

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,

v.

REBECCA J. WISE,

Defendant.

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I.D. No. 1603020444
Kent County

Submitted: December 20, 2016

Decided: December 22, 2016

ORDER

Upon Defendant's Motion to Suppress.

Denied.

D. Benjamin Snyder, Esquire of the Department of Justice, Dover, Delaware; attorney for the State.

James M. Stiller, Jr., Esquire of Schwartz & Schwartz, Dover, Delaware; attorney for the Defendant.

WITHAM, R.J.

Upon consideration of Defendant Rebecca Wise's motion to suppress, it appears to the Court that:

1. Ms. Wise is charged with a single count of driving a vehicle while under the influence of alcohol and/or drugs (DUI), in violation of 21 *Del. C.* § 4177. Her motion seeks to suppress all the evidence against her. The Court heard evidence at a suppression hearing held on December 20, 2016.

2. The State has met its burden to show that the officer had a reasonable and articulable suspicion of DUI when he investigated Ms. Wise, and that there was probable cause to support her eventual arrest and the administration of a portable breathalyzer test. Ms. Wise's motion to suppress will be DENIED.

FACTS

3. On March 26, 2016, around 6:30 p.m., Ms. Wise was driving her sport utility vehicle when she rear-ended another car, which was stopped at a stop sign. The collision occurred on private property managed by Dover Downs in Dover, Delaware. It caused minor damage to both vehicles. Dover Downs surveillance video shows that the weather conditions were dry and that it was still daylight at the time of the collision.

4. Ms. Wise and the driver of the other car pulled their vehicles to the side of the road. The two drivers (and the passengers from the other car) then exited their vehicles. They were first approached by Dover Downs security personnel, and later by Corporal Rich of the Dover Police Department. Corporal Rich was assigned to patrol duties at the time he responded to the collision.

5. The officer testified that he was uncertain of whether he turned on his motor vehicle recording (MVR) device when he pulled his patrol car up behind the vehicles. He further testified that a police report is often not prepared when a collision occurs on private property, and that he thus might not have turned on the MVR. An MVR can be activated through the console within the patrol car, by the officer turning on his microphone, by driving the patrol car faster than a set speed, or by activating certain lights on the patrol car. He testified that he activated only his rear lights when he arrived, and not the full overhead light bar on his patrol car, although the Dover Downs surveillance video shows the full overhead light bar activated. After the incident, he contacted an evidence technician to see if an MVR had been made, but the evidence technician was unable to find a recording.

6. After arriving, the officer spoke with both drivers and the other car's passengers to make sure they were uninjured. One of the other car's passengers told the officer that Ms. Wise was eating breath mints and smoking, and that she seemed nervous about the police encounter.

7. The officer then separated Ms. Wise from the occupants of the other car and asked her to put out her cigarette. At the time of their conversation and throughout most of their interaction, Ms. Wise was wearing sunglasses, which obscured the officer's view of her eyes. After she put out her cigarette, the officer smelled what he described as a moderate odor of alcohol, despite the presence of a breeze. In response to a question by the officer, Ms. Wise stated that she had two to three drinks earlier in the day.

8. Corporal Rich testified that he is a certified police instructor, teaching both full DUI courses and DUI refresher courses. He testified that since he started with the Dover Police Department in 2008 he has taught around four full DUI courses at the Delaware State Police Academy. He has undergone a DUI course and refresher course himself, as well as DUI instructor school.

9. Based upon his observations, the officer decided to conduct three “pre-exit” tests while he and Ms. Wise were standing outside the vehicles. He administered the alphabet, counting, and finger-dexterity tests. Ms. Wise failed all three tests, which suggested to the officer that she may have been impaired.

10. After completing the pre-exit tests, the officer conducted both a horizontal gaze nystagmus (HGN) test and a vertical gaze nystagmus test. Ms. Wise completed the vertical gaze nystagmus test successfully. She could not successfully complete the HGN test.

