

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

JENNIFER L. COHAN, Director,)
Division of Motor Vehicles,)

Appellant,)

v.)

MATTHEW SIMMONS,)

Appellee.)

C.A. No. SN09A-02-001 JAP

Submitted: October 20, 2010

Decided: January 28, 2011

*On Appeal from the Court of Common Pleas of the State of Delaware
In and For New Castle County
Decision **REVERSED** and **REMANDED***

MEMORANDUM OPINION

Appearances:

Paul R. Wallace, Deputy Attorney General, Wilmington, Delaware
James T. Wakley, Deputy Attorney General, Wilmington, Delaware
Attorneys for Appellant Jennifer L. Cohan

Appellee did not appear

JOHN A. PARKINS, Jr., JUDGE

INTRODUCTION

Before the Court is an appeal from the Division of Motor Vehicles, (the “Division”) of a decision of the Court of Common Pleas reversing a decision of the Division’s hearing officer to revoke the driver’s license of Matthew Simmons, (“Simmons”), for failure to submit to an Intoxilyzer test pursuant to 21 *Del.C.* § 2742.¹ The Court of Common Pleas found that the underlying traffic stop leading to Simmons’ arrest for driving under the influence violated his Constitutional rights and, therefore, any evidence obtained from the stop was fruit of the poisonous tree. The Court **REVERSES** the decision of the court below and remands for further action as necessary pursuant to this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

On September 15, 2007, at 12:45 a.m., the DUI Task Force was operating a sobriety checkpoint on Pennsylvania Avenue in Wilmington near Tower Hill School.² Cpl. Dempsey, (the “Officer”), was in the chase vehicle positioned at a nearby parking lot when he observed two black vehicles traveling northwest on Pennsylvania Avenue toward the checkpoint.³ According to the Officer, the lead vehicle activated its turn signal at the last minute, in violation of 21 *Del. C.* §

¹ Section 2742(b)(1) states that “[u]pon certification by the police officer that there existed probable cause to believe that the person had been acting in violation of § 4177 of this title or a local ordinance substantially conforming thereto and that the person refused to submit to a chemical test after being informed of the penalty of revocation for such refusal, the Secretary shall revoke the person's driver's license”

² *Simmons v. Shahan*, 2008 WL 5208573, *1, Smalls, C.J. (Del. Com. Pl. Dec. 11, 2008); Transcript of Hearing before the Division of Motor Vehicles, 3 (Nov. 6, 2007) (hereinafter “T”).

³ *Simmons*, 2008 WL 5208573 at *1; T at 3.

4155(b),⁴ and suddenly turned right at Mt. Salem Lane while the second vehicle closely followed.⁵ The Officer, then, pursued the vehicles because they were avoiding the checkpoint and attempted to stop them both.⁶ However, only the second vehicle stopped; the lead vehicle continued on.⁷ While the Officer was requesting documentation from the driver of the second vehicle, a man staggered toward him on foot, and the occupants of the second vehicle identified the man on foot as the driver of the lead vehicle, Simmons.⁸ The Officer then ordered Simmons to sit on the curb, but, instead, he walked away.⁹ So, the Officer grabbed Simmons, cuffed him and, upon the arrival of back-up, conducted a pat-down search.¹⁰ While doing so, the Officer observed that Simmons' eyes were glassy and bloodshot and that he had a strong odor of alcohol emanating from him.¹¹

Furthermore, the Officer testified that Simmons provided conflicting stories as to his behavior—when asked why he did not pull over, Simmons stated that he was out walking and happened upon the accident, yet, there was no accident.¹² While in the patrol car on the way to the command post, Simmons stated that his

⁴ Section 4155(b) states that “[a] signal of intention to turn or move right or left when required shall be given continuously during not less than the last 300 feet or more than one-half mile traveled by the vehicle before turning.”

⁵ *Simmons*, 2008 WL 5208573 at *1; T at 3.

⁶ T at 12-13.

⁷ *Simmons*, 2008 WL 5208573 at *1; T at 3-4, 13-14.

