IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
v.	)	ID. No. 12909005937
	)	
FREDDIE FLONNORY.	)	

ORDER

AND NOW, TO WIT, this 12th day of June, 2013, **IT IS HEREBY ORDERED** as follows:

Introduction

Before the Court is Defendant Freddie Flonnory's ("Defendant") Motion to Suppress statements and evidence, including the results of a blood draw, obtained after a traffic stop was initiated. Defendant does not challenge the initial stop for his failure to signal, but he argues that 1) the officer lacked reasonable suspicion to further detain him and to administer Field Sobriety Tests ("FSTs"); 2) the officer lacked probable cause to arrest or to extract a blood sample; 3) the warrantless blood draw was not taken pursuant to any applicable exception to the warrant requirement; and 4) any statements made before *Miranda* warnings were given are inadmissible. Defendant's arguments relating to the blood draw were made while

the motion was pending and after Defense counsel brought to the Court's attention *Missouri v. McNeely,* 133 S.Ct. 1552 (2013), a case which was pending in the U.S. Supreme Court. The Court reviewed the motion and response and held a suppression hearing. After the hearing, the Court reserved decision pending the Supreme Court's decision in *McNeely*. The Supreme Court issued its decision on April 17, 2013 and the Court invited the parties to submit additional memoranda addressing the applicably of *McNeely*. For the following reasons, Defendant's Motion to Suppress is **DENIED.**

Findings of Fact

Corporal Andrew Pietlock ("Cpl. Pietlock") has been with the Delaware State Police since July 2000. As part of his assignment to uniformed patrol, Cpl. Pietlock conducts traffic enforcement and criminal investigations, which includes investigations for DUIs. Cpl. Pietlock has attended a National Highway Transportation Safety Administration ("NHTSA") certification course at the Delaware State Police Academy and received his certification, which included certification to do standard FSTs.

On September 8, 2012, Cpl. Pietlock was assigned to "Operation Pressure Point," an extra-duty assignment which assists the Wilmington Police Department

with patrol. Sometime after 9:00 p.m.,[1] while operating a marked patrol vehicle with Corporal Hazard and traveling northbound on Bowers Street, Cpl. Pietlock observed a White Cadillac Eldorado traveling in front of the patrol vehicle as it failed to signal while making a left turn from Bowers Street onto 27th Street.[2]

The officers continued to follow the vehicle and Cpl. Pietlock then observed the vehicle again fail to signal during a right turn onto Northeast Boulevard traveling northbound. Cpl. Pietlock continued follow the vehicle, which made a controlled stop at a red light at the intersection at Northeast Boulevard until it turned green. Cpl. Pietlock then activated the emergency equipment in order to conduct a traffic stop based on the failure to signal. The vehicle pulled into the right shoulder of Northeast Boulevard and continued slowly, until it came to a controlled stop around Eastlawn Avenue.

Once the vehicle stopped, the officers approached the vehicle. Cpl. Pietlock approached the driver's side to make contact with the Defendant. Cpl. Pietlock immediately observed Defendant's glassy, bloodshot eyes and a beer bottle two-thirds full in the driver's side door and smelled the odor of an alcoholic beverage on Defendant's breath.

[1] The Court is unable to determine the exact start time of Cpl. Pietlock's observations because they were not recorded. The Motor Vehicle Recording ("MVR") did not begin until 9:45 p.m.
[2] The MVR began recording after this point.

Cpl. Pietlock asked Defendant where he was coming from and Defendant explained that he was coming from his girlfriend's house and that he was on his way home. When Cpl. Pietlock asked how much Defendant had had to drink that night, Defendant first stated that he did not have anything, but quickly admitted that he had "a beer." Cpl. Pietlock asked follow up questions and Defendant admitted to having one beer in addition to the beer that was in the driver's side door. Defendant's demeanor was nonaggressive and he was sitting normally. He was talkative, but was not slurring his speech. In addition, Defendant had no trouble producing his driver's license and registration.