11. The video shows Ms. Wise continually brushing her hair away as the test was being performed, which could obviously impact a proper examination of HGN. In addition, the officer testified that the results of an HGN test can be inaccurate when there are cars passing by in the subject’s line of sight, a phenomenon he described as optokinetic nystagmus. The video demonstrated that cars drove by in the parking lot in Ms. Wise’s line of sight at least twice while the test was being administered.

12. The officer testified both to his training in the National Highway Traffic Safety Administration (NHTSA) standards that govern the HGN test (and other field sobriety tests used in this case) and to the content of those standards. According to

the officer, the HGN test measures the involuntary jerking of the eyes that is more pronounced in impaired individuals. The test looks for clues of impairment, and the presence of four or more clues indicates that the individual is impaired. The NHTSA standards require that the stimulus for the test be held twelve to fifteen inches away from the individual at about eye level. They further dictate that the officer should look for signs of eye abnormalities, particularly different-sized pupils, and should ask the individual whether she has any eye problems or eye abnormalities.

13. The officer testified that he did not ask whether Ms. Wise had eye problems or eye abnormalities, but that he examined her pupils to look for signs of problems. Observing none, he began to administer the test, but was unable to complete it because Ms. Wise kept turning her head instead of following the stimulus with her eyes. This was perhaps in part because her hair was obscuring her vision, as described above. Before completing the test, he observed four clues of impairment. He testified that he held the stimulus twelve to fifteen inches away from Ms. Wise throughout the test.

14. Corporal Rich next administered the walk-and-turn test. According to the NHTSA standards, he was required to ask Ms. Wise if she had any physical problems or disabilities. The officer testified that he routinely asks about physical problems or disabilities, and that he believes he did so with Ms. Wise. The Court finds that testimony credible. Ms. Wise exhibited seven clues on the test. Showing two clues demonstrates impairment.

15. Corporal Rich finally administered the one-leg-stand test. As with the

walk-and-turn test, the officer was required to ask about physical problems or disabilities. He was also required to instruct Ms. Wise to hold her foot parallel to the ground. As with the walk-and-turn test, the officer testified that he routinely asks about physical problems and that he believes he did so with Ms. Wise. He also testified that he instructed her to “point [her] toe.” He admitted that the instruction could be confusing, but he also demonstrated how to perform the test while he gave the instructions. Ms. Wise exhibited three clues on the test. Showing two clues demonstrates impairment.

16. During the course of the investigation, Ms. Wise stated that she had “screwed up” and that she was going to lose her job because she had a couple of drinks. The officer noted that her speech seemed slurred or mumbled, although he also stated that it may have been her usual speech pattern. Eventually, Ms. Wise removed her glasses, which allowed the officer to observe that her eyes were glassy and watery.

17. After administering the field sobriety tests, Corporal Rich arrested Ms. Wise. Afterwards, a portable breathalyzer test (PBT) and blood draw were performed. The PBT revealed a blood alcohol content (BAC) of 0.11. And the blood draw resulted in a BAC of 0.16.

18. Ms. Wise was indicted on a single charge of driving a vehicle while under the influence of alcohol and/or drugs.

THE PARTIES’ CONTENTIONS

19. Ms. Wise seeks the suppression of all the evidence against her or,

alternatively, of the results of various field sobriety tests (FSTs), the PBT, and her blood test. She alleges that the officer did not have a reasonable and articulable suspicion to initiate the investigation, failed to preserve an MVR of the incident, used unreliable pre-exit test methods, improperly administered the tests, and lacked probable cause for her arrest, PBT, and blood draw.

20. The State responds that the lack of an MVR does not entitle Ms. Wise to suppression, the pre-exit tests are admissible and part of the probable cause analysis, even imperfectly administered field sobriety tests can contribute to probable cause, and there was thus sufficient probable cause for Ms. Wise's arrest, PBT and subsequent blood draw.