⁸ *Simmons*, 2008 WL 5208573 at *1; T at 4-5.

⁹ *Simmons*, 2008 WL 5208573 at *1; T at 5.

¹⁰ *Simmons*, 2008 WL 5208573 at *1; T at 4-5.

¹¹ *Simmons*, 2008 WL 5208573 at *1; T at 5.

¹² T at 6.

friends were following him home.¹³ Upon arrival at the command post, Simmons was unable to walk in a straight line, was irate and uncooperative, and refused an Intoxilyzer test.¹⁴ Simmons was then arrested for violation of 21 *Del. C.* § 4177, driving under the influence of alcohol.¹⁵ He was not cited for his failure to signal his intention to turn.¹⁶

On November 6, 2007, the Division of Motor Vehicles conducted a hearing after which the hearing officer found that the requisite probable cause existed to believe that Simmons was driving while under the influence of alcohol.¹⁷ The hearing officer based his determination regarding the existence of probable cause on, among other facts, the evidence that Simmons attempted to avoid a sobriety checkpoint by making a sudden turn for which he signaled too late.¹⁸ Simmons' license was, consequently, revoked.¹⁹

Simmons appealed the decision of the Division of Motor Vehicles to the Court of Common Pleas alleging that his Constitutional rights under Article 1, Section 6 of the Delaware Constitution were violated by a “pretextual” stop.²⁰

¹³ *Simmons*, 2008 WL 5208573 at *1; T at 6.

¹⁴ *Simmons*, 2008 WL 5208573 at *1; T at 6.

¹⁵ *Simmons*, 2008 WL 5208573 at *1; T at 7-8.

¹⁶ T at 12.

¹⁷ *Simmons*, 2008 WL 5208573 at *1; Hearing Disposition of the Division of Motor Vehicles, 1-3 (Nov. 13, 2007) (hereinafter “Hearing Disposition”).

¹⁸ Hearing Disposition at 3.

¹⁹ *Simmons*, 2008 WL 5208573 at *1.

²⁰ *Simmons*, 2008 WL 5208573 at *1.

Simmons also claims that he was not advised of his rights regarding his refusal to submit to an Intoxilyzer test.²¹

The Court of Common Pleas reversed the decision of the Division of Motor Vehicles finding that the hearing officer's decision to revoke Simmons' license was not supported by substantial evidence or applicable law.²² The Court of Common Pleas found that the traffic stop was "purely pretextual" and ordered all evidence obtained from the stop suppressed.²³ In determining the "pretextual" nature of the stop, the Court of Common Pleas relied on a labyrinthine analysis proffered by *State v. Heath*,²⁴ a Superior Court case which determined that "purely pretextual" stops are prohibited by the Delaware Constitution.²⁵

The Court has before it a brief timely filed by the Division. Simmons, however, did not file a brief or any other submittal containing argument. The Court will, therefore, decide this matter on the basis of the Division's brief and its own review of the law and the record.

²¹ *Simmons*, 2008 WL 5208573 at *1.

²² *Simmons*, 2008 WL 5208573 at *4.

²³ *Simmons*, 2008 WL 5208573 at *3.

²⁴ 929 A.2d 390 (Del. Super. 2006).

²⁵ *Simmons*, 2008 WL 5208573 at *3; see *Heath*, 929 A.2d at 402-404. The effect of *Heath* was limited to some extent by *State v. Darling* where the Superior Court refused to adhere to the *Heath* analysis and instead followed *Whren v. United States*, 517 U.S. 806 (1996), the established Fourth Amendment standard permitting valid stops of a pretextual nature. 2007 WL 1784185, *3-4, n. 43, Witham, J. (Del. Super. June 8, 2007) (stating that "the issue [as to whether pretextual stops are prohibited by the Delaware Constitution] is better suited at the appellate level where the Delaware Supreme Court can be afforded the opportunity to address whether the standard under the Fourth Amendment (*Whren* decision) is consistent with a proper interpretation of Article I, § 6 of the Delaware Constitution").