Cpl. Pietlock then asked Defendant to step out in order to conduct FST's based on his initial observations of Defendant's glassy, bloodshot eyes, the beer bottle and the smell of an alcoholic beverage. Defendant complied without displaying any difficulty exiting the vehicle or keeping his balance. Prior to each FST, Cpl. Pietlock gave instructions to the Defendant. Defendant failed the alphabet, numbers, one-leg stand, and heel-to-toe tests.

Next, Cpl. Pietlock attempted to administer the Portable Breath Test ("PBT"), but Defendant asked whether he had to take the test. Cpl. Pietlock asked whether he was refusing to take the test and informed him that he did not have to. Defendant asked what would happen if he did not take the test and Cpl. Pietlock

informed Defendant that he would be placed under arrest for DUI. Defendant eventually agreed to take the PBT and, at 10:02 pm., the reading was 0.163.[3] Cpl. Pietlock placed Defendant under arrest for suspicion of DUI and placed him into the back of the patrol vehicle.[4]

While in the patrol vehicle, Officer Pietlock called Defendant's girlfriend to allow her to come and pick up the Defendant's vehicle. The officers waited for her to come before transporting the Defendant to Troop 1. There is some discrepancy as to how long the officers waited to transport Defendant based on the duration of the video and Cpl. Pietlock's testimony. Cpl. Pietlock's testified that the total time between the PBT and the blood draw was an hour and a half, which included the time spent waiting for Defendant's girlfriend, transporting him to Troop 1, and waiting for the phlebotomist.[5] At Troop 1, the phlebotomist was contacted and Defendant was advised that blood would be drawn because he had two prior DUI convictions. However, Cpl. Pietlock did not ask Defendant for permission to do the test nor did he attempt to get a warrant for the blood draw. Cpl. Pietlock decided not to administer an intoxylizer test because of Defendant's prior DUI convictions

[3] Cpl. Pietlock testified that the PBT was properly calibrated at the time of the incident. The State submitted the calibration log showing the last calibration before the incident to be July 3, 2012.
[4] Cpl. Pietlock testified that he did not administer the Horizontal Nystagmus Test, although he usually administers it.
[5] The time from the PBT to the end of the MVR was about 21 minutes; however, Cpl. Pietlock testified that it took longer than that time to wait for Defendant's girlfriend.

and he believed the blood draw was a more exact test. Defendant's blood was drawn at 11:36 p.m. During the blood draw, Defendant told the phlebotomist "that's a good vein, don't miss it."

Discussion

I. Reasonable Suspicion Required for Field Sobriety Tests

Upon a defendant's motion to suppress, it is the State's burden to show by a preponderance of the evidence that a challenged warrantless search or seizure did not violate the rights guaranteed to a defendant by the United States and Delaware constitutions and Delaware statutory law.[6]

An officer must have reasonable suspicion to stop a vehicle for a traffic violation.[7] The duration of a lawful traffic stop must be proportionate to the initial purpose of the stop, unless such facts exist to "independently warrant" further intrusion.[8] "If during such a stop the officer further detains the person in order to investigate other possible crimes, the officer must have a reasonable articulable suspicion that additional criminal activity is afoot."[9]

[6] *Hunter v. State,* 783 A.2d 558, 560 (Del. 2001).
[7] *State v. Arterbridge*, 1995 WL 790965, at *3 (citing *Delaware v. Prouse,* 440 U.S. 648 (1979)).
[8] *Caldwell v. State*, 780 A.2d 1037, 1047 (Del. 2001).
[9] *State v. Huntley*, 777 A.2d 249, 254 (Del. Super. 2000).