STANDARD OF REVIEW

21. When a defendant moves to suppress evidence collected in a warrantless search, the State bears the burden of proving by a preponderance of the evidence "that the challenged police conduct comported with the rights guaranteed [to the defendant] by the United States Constitution, the Delaware Constitution and Delaware statutory law."¹

DISCUSSION

22. Ms. Wise's motion will be denied. The officer had a reasonable and articulable suspicion to engage in the pre-exit tests and standardized field sobriety tests based upon the motor vehicle collision, the odor of alcohol, Ms. Wise's slurred speech, and her statement that she had recently consumed alcohol. Even excluding

¹ *State v. Kang*, 2001 WL 1729126, at *3 (Del. Super. Nov. 30, 2001).

the incomplete HGN test, the results of all the other tests, additional statements by Ms. Wise, and observations by the officer provided probable cause to support Ms. Wise's eventual arrest and PBT. And the missing MVR provides no ground for relief, because the police were under no duty to create a recording of the investigation.

Reasonable and Articulate Suspicion for the Officer's Investigation

23. The officer had a reasonable and articulable suspicion of DUI, based upon the motor vehicle collision, the odor of alcohol, Ms. Wise's slurred speech, and her statement that she had recently consumed alcohol, to engage in further investigation.

24. An investigatory stop is a "seizure" for the purposes of the Fourth Amendment.² When such seizures are "unreasonable," they violate the Fourth Amendment.³ A *Terry* stop "is reasonable when a law enforcement officer conducts a brief investigatory traffic stop based on reasonable and articulable suspicion of criminal activity."⁴ "Reasonable and articulable suspicion is a less stringent standard than the probable cause standard and requires a quantum of proof that is less than preponderance of the evidence."⁵

25. A court determining whether an officer's actions were supported by reasonable and articulable suspicion "must examine the totality of the circumstances 'as viewed through the eyes of a reasonable, trained police officer in the same or

² *West v. State*, 143 A.3d 712, 716 (Del. 2016).

³ *Id.*

⁴ *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 20–21 (1968)).

⁵ *Purnell v. State*, 832 A.2d 714, 719 (Del. 2003) (citing *Woody v. State*, 765 A.2d 1257, 1263 (Del. 2001)).

similar circumstances, combining objective facts with such an officer's subjective interpretation of those facts.”⁶ “Courts will defer to the experience and training of police officers.”⁷

26. An odor of alcohol and the commission of a traffic offense are enough, on their own, to constitute a reasonable and articulable suspicion that a DUI offense has been committed and “justify a request that the driver perform some field sobriety tests.”⁸ Based upon the driver's performance on those tests, the officer may discover “facts that either elevate what was only a suspicion into probable cause, or dispel the suspicion and result in no DUI arrest.”⁹

27. Before beginning the pre-exit tests, the officer observed that Ms. Wise had a moderate odor of alcohol and had rear-ended another vehicle at a stop sign. That alone would create a reasonable and articulable suspicion that DUI had been committed. Ms. Wise's answer to his follow-up question, indicating that she had a “couple of drinks two or three hours ago,” further bolstered that suspicion. Finally, Ms. Wise's slurred speech suggested that she may have been impaired. The officer's investigation was thus supported by a reasonable and articulable suspicion of DUI.

Probable Cause for the Arrest and PBT

28. The arrest of Ms. Wise and the PBT that was later performed were

⁶ *Id.* (quoting *Woody*, 75 A.2d at 1263).

⁷ *Id.* at 719–20 (quoting *Woody*, 75 A.2d at 1262).

⁸ *Lefebvre v. State*, 19 A.3d 287, 295 (Del. 2011) (citing *Esham v. Voshell*, 1987 WL 8277, at *2 (Del. Super. Mar. 2, 1987)).

⁹ *Id.*

supported by probable cause, based in part on the same grounds that gave the officer a reasonable and articulable suspicion of DUI. In addition, Ms. Wise's performance on the field sobriety tests, her statements during the investigation, and the officer's later observation of her glassy, watery eyes solidified the necessary probable cause for her arrest.

