized risk to public health and safety posed by *any* driving under the influence, whether it be a first offense or fourth offense.[99] Furthermore, while the potential punishment may vary depending on the

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[96] *Id.*

[97] *See Carleton v. The Superior Court of San Diego,* 170 Cal. App. 3d 1182, 1191 (1985).

[98] *Crespo,* Op. at 11.

[99] *See Bloomingdale v. State*, 2002 WL 31477995, at *5 (Del. Super.) (recognizing the "moral threat to innocent people and their loved ones presented by drunks operating 4000 pound automobiles").

misdemeanor or felony nature of a DUI offense, the elements of the offenses are the same, and the legislature chose not to distinguish between misdemeanors and felonies in the statutory scheme that governs the testing of blood alcohol content in DUI suspects.

Next, to determine that the use of force in this case was unreasonable, the trial court found significant the distinction between the use of force to obtain a blood sample in a hospital or medical setting and the use of the same level force to obtain a blood sample in a police station or other non-medical environment where "infectious diseases and viruses" may be present.[100] This distinction, however, has no place in the "reasonableness" analysis. Neither the Fourth Amendment nor its State statutory or constitutional counterparts require police to draw blood in a hospital or other medical setting.[101] As discussed above, in the absence of any specific evidence in the record to the contrary, there is no presumption that withdrawal of a DUI suspect's blood in a non-medical environment (as opposed to a medical environment) poses an unreasonable risk of harm to the health or safety of that suspect.[102]

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[100] *Crespo,* Op. at 12.

[101] *Cardona*, 2008 WL 5206771, at *7.

[102] *See Cardona,* 2008 WL 5206771, at *7-8.

The most significant factor in the reasonableness determination is not where the blood is drawn but the qualifications of the person performing the procedure.[103] In this regard, courts have observed that, in most cases, there will be no basis to assume "that a medical professional authorized to withdraw blood" would do so either in a way "that would endanger the health of the blood donor,"[104] or "in any circumstances not medically acceptable so as to endanger public health."[105] The Delaware statutory testing scheme "expressly authorizes medical technicians to withdraw blood, and phlebotomists are medical technicians."[106] The evidentiary record in this case reflects that a phlebotomist drew Ms. Crespo's blood, and there is no indication that the phlebotomist was unqualified under the statute or that he drew or would have allowed Ms. Crespo's blood to be drawn in a medically unacceptable manner.

The trial court also found that the absence of an administrative policy or procedure governing the withdrawal of a suspect's blood within the State Police

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[103] *See e.g. People v. Ford*, 4 Cal.App.4th 32, 34 (Cal.Ct.App. 1992) (upholding a blood draw in a police station by a licensed clinical technologist); *People v. Mari*, 528 P.2d 917, 919 (Colo. 1974) (upholding a blood draw performed in an open room at a sheriff's office by "a highly qualified and experienced medical technologist"); *State v. Lanier*, 452 N.W.2d 144, 146 (S.D. 1990) (upholding a blood draw performed in a jail by "a certified medical technologist"); *Daggett*, 640 N.W.2d at 550 (upholding a blood draw performed in a jail by a physician).

[104] *Daggett*, 640 N.W.2d at 550-51.

[105] *Lanier*, 452 N.W.2d at 146 n.4.

[106] *State v. Harmon,* 1984 WL 553534, at *1 (Del. Super.).

somehow afforded Corporal Eschenwald an unreasonable amount of discretion in determining when and how to draw blood samples.[107] This argument has already been rejected by the Court in *Cardona*, which distinguished the Delaware implied consent statutes from those in other jurisdictions containing more stringent requirements for the performance of DUI blood tests.[108] In Delaware, once an officer has met the procedural requirements noted above by finding probable cause to believe the defendant was driving under the influence, complying with the implied consent statutes, and taking reasonable steps to secure a blood sample, the logistics of drawing a DUI suspect's blood for chemical testing are thereafter governed by 21 DEL. C. § 2746. Section 2746 provides that:

> [O]nly duly licensed physicians, registered nurses, licensed practical nurses or other persons trained in medically acceptable procedures for the drawing of blood and employed by a hospital or health care facility, acting at the request of a police officer, may withdraw blood from a person submitting to a chemical test under this subchapter.