The "reasonable suspicion" standard also applies to an officer's decision to detain an individual for the purpose of conducting field sobriety tests.[10] An officer will be deemed to have had reasonable articulable suspicion when the totality of the circumstances, which include objective facts and the officer's subjective interpretation of those facts, shows the officer had "a particularized and objective basis for suspecting the particular person stopped of criminal activity."[11] Where certain factors standing alone may be insufficient to establish reasonable suspicion, those facts viewed in light of other circumstances may support a finding of reasonable suspicion to conduct field sobriety tests.[12]

In *Perrera v. State*, 852 A.2d 908 (Del. 2004)(TABLE), after stopping a defendant, an officer observed the defendant's bloodshot, glassy eyes and smelled of alcohol. Defendant had beer cans visible on the floor of her car and admitted to having two beers. Based on these facts, the Court found that reasonable suspicion existed to detain the defendant for FSTs.[13]

Sufficient independent facts existed to justify Cpl. Pietlock's further detention of Defendant and to constitute the reasonable suspicion necessary for

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[10] *Arterbridge*, 1995 WL 790965 at *5.
[11] *Harris v. State*, 806 A.3d 119, 125 (Del. 2002)(quoting *United States v. Arvizu*, 122 S. Ct.744,750 (2002))(internal quotations omitted)).
[12] *Arterbridge*, 1995 WL 790965 at *5; *State v. Quinn*, at 1995 WL 412355, at *4 (Del. Super. Mar. 8, 1995)).
[13] *Perrera,* at *1.

Cpl. Pietlock to conduct FSTs . Cpl. Pietlock's observations after stopping Defendant were almost identical to the officer's observations in *Perrera*. Upon approaching the Defendant, Cpl. Pietlock observed a beer bottle which was two-thirds full in the driver's side door, Defendant's bloodshot, glassy eyes, and smelled an odor of alcoholic beverage. In addition, Defendant admitted drinking beer earlier that evening and the beer in the driver's side door. Based on these circumstances, Cpl. Pietlock had reasonable suspicion to conduct FSTs.

II. Probable Cause to Arrest and for Blood Draw

Probable cause is required to arrest an individual for DUI and to require the individual to submit to chemical testing.[14] "Probable cause 'lies between suspicion and sufficient evidence to convict.'"[15] To determine if the police had probable cause to believe than a defendant committed the crime of driving under the influence, the Court conducts a case-by-case inquiry in determining whether the officer "possess[ed] 'information which would warrant a reasonable man in believing that [such] a crime has been committed."[16] "To establish probable cause, the police are only required to present facts which suggest, when viewed under the

[14] *Miller v. State,* 4 A. 3d 371, 375 (Del. 2010); *See Bell v. State*, 511 A.2d 1 (Del. 1986); 21 *Del. C.* § 2740(a).
[15] *State v. Powell*, 2002 WL 1308368, at *4 (Del. Super. June 4, 2002) (quoting *Thompson v. State*, 539 A.2d 1052, 1055 (Del. 1988)).
[16] *State v. Maxwell*, 624 A.3d 926, 929 (Del. 1993)(quoting *Clendaniel v. Voshell*, 562 A.2d 1167, 1170 (Del. 1989) (internal quotations omitted).

totality of the circumstances, a fair probability that the defendant has committed a crime."[17] Because "[a] finding of probable cause does not require the police to uncover information sufficient to prove a suspect's guilt beyond a reasonable doubt or even to prove that guilt is more likely than not",[18] hypothetically innocent explanations do not extinguish a finding of probable cause for arrest.[19]

Just as factors viewed in isolation might not support a finding of reasonable suspicion, certain factors alone might not establish a showing a probable cause. For example, a traffic violation and the odor of alcohol, standing alone, have been held to be insufficient to establish probable cause.[20] Where the officer has reasonable suspicion of DUI, "[t]he driver's performance on [FSTs] may give rise to facts that either elevate what was only a suspicion into probable cause, or dispel the suspicion and result in no DUI arrest."[21]

In *Bease v. State*, 884 A.2d 495 (Del. 2005), after stopping a defendant for improperly changing lanes, an officer smelled an odor of alcoholic beverage on the defendant's breath and observed his bloodshot, glassy eyes. The defendant spoke rapidly, did not produce his driver's license, and admitted that he had consumed