29. Delaware courts "determine probable cause by the totality of the circumstances, as viewed by a reasonable police officer in the light of his or her training and experience:"

To establish probable cause, the police need only present facts suggesting, in the totality of the circumstances, that a fair probability exists that the defendant has committed a crime. "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."¹⁰

30. As a threshold matter, there is no authority for Ms. Wise's contention that pre-exit tests may not be used to establish probable cause. To the contrary, courts have held such tests to be an appropriate part of a probable cause analysis and even permitted their use to establish guilt.¹¹ Accordingly, the results of those tests are

¹⁰ *Miller v. State*, 4 A.3d 371, 373–74 (Del. 2010) (citations omitted).

¹¹ *E.g.*, *Guilfoil v. State*, 135 A.3d 78 (Table), 2016 WL 943760, at *5 (Del. Mar. 11, 2016) (including among "overwhelming evidence . . . in favor of conviction" the defendant's failure at the alphabet and counting tests); *Lefebvre*, 19 A.3d at 293 (citing *Bease v. State*, 884 A.2d 495, 497–98 (Del. 2005)) ("[A]s this Court held in *Bease*, evidence of a traffic violation, odor of alcohol, rapid speech, admission to drinking, bloodshot and glassy eyes and a failed alphabet test constituted probable cause to arrest the driver for a DUI offense."); *State v. Lackford*, 2014 WL 1230765, at *1, *4 (Del. Super. Jan. 29, 2014) (poor performance on pre-exit field sobriety tests, including finger

relevant to a finding of probable cause and are also potentially admissible as evidence of guilt.

31. As to the other field sobriety tests (the HGN, the walk-and-turn, and the one-leg stand tests), Ms. Wise has raised issues with the way they were administered, suggesting that those issues make the tests unusable in determining probable cause. An incorrectly administered field sobriety test generally cannot be used to establish probable cause.¹² The State must lay a foundation for the NHTSA standards and the officer's compliance with those standards.¹³

32. The issues with the HGN test merit disregarding the results for the purposes of determining probable cause. The officer was unable to complete the test with Ms. Wise and he neglected to ask at any point if she had eye issues. While Ms. Wise has offered no evidence to support the claim that she had cataracts or that her cataracts would have altered the results of the HGN test, it is undisputed that the test was never fully completed. And the failure to establish whether Ms. Wise had a pre-

dexterity test, is part of the totality of circumstances analysis for probable cause).

¹² See *Miller v. State*, 4 A.3d 371, 374 (Del. 2010) (“Because [the officer] did not testify as to the NHTSA standards *or compliance with those standards*, the trial judge erred by considering the results of these tests in his probable cause analysis.” (emphasis added)); *State v. Mulholland*, No. 1108002781, 2013 WL 3131642, at *6 (Del. Ct. Com. Pl. June 14, 2013). *But see State v. Murray*, No. 1306022016, 2014 WL 4178345, at *3 n.11 (Del. Ct. Com. Pl. Aug. 22, 2014) (failure to follow NHTSA standards does not disqualify tests from consideration in probable cause determination); *State v. Lanouette*, No. 0803028532, 2012 WL 4857820, at *8 (Del. Ct. Com. Pl. Aug. 27, 2012) (same); *State v. Ministero*, No. 0306011221, 2006 WL 3844201, at *2 (Del. Ct. Com. Pl. Dec. 21, 2006) (same).

¹³ *Miller*, 4 A.3d at 374.

existing eye condition draws the test's reliability into doubt. Accordingly, the results of the HGN will not be considered for the purpose of determining probable cause.

33. In contrast, it became clear at the hearing that the issues with the walk-and-turn and one-leg stand tests did not compromise their role in establishing probable cause. The crux of Ms. Wise's argument in her motion was that the officer failed to ask her if she had any physical injuries or disabilities. But the officer credibly testified that he did ask her if she had any physical injuries or disabilities, and Ms. Wise has offered no evidence to the contrary. Ms. Wise's other objection to the test was that the officer's instruction to "point [her] toe" was ambiguous and should have been replaced with an instruction to keep her foot parallel to the ground. To the extent the officer departed from the standard by using less technical, more accessible language, he corrected that error by demonstrating the correct performance of the test. As a result, there was no error in the administration of the test, and both the one-leg stand and walk-and-turn tests are part of a probable cause analysis.