This limitation imposed by the General Assembly protects defendants "both from harm which can be caused by persons not properly trained to draw blood, and from the possibility that the blood sample may be contaminated through the use of improper

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[107] *Crespo,* Op. at 12.

[108] *Cardona*, 2008 WL 5206771, at *8.

procedures."[109] In deciding to address the issue in this manner, the General Assembly reflected its intent to protect DUI suspects "by requiring that the person drawing blood be properly trained, rather than requiring that each blood test conform to a specific standard of care."[110] The Court, as it must, presumes that the General Assembly, having addressed the issue, set forth all limitations to be adhered to in the drawing of blood for chemical testing.[111] No additional limitations will be imposed here.

Finally, the trial court found that Ms. Crespo presented no immediate threat to those around her during the blood draw procedure because she was relatively small in physical stature, had not physically assaulted Corporal Eschenwald or resisted arrest, and had not been verbally abusive.[112] The trial court also found that Ms. Crespo presented no threat to the public because her refusal to submit to the test would have resulted in the suspension of her driving privileges.[113] While Ms. Crespo's physical size is certainly one of many factors a court should consider when

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[109] *Reeder v. State*, 1993 WL 81292 (Del. 1993). *See also O'Toole v. State*, 1997 WL 819134, at *3 (Del. Super. 1997) (noting that Section 2746 requires only that "the test be administered by a qualified individual.").

[110] *O'Toole*, 1997 WL 819134, at *3.

[111] *Ramirez v. Murdick*, 948 A.2d 395 (Del. 2008) (noting that "the goal of statutory construction is to determine and give effect to legislative intent...courts must apply the words as written, unless the result of such a literal application could not have been intended by the legislature.") (internal citations omitted).

[112] *Crespo*, Op. at 13.

[113] *Id*. at 12.

determining whether the amount of force used was excessive, "the reasonableness inquiry necessarily involves careful attention to [all of] the circumstances of the police action."[114] In this case, Corporal Eschenwald described Ms. Crespo's behavior as uncooperative and belligerent throughout his entire interaction with her.[115] She refused voluntarily to submit to field sobriety testing at the scene of the vehicle stop and then to an Intoxilyzer breath test at the police station. And all the while she peppered the officer with belligerence and profanities.[116] Under these circumstances, Corporal Eschenwald was certainly justified in believing that Ms. Crespo might physically struggle while the needle was in her arm, so he secured her arm during the procedure to ensure the safety of everyone involved. The trial court recognized that, under similar circumstances in a hospital setting, such minimal use of force has been found appropriate[117] if it was "no more force than was reasonable to carry out their objective of obtaining the blood evidence."[118] As discussed above, however, the distinction between a medical and non-medical environment in this context is not justified absent specific evidence to justify the distinction. Under the specific facts

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[114] *Field*, 1995 WL 360744, at *7.

[115] Trial Tr. at 79.

[116] *Id.* at 74, 78, and 80.

[117] *Crespo*, Op. at 10.

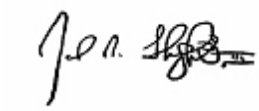
[118] *Field*, 1995 WL 360744, at *8.

and circumstances of the instant case, the amount of force employed by Corporal Eschenwald in holding Ms. Crespo's arm as her blood was drawn was objectively reasonable. The trial court's determination to the contrary was legal error.

IV. CONCLUSION

For all of the foregoing reasons, the decisions of the Court of Common Pleas granting defendant's motion to suppress the results of the chemical blood test are **REVERSED**.

IT IS SO ORDERED.



Judge Joseph R. Slights, III