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[17] *Id.* (citing *Jarvis v. State*, 600 A.2d 38, 43(Del. 1991)).
[18] *Id.*
[19] *Id.*
[20] *Esham v. Voshell*, 1997 WL 8277, at *2 (Del. Super. Mar. 2, 1987)
[21] *Lefebvre v. State,* 19 A.3d 287,295 (Del. 2011); *Powell*, 2002 WL 1308368, at * (citing *State v. Kang,* 2001 WL 1729126 at *7(Del. Super. Nov. 30, 2001)).

alcohol the night before. Based on these facts, the Supreme Court found that probable cause existed and that this Court properly denied the defendant's motion to suppress.[22]

Probable cause existed to arrest Defendant for DUI and to obtain a blood sample from Defendant. The four failed FSTs and PBT reading of 0.163, in addition to the factors which constituted Cpl. Pietlock's reasonable suspicion, suggested a fair probability that Defendant was driving under the influence. Defendant argues that neither reasonable suspicion nor probable cause existed based on his safe operation of the vehicle (notwithstanding his failure to signal), cooperative demeanor, and prompt presentment of his documentation. While the Court does not dispute the relevance of this evidence, such evidence does not automatically defeat probable cause. The Court has weighed the evidence of non-impairment and impairment in order to reach the conclusion that probable cause existed.[23]

[22] *Bease*, 884 A.2d at 500.
[23] *Cf. Lefebvre,* 19 A.3d at 295.

III. Blood Withdrawal

Exigent Circumstances and McNeely

Defendant insists that *McNeely* requires the Court to suppress the results of the blood draw because it was a warrantless, nonconsensual search not subject to the exigent circumstances exception to the warrant requirement. Based on the totality of the circumstances, the Court agrees that the exigent circumstances exception did not apply here. However, the Court finds, based on the operation of Delaware's Implied Consent Statutes, that the results of the blood draw remain admissible under the consent exception to the warrant requirement.

The Fourth Amendment to the U.S. Constitution and Article I, Section 6 of the Delaware Constitution guarantee citizens the right to be free against unreasonable searches and seizures.[24] Therefore, warrantless searches and seizures are "*per se* unreasonable," unless an exception to the warrant requirement applies.[25] For example, exigent circumstances, search incident to arrest and consent[26] are a few of the limited exceptions which have been recognized by Delaware courts. Where a more invasive warrantless search is involved, such as a

[24] *Scott v. State*, 672 A.2d 550, 551 (Del. 1996).
[25] *McNeely*, 133 S.Ct. at 1558; *State v. Poli*, 390 A.2d 415, 418 (Del. 1978)(quoting *Katz v. U. S.*, 389 U.S. 347, 357 (1967)).
[26] *Scott,* 672 A.2d at 551.

blood withdrawal from a defendant, Courts have more thorough inquired into the constitutionality of those searches.[27]

In *McNeely*, after a defendant was stopped for speeding and repeatedly crossing the centerline of a highway, an officer noticed certain indications that the defendant was intoxicated and the defendant admitted to having "a couple of beers" at a bar.[28] The defendant also appeared unsteady when exiting his truck and performed poorly on FSTs. After the FSTs were administered, the defendant refused to submit to a breath test.[29] He was arrested and, while in transport, indicated that he would again refuse to provide a breath sample.[30] As a result, the officer took him to a nearby hospital for a blood draw without attempting to obtain a warrant.[31] At the hospital, the defendant refused to consent to the blood draw. Then, the officer read him a standard implied consent form from which the officer informed the defendant that certain penalties would result, based on Missouri statutory law, for refusal to submit voluntarily to the test.[32] The defendant again refused, but a blood sample was still obtained.[33] The U.S. Supreme Court affirmed