CONTENTIONS OF THE PARTIES

In its appeal, the Division contends that the Court of Common Pleas erred in finding that Simmons' traffic stop violated his rights under the Delaware Constitution.²⁶ The Division argues that since the Delaware Supreme Court has never held that stops based on an officer's subjective belief that in addition to a traffic violation another crime might be occurring are invalid under the Delaware Constitution, this Court should reverse and find the traffic stop to be justified.²⁷

DISCUSSION

Standard of Review

Upon an appeal of a decision from the Court of Common Pleas, the Superior Court is limited to correcting legal error and determining whether any factual findings are supported by the record and based on logical reasoning.²⁸ Factual findings supported by the record shall be upheld even if the Superior Court would have decided differently acting on its own right.²⁹ However, any questions of law receive *de novo* review.³⁰

The Definition of Seizure Under the Delaware Constitution

The Fourth Amendment to the United States Constitution states, "The right of the people to be secure in their persons, houses, papers, and effects, against

²⁶ Division's Opening Brief, 11 (July 7, 2010).

²⁷ Division's Opening Brief at 12.

²⁸ *Hicklin v. Onyx Acceptance Corp.*, 970 A.2d 244, 248 (Del. 2009), reargument denied (Apr. 22, 2009); 10 *Del. C.* § 1326(c) (stating that "[t]he appeal shall be reviewed on the record and shall not be tried de novo").

²⁹ *Hicklin*, 970 A.2d at 248.

³⁰ *Robert J. Smith Companies, Inc. v. Thomas*, 2001 WL 1729143, *2, Ridgely, J. (Del. Super. Dec. 10, 2001).

unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”³¹

These Fourth Amendment freedoms also apply to state actions.³²

Similarly, the Delaware Constitution provides that “[t]he people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and no warrant to search any place, or to seize any person or thing, shall issue without describing them as particularly as may be; nor then, unless there be probable cause supported by oath or affirmation.”³³ Furthermore, in *Jones v. State*,³⁴ the Delaware Supreme Court held that the Delaware Constitution provides greater protection from unreasonable seizure than its federal counterpart by finding without exception that a seizure has occurred when a reasonable person believes that he is not free to ignore the police presence and go on with his own business.³⁵ Thus, a seizure takes place where an officer uses physical force against a person or where an officer asserts authority and a person submits.³⁶ So, a Delaware court must analyze a police officer’s actions and

³¹ U.S. Const. amend. IV.

³² U.S. Const. amend. XIV; *Mapp v. Ohio*, 367 U.S. 643, 655 (1961); *State v. Thomas*, 2007 WL 949491, *2, Jurden, J. (Del. Super. Mar. 29, 2007).

³³ Del. Const. art. I, § 6.

³⁴ 745 A.2d 856, 869 (Del. 1999).

³⁵ *Jones*, 745 A.2d at 869.

³⁶ *Harris v. State*, 806 A.2d 119, 124 (Del. 2002); *Purnell v. State*, 832 A.2d 714, 719 (Del. 2003).

determine if “a reasonable person would have believed he or she was not free to ignore the police presence.”³⁷

The Valid Traffic Stop

A traffic stop is ordinarily deemed a seizure of a vehicle and its occupants and, as such, it, too, must meet Constitutional muster.³⁸ The stop must be justified at its commencement by either reasonable suspicion that criminal activity is afoot or probable cause that a traffic violation has occurred.³⁹ The validity of a traffic stop does not depend upon the subjective intent of the officer.⁴⁰ Therefore, where the traffic stop is premised upon an observed traffic violation, the police officer’s subjective intent regarding the stop is irrelevant.⁴¹ Furthermore, whether a driver is cited for the actual traffic violation that supports the stop is also irrelevant.⁴²

A “pretextual” stop occurs when a police officer uses an observed traffic violation as a ruse to stop a vehicle for the purpose of investigating unrelated criminal activity.⁴³ But, again, since the validity of a traffic stop under the Fourth Amendment is not dependant upon the subjective intent of the police officer, any

³⁷ *Woody v. State*, 765 A.2d 1257, 1264 (Del. 2001).