34. The officer thus had ample probable cause for Ms. Wise's arrest and PBT. Beside the motor vehicle collision, the odor of alcohol, Ms. Wise's slurred speech, and her statement that she had recently consumed alcohol, the officer also had the benefit of Ms. Wise's failed performance on the pre-exit tests, the indications of impairment from her one-leg stand and walk-and-turn tests, her additional statements to him that she had "screwed up" and might lose her job because of a "couple of drinks," and her glassy, watery eyes. Under any precedential authority on the

subject,¹⁴ the evidence available to the officer constituted probable cause for Ms. Wise's arrest.

Remedies Under Deberry for the Missing MVR

35. As to the MVR, Ms. Wise is not entitled to any remedies under *Deberry*. The State was under no obligation to make a video record of the traffic stop and, by the officer's testimony, did not appear to have made an MVR which would have given rise to a duty to preserve.

36. When a defendant claims that the State lost or destroyed exculpatory evidence, the Court considers "(1) whether the requested material would have been subject to disclosure under Criminal Rule 16 or *Brady v. Maryland*; (2) if so, whether the government had a duty to preserve the material; and (3) if so, whether the State breached that duty and what consequences should flow from that breach."¹⁵ Police are under no "affirmative duty to video record all driving under the influence investigations."¹⁶ However, if the recording is created, the State has a duty to preserve it.¹⁷ Indeed, "increased diligence is required when a recording is made of an alleged event and the defendant is subsequently charged in connection with the

¹⁴ See, e.g., *Bease v. State*, 884 A.2d 495, 499–500 (Del. 2005) (probable cause existed where defendant "spoke in a rapid manner . . . , smelled of alcohol, admitted that he consumed alcoholic beverages the night before, had bloodshot and glassy eyes, and had just committed a traffic violation . . ."); see generally *id.* at 498–99 (collecting cases).

¹⁵ *DeLoach v. State*, No. 1104015991, 2012 WL 2948188, (Del. Super. July 16, 2012) (citing *Wainer v. State*, 869 A.2d 328 (Table), 2005 WL 535010, at *2 (Del. Feb. 15, 2008)).

¹⁶ *Id.*

¹⁷ *Hunter v. State*, 55 A.3d 360, 369 (Del. 2012).

event.”¹⁸

37. While an MVR of the incident, if it existed, would have been subject to disclosure,¹⁹ the police had no duty to create an MVR. The officer did not breach any duty by failing to record the interaction simply because he had the tools to make a recording. While it is unclear whether he omitted to record through inadvertence, equipment malfunction, or simply because he viewed the interaction as routine, it is clear that his failure to make the recording was not a breach of any duty.

38. Ms. Wise urges the Court to read *Johnson v. State*²⁰ to mandate a different result. In Ms. Wise’s reading, our Supreme Court’s holding in that case would extend a duty on the part of police to create MVRs of routine calls for service like this call to the scene of a motor vehicle collision. This Court disagrees with Ms. Wise’s interpretation. The Supreme Court’s holding in *Johnson* imposes a duty to gather and preserve physical evidence that could be used to support a conviction on a charge that the police are investigating.²¹ But it cannot be read to impose a duty to affirmatively *create* evidence by making an MVR of every citizen interaction that occurs near a patrol car. The lack of an MVR provides no ground to suppress the evidence.

CONCLUSION

39. Ms. Wise’s arrest and PBT were supported by probable cause.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ 27 A.3d 541 (Del. 2011).

²¹ *Id.* at 547.

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Defendant's motion to suppress is thus **DENIED**.

IT IS SO ORDERED.



Resident Judge

WLW/dmh

oc: Prothonotary

xc: D. Benjamin Snyder, Esquire
James M. Stiller, Jr., Esquire