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[27] *McNeely*, 133 S.Ct. at 1558 (quoting *Winston v. Lee*, 470 U.S. 753, 760 (1985)); *see also State v. Doleman*, 1995 WL 339184, at *7, n.1 (Del. Super. Apr. 21, 1995) (citing 2 Wayne R. LaFave, *Search and Seizure,* § 5.3(c) (2d ed. 1987))("These references suggest the need to scrutinize more closely searches incident to arrest that involve intrusions into the body.").
[28] *McNeely,* 133 S.Ct. at 1556.
[29] *Id.*
[30] *Id.* at 1557.
[31] *Id.*
[32] *Id.*
[33] *Id.*

the Missouri Supreme Court's holding that, since no factors other than the natural dissipation of blood alcohol suggested exigency after the routine traffic stop, the nonconsensual blood draw was an unreasonable search.[34]

McNeely reaffirmed the principle in *Schmerber* that a totality of the circumstances test is required to determine exigency. In doing so, the Court refused to adopt a rule, proposed by Missouri and several states, including Delaware, in *amici*, that the natural dissipation of blood-alcohol content would present *per se* exigency sufficient to justify a warrantless blood draw.[35] The Court stated

> while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in *Schmerber*, it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.[36]

In *Schmerber v. State,* 284 U.S. 757 (1966), a driver suffered injuries from an automobile accident and, while receiving treatment at a hospital, he was arrested for driving under the influence. Thereafter, an officer obtained a blood sample.[37] In determining whether the officer was justified in obtaining the blood sample without a warrant, the Court acknowledged the dissipation of blood alcohol percentage and stated that the officer may have "reasonably believed that he was

[34] *Id.* at 1567-68.
[35] *Id.* at 1561.
[36] *Id.* at 1563.
[37] *Schmerber*, 284 U.S. at 758-59.

confronted with an emergency," considering the time it took to bring the petitioner to the hospital and investigate the scene of the accident.[38] The Court stated, "[g]iven these special facts, we conclude that he attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to arrest."[39]

Applying the totality of the circumstances test for exigency to the facts *sub judice*, the Court finds that, aside from the natural dissipation of alcohol, no special facts were present that would warrant the application of the exigent circumstances exception. During the hour and a half between Defendant's PBT results and the blood draw, Cpl. Pietlock waited for Defendant's girlfriend to retrieve the vehicle before taking Defendant to Troop 1 and he did not contact the phlebotomist until arriving at the station.

Delaware's Implied Consent Statutes and McNeely

Delaware's Implied Consent Statutes[40] trigger the consent exception to the warrant requirement.[41] 21 *Del. C.* § 2740(a) states that

> Any person who drives, operates or has in actual physical control a vehicle, an off-highway vehicle, or a moped within this State *shall be*

[38] *Id.* at 770-71.
[39] *Id.* at 771.
[40] 21 *Del. C.* §§ 2740-43.
[41] *Seth v. State*, 592 A.2d 436, 443 (Del. 1991); *State v. Crespo*, 2009 WL 1037732, at *7 (Del. Super. Apr. 17, 2009)(citing *State v. Cardona*, 2008 WL 5206771, at *5 (Del. Super. Dec. 3, 2008)).

> *deemed to have given consent*, subject to this section and §§ 4177 and 4177L of this title to a chemical test or tests of that person's blood, breath and/or urine for the purpose of determining the presence of alcohol or a drug or drugs. The testing may be required of a person when an officer has *probable cause* to believe the person was driving, operating or in physical control of a vehicle in violation of §§ 4177 and 4177L or § 2742 of this title, or a local ordinance substantially conforming thereto.[42]

Under §2741 (a), an officer is not required to inform a driver about the informed consent law and the consequences of refusal;[43] however, § 2742(a) provides that

> *[i]f a person refuses* to permit chemical testing, *after being informed* of the penalty of revocation for such refusal, *the test shall not be given* but the police officer shall report the refusal to the Department. The police officer may, however, take to conduct such chemical testing even without the *reasonable steps* consent of the person if the officer seeks to conduct such test or tests *without informing the person* of the penalty of revocation for such refusal and thereby invoking the implied consent law.[44]

Therefore, "[u]nder 21 *Del. C.* § 2742(a), the officer is explicitly bound by that person's refusal after they have been informed of penalty."[45]

Based on Delaware's Implied Consent law, Defendant was deemed to have consented to the blood draw by simply operating his vehicle. Therefore, Cpl.