³⁸ *Caldwell v. State*, 780 A.2d 1037, 1045-1046 (Del. 2001).

³⁹ *Whren v. United States*, 517 U.S. 806, 810 (1996); *Caldwell*, 780 A.2d at 1046-1047.

⁴⁰ *Whren*, 517 U.S. at 813; *Darling*, 2007 WL 1784185 at *3.

⁴¹ *Whren*, 517 U.S. at 812; *Darling*, 2007 WL 1784185 at *3; *State v. McDannell*, 2006 WL 1579818, *2, Scott, J. (Del. Super. May 16, 2006) (stating that the “validity of such a stop is not questionable even where the officer may believe the motorist has engaged in other illegal conduct”).

⁴² See *State v. Dougherty*, 2008 WL 4335685, *1, Silverman, J. (Del. Super. Aug. 7, 2008); *People v. Adames*, 907 N.Y.S.2d 439, 2009 WL 5868581, *2, Mangano, J. (N.Y. Sup. Ct. Oct. 26, 2009).

⁴³ *State v. Rickards*, 2 A.3d 147, 149 (Del. Super. 2010) (citing *Adames*, 2009 WL 5868581) *aff’d*, 2011 WL 153643, Jacobs, J. (Del. Jan. 12, 2011).

pretext is irrelevant.⁴⁴ At least forty other states have adopted this objective standard.⁴⁵ More significantly, though, the Delaware Supreme Court has not held that the Delaware Constitution provides greater protection than the Fourth Amendment in circumstances where a police officer conducts a valid traffic stop with an ulterior motive.⁴⁶ Therefore, in Delaware, where a traffic stop is based upon reasonable suspicion or probable cause that a traffic violation has occurred, the stop is reasonable under the Constitution and is not invalidated by the ulterior motive of the police officer.⁴⁷

In *State v. Banther*,⁴⁸ the Court found a traffic stop to be valid where a defendant suspected of a Delaware murder was stopped in Maryland for changing lanes without a proper turning signal and subsequently arrested and charged with driving with a suspended license and providing the police with false information.⁴⁹ The stop in *Banther* was concededly “pretextual” in that Delaware State police had asked Maryland State police to follow the defendant’s vehicle for the purpose of establishing probable cause to stop him because they suspected he was involved in

⁴⁴ *Whren*, 517 U.S. at 813.

⁴⁵ See *People v. Robinson*, 767 N.E.2d 638, 97 N.Y.2d 341, 349 (N.Y. Ct. App. 2001); e.g. *Rickards*, 2 A.3d 147; *McDannell*, 2006 WL 1579818; *State v. Karg*, 2001 WL 660014, *2, Babiarez, J. (Del. Super. May 31, 2001); *Com. v. Chase*, 960 A.2d 108, 120 (Pa. Supr. 2008); *Com. v. Santana*, 649 N.E.2d 717, 719 (Mass. Supr. 1995).

⁴⁶ *Darling*, 2007 WL 1784185 at *3-4.

⁴⁷ *Rickards*, 2 A.3d at 150; *Darling*, 2007 WL 1784185 at *3; *McDannell*, 2006 WL 1579818 at *; *Karg*, 2001 WL 660014 at *2; *contra Heath*, 929 A.2d at 402-404.

⁴⁸ 1998 WL 961765, Ridgely, P.J. (Del. Super. Ct. Sept. 24, 1998).

