

SUPERIOR COURT
OF THE
STATE OF DELAWARE

FRED S. SILVERMAN
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 North King Street, Suite 10400
Wilmington, DE 19801-3733
Telephone (302) 255-0669

April 8, 2009

Louis B. Ferrara, Esquire
Ferrara & Haley
1716 Wawaset Street
P.O. Box 188
Wilmington, DE 19899-0188

Kevin Carroll, Esquire
Deputy Attorney General
Caravel State Office Building, 7th Floor
820 North French Street
Wilmington, De 19801

RE: *State v. Ann M. Baker*
ID # 0803038600
Letter Memorandum

Upon Defendant's Motion to Suppress BAC Test – DENIED

Dear Counsel:

The court now addresses the so-called “four-hour rule,”¹ which involves the mistaken notion that for a blood test’s results to be admissible in a driving under the influence prosecution, the blood must be drawn within four hours of the alleged offense. In that sense at least, as explained below, there is no “four hour rule.” As long as the test, itself, is regular and the driver has not had anything else to drink, it does not matter how long after driving the blood is drawn.

¹ 21 *Del. C.* § 4177(a)(5).

Kevin M. Carroll, Esquire
Louis B. Ferrara, Esquire
State v. Ann Baker
ID # 0803038600
Letter Memorandum
April 8, 2009
Page 2

Defendant filed a motion to suppress, challenging the traffic stop and the blood test that resulted in her felony Driving Under the Influence arrest. The court held an evidentiary hearing on March 18, 2009, at which the court preliminarily found there was ample cause for Defendant's arrest, and the court stands by its bench ruling as to that. The specific issue that was left open concerned the fact that Defendant's blood may have been drawn more than four hours, perhaps five or six hours, after driving.

The case began when Defendant was involved in a fender-bender in a residential area. A witness who did not see the collision, but who saw Defendant getting out of her car afterwards, initially left the development and returned before calling the police. Therefore, the exact time that elapsed between Defendant's driving and the blood test is uncertain. The State cannot prove that Defendant's blood was drawn within four hours of the collision. And so, Defendant contends that the test is invalid under the "four hour rule."

In part, the driving under the influence law prohibits a person from driving a vehicle when the person's alcohol concentration is .08% or more within four hours of driving, provided the person did not drink after driving and before being tested.² Thus, under the four-hour prohibition, the State is not required to prove the motorist's BAC was above .08% while the motorist was actually driving. The State merely needs to prove that the defendant had a prohibited BAC at any time during the four-hours after driving.

Obviously, the results of a test administered properly within the four-hour window will do. The question here is whether there is a requirement that in order for a defendant to be found guilty under the four-hour prohibition, defendant's blood must be tested within the four hours. Nowhere does the statute expressly demand that, and there is no logical reason why it should.

Section 4177(a)(5)'s synopsis explains the four-hour window. It flatly

² *Id.*

Kevin M. Carroll, Esquire
Louis B. Ferrara, Esquire
State v. Ann Baker
ID # 0803038600
Letter Memorandum
April 8, 2009
Page 3

states the General Assembly intended to protect the public from drivers who have consumed alcohol before driving, but whose BAC levels have not yet met the proscribed level at the time of a stop.³ The four-hour window simply accounts for the time it takes alcohol to reach the blood stream.⁴ Before the four-hour prohibition's enactment, a defendant sometimes argued that the reason the defendant failed the blood tests was because the defendant's BAC only crossed the limit between the arrest and the test. Section 4177(a)(5) eliminated that defense. Simply put, the four-hour prohibition is a sword, not a shield.

If a driver's BAC is tested more than four hours after driving and it is over .08, that makes it more likely the driver's BAC was above .08 within four hours of driving. The benefit a delayed test might confer is that during the delay, due to metabolism, the driver's BAC may fall below .08. Only then does the delay work to the driver's advantage.

As for this case, if Defendant's BAC was still above .08 five or six hours after the collision, that implies that her BAC was more than .08 within four hours of the collision. The State still must prove chain of custody of the sample, etc., but the test is not objectionable simply because it might have been administered more than four hours after Defendant was driving. Therefore, Defendant's motion to suppress based on the test's timing is **DENIED**.

IT IS SO ORDERED.

Very truly yours,
/s/ Fred S. Silverman

FSS: mes
oc: Prothonotary (Criminal)

³ Del. H.B. 44 syn., 140th Gen. Assem. (1999) (citations omitted).

⁴ *Id.*