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[42] §2740(a) (Emphasis added).
[43] §2741(a) ("At the time a chemical test specimen is required, the person *may* be informed that if testing is refused [certain penalties may be imposed]")(emphasis added).
[44] § 2742(a)(emphasis added).
[45] *State v. Betts*, 2009 WL 388952, at *10 (Del. Super. Feb. 3, 2009).

Pietlock was entitled to obtain a blood sample because he had probable cause to arrest Defendant for DUI. Cpl. Pietlock was not required to inform Defendant about the consequences of refusal. There was also no indication that the blood sample was obtained through unreasonable means or through the use of force. Instead of refusing or challenging the blood draw, Defendant stated "that's a good vein, don't miss it." Therefore, the Court finds that Defendant's statutory implied consent exempted the blood draw from the warrant requirement.

The Supreme Court's holding in *McNeely* does not alter the application of Delaware's Implied Consent Statutes to the facts of this case. The only question answered by the Court was "whether the natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies an exception the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk driving cases."[46] The Court did not make any specific rulings about Missouri's implied consent statute; instead, the Court acknowledged that implied consent statutes are among the "broad range of legal tools [States have] to enforce their drunk-driving laws and to secure BAC evidence without undertaking nonconsensual blood draws".[47] Therefore, *McNeely* does not affect this Court's

[46] *McNeely,* 133 S.Ct. at 1556.
[47] *Id.* at 1566.

finding that the results from the blood sample are admissible pursuant to the consent exception to the warrant requirement.[48]

IV. Admissibility of Statements given without Miranda Warnings

Defendant has failed to meet his burden to establish a basis for his motion to suppress his statements.[49] In his motion, Defendant cited *Garvey v. State,* 873 A.2d 291 (Del. 2005) in stating that, "[d]ue to the 'inherently compelling pressures' of an interrogation, the Delaware Supreme Court has held that in a DUI investigation, the suspect must be Mirandized before the interrogation begins." However, Defendant's interpretation of the holding in *Garvey* is incorrect because *Garvey* did not involve a DUI investigation. The Defendant offered no other argument in his motion regarding this issue and it was not addressed during the suppression hearing. Therefore, Defendant's statements will not be suppressed.

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[48] It is also notable that *McNeely*'s factual and statutory background differs starkly from the background here. The defendant in *McNeely* was subjected to the blood draw despite repeatedly refusing to submit to chemical testing, even after he was apprised of Missouri's implied consent law. Here, as stated above, Cpl. Pietlock was not required to inform Defendant of his right to refuse and Defendant did not refuse. Instead, he cautioned the phlebotomist not to miss the vein. In *McNeely*, the Missouri legislature had recently amended the implied consent statute's refusal provision by removing the words "none shall be given" which operated to prohibit chemical tests once refused. The state court discussed the issue of whether an officer could subject an individual arrested for DUI to chemical testing after his refusal. That issue was not ruled on by the U.S. Supreme Court. Furthermore, those same concerns are not present here because §2472(a) expressly states that "*[i]f a person refuses* to permit chemical testing, *after being informed* of the penalty of revocation for such refusal, *the test shall not be given* …"

[49] *State v. Caldwell*, 2007 WL 1748663, at *2 (Del. Super. May 17, 2007) (quoting *United States v. Davis,* 2006 U.S. Dist. LEXIS 3591).

CONCLUSION

For the aforementioned reasons, Defendant's Motion to Suppress is **DENIED.**

IT IS SO ORDERED.

/S/CALVIN L. SCOTT
Judge Calvin L. Scott, Jr.