⁴⁹ *Banther*, 1998 WL 961765, *5.

the murder.⁵⁰ As a result, while in custody the defendant in *Banther* made incriminating statements to the police.⁵¹ In his motion to suppress the statements, the defendant in *Banther* argued that his rights were violated because the stop was “pretextual.”⁵² The *Banther* Court rejected this contention finding that the stop was reasonable under the Constitution because the police officer had probable cause to justify the stop for violation of a traffic regulation regardless of any other subjective intent.⁵³

In the matter before the Court, the Officer asserted his authority by attempting to stop Simmons for failing to use a proper turning signal so that he could investigate why Simmons avoided the DUI checkpoint. Although Simmons initially kept driving and did not submit to the Officer’s attempt to stop him, Simmons did eventually stop his vehicle and stagger toward the Officer. When asked why he did not stop initially, Simmons claimed that was not driving but only out walking. Simmons, therefore, did not submit to the authority of the officer. The Court, therefore, finds that a seizure did not occur when the Officer asserted his authority in an attempt to stop Simmons’ vehicle.

But, even if Simmons was “seized” when the Officer activated his lights, that seizure passes Constitutional muster. The Court finds that the Officer had

⁵⁰ *Banther*, 1998 WL 961765, *2.

⁵¹ *Banther*, 1998 WL 961765, *5.

⁵² *Banther*, 1998 WL 961765, *5.

⁵³ *Banther*, 1998 WL 961765, *5.

probable cause to believe that a traffic violation had occurred. Based upon such probable cause, the traffic stop was valid at its commencement. The fact that the Officer did not subsequently cite Simmons for failure to timely signal his intention to turn does not affect the validity of the traffic stop—as long as the observed traffic violation, the failure to timely signal the turn, supported the stop at its commencement, which it did, the stop is valid. No citation is required.

The Court of Common Pleas found that the stop violated Simmons’ rights under the Delaware Constitution because it was “pretextual” in that the Officer was using Simmons’ failure to timely signal a turn as a pretense to stop him for a possible DUI charge. In one sense, the stop was “pretextual” because the Officer admitted that he pursued Simmons’ vehicle for the traffic violation in order that he could investigate why he was avoiding the DUI checkpoint.⁵⁴ Simmons’ rights, however, were not violated because Delaware Courts have consistently held that where a traffic stop is supported by reasonable suspicion or probable cause that a traffic violation has occurred, the ulterior motive of the police officer is irrelevant.⁵⁵ Therefore, any subjective intent on the Officer’s part to investigate a possible DUI charge does not affect the validity of the stop because the stop was

⁵⁴ T at 13.

⁵⁵ *Rickards*, 2 A.3d at 150; *Darling*, 2007 WL 1784185 at *3; *McDannell*, 2006 WL 1579818 at *; *Karg*, 2001 WL 660014 at *2; *contra Heath*, 929 A.2d at 402-404.

supported by probable cause that Simmons had failed to timely signal his turn in violation of 21 *Del.C.* § 4155(b).

As in *Banther*, here, evidence of further criminal activity—driving under the influence—was obtained after Simmons was validly stopped for a traffic violation. Accordingly, the Court finds that the “pretextual” stop of Simmons was valid under Delaware law and that the Court of Common Pleas erred in determining that Simmons’ rights were violated.

The Court of Common Pleas supported its finding of a rights’ violation on *State v. Heath*.⁵⁶ However, since the *Heath* case stands alone in Delaware jurisprudence and since the Delaware Supreme Court has not determined that a “pretextual” stop violates the Delaware Constitution, the Court will not presume such a violation here.

CONCLUSION

Therefore, the Court finds that the traffic stop is valid under the Delaware Constitution because it was supported by probable cause that a traffic violation had occurred. Thus, the Court hereby **REVERSES** the decision of the Court of Common Pleas.

⁵⁶ *Simmons*, 2008 WL 5208573 at *3.

Furthermore, since the court below made no findings as to Simmons' second argument on appeal, namely, that he was not sufficiently advised of his rights pursuant to his refusal to submit to an Intoxilyzer test, the Court **REMANDS** this case back to the Court of Common Pleas for findings of fact and conclusions of law on that issue alone.

Accordingly, the Court **REVERSES** the decision of the court below and **REMANDS** for further action as necessary pursuant to this opinion.

IT IS SO ORDERED.

Judge John A. Parkins, Jr.