IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

SEAN P. HUGHES,	)	
Appellant-Defendant Below,	)	I.D. No. 0202016153
	)	
v.	)	Cr. A. No. N02122381
	)	
STATE OF DELAWARE,	)	
Appellee.	)	

Date Submitted: August 3, 2003
Date Decided: November 4, 2003

UPON APPEAL FROM A DECISION
OF THE COURT OF COMMON PLEAS
AFFIRMED.

OPINION AND ORDER

Robert G. Carey, Esquire, Assistant Public Defender, Wilmington, Delaware for the Appellant-Defendant Below.

Saagar B. Shah, Esquire, Deputy Attorney General, Wilmington, Delaware for the Appellee.

ABLEMAN, J.

This is an appeal from the conviction and sentencing Order issued by the Court of Common Pleas on December 17, 2002. Following a bench trial, the Court found the defendant, Sean Hughes ("Appellant"), guilty of Driving a Vehicle Under the Influence of Alcohol ("DUI") in violation of 21 *Del. C.* § 4177(a)(5).[1] At trial, the Appellant moved to suppress evidence based on a lack of probable cause. The Court of Common Pleas denied the motion to suppress and the Intoxilyzer results were submitted into evidence.

This is Appellant's second DUI conviction. Pursuant to 21 *Del. C.* § 4177(d)(2), he was sentenced to the minimum mandatory period of incarceration of sixty days at Level V and received a fine. Additionally, he was placed on probation for fifteen months at Level I. As a special condition of probation, he was directed to be evaluated for substance abuse at D.E.R.P. and, thereafter, complete a course of instruction or program of rehabilitation established by 21 *Del. C.* § 4177(e).

[1] Section 4177 provides:

(a) No person shall drive a vehicle:

(5) When the person's alcohol concentration is, within 4 hours after the time of driving .10 or more. Notwithstanding any other provision of the law to the contrary, a person is guilty under this subsection, without regard to the person's alcohol concentration at the time of driving, if the person's alcohol concentration is, within 4 hours after the time of driving .10 or more and that alcohol concentration is the result of an amount of alcohol present in, or consumed by the person when that person was driving. DEL. C. ANN. tit. 21 § 4177 (a)(5) (1995 & Supp. 2002).

Despite having already served his sentence, Appellant filed the instant appeal with the objective of having his second DUI conviction removed from his record. On July 1, 2003, his counsel filed a brief and motion to withdraw pursuant to Appellant's Brief Under Superior Court Civil Rule 72, Superior Court Criminal Rule 39 (C) and Supreme Court Rule 26(c). Appellant's counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues and the appeal is without merit. By letter, dated June 2, 2003, Appellant's attorney informed him of the provisions of Rule 26(c) and provided him with a copy of the motion to withdraw and the accompanying brief. Appellant was also informed of his right to supplement his attorney's presentation. Appellant responded to his counsel on June 27, 2003, raising seven issues incorporated in his appeal brief that he asks this Court to consider. The State ("Appellee") has responded to the position taken by Appellant's counsel and has moved to affirm the Court of Common Pleas' decision. This is the Court's decision on appeal.

Statement of Facts

On February 19, 2002, Corporal Keith R. Mark of the Delaware State Police, Troop 6, was patrolling the west side sector of New Castle County (Route 4, Route 2, Kirkwood Highway, parts of I-95, and Route 41).[2] Corporal Mark responded to a criminal complaint of terroristic threatening at Vince's Sport Center in Newark,

[2] Transcript of Trial, dated December 17, 2002, at 5 (hereinafter "Tr. of Trial at __.").

New Castle County, Delaware.[3] While interviewing the alleged victim and witness, both individuals identified Appellant's vehicle as it drove into the parking lot. Appellant was the suspect in the criminal complaint that Corporal Mark was investigating.[4]

After his attention was directed to Appellant's car entering the parking lot, Corporal Mark observed a female passenger in the front right seat of the car. Corporal Mark testified that Appellant parked his car in a space of the parking lot of Vince's Sport Complex approximately fifty to one hundred feet away from where he was positioned.[5] When Appellant got out of his car, Corporal Mark walked immediately towards the Appellant.[6]

Upon approaching the Appellant to investigate the terroristic threatening complaint, Corporal Mark smelled a strong odor of alcohol emanating from the Appellant. He further observed that Appellant's eyes were watery, bloodshot, and glassy as well.[7] When Corporal Mark asked the Appellant if he had been drinking, he responded that he had consumed one drink and two shots.[8] Appellant told Corporal Mark that he and his female passenger had picked up a birthday cake and had returned to Vince's for her son's birthday party. Prior to picking up the cake

[3] Tr. of Trial at 6-7.
[4] Tr. of Trial at 8.
[5] Tr. of Trial at 9.
[6] Tr. of Trial at 13.
[7] Tr. of Trial at 13-14.
[8] Tr. of Trial at 13.

and before returning to Vince's, they had stopped to consume some drinks.[9] While Corporal Mark suspected that the Appellant might have been under the influence, he decided not to investigate the DUI out of concern for officer safety. Instead, he arrested the Appellant on the terroristic threatening complaint.[10] Corporal Mark believed it was prudent to delay sobriety field testing as he feared an impending altercation possibly involving the Appellant, the alleged male victim, the male witness, and himself.[11]

Corporal Mark transported the Appellant to the Delaware State Police Troop 6 where he removed the handcuffs and asked the Appellant to undergo field sobriety tests, as well as to submit to an Intoxilyzer exam inside the Intoxilyzer room.[12] Corporal Mark performed the Horizontal Gaze Nystagmus ("HGN"), the Portable Breath Test ("PBT"), the Alphabet Test, and the Counting Backwards Test on the Appellant who voluntarily submitted to these tests.[13] Corporal Mark did not perform any physical field tests on the Appellant because Appellant advised him that he suffered from leg or knee problems.[14] Corporal Mark testified that the purpose for conducting these field sobriety tests was to establish probable cause for being under the influence of alcohol.[15] Appellant stated to Corporal

[9] *Id*.
[10] Tr. of Trial at 15-17.
[11] Tr. of Trial at 17-18.
[12] Tr. of Trial at 21-22.
[13] *Id*.
[14] Tr. of Trial at 23.
[15] Tr. of Trial at 23-24.

Mark that he was taking Valium, but that he was not ill at the time the tests were being conducted.[16]

Corporal Mark testified that all the field sobriety tests were conducted in accordance with the National Highway Traffic Safety Administration standards. Appellant failed the HGN and the PBT tests, but passed the Alphabet and Counting Backwards tests.[17] Based on Appellant's slurred speech, bloodshot and watery eyes, and his failure to pass the HGN and PBT tests, Corporal Mark determined that Appellant's faculties were impaired. He then conducted the Intoxilyzer test on Appellant.[18] In compliance with the requirements for administering the Intoxilyzer test, Corporal Mark ensured that Appellant did not eat, smoke, or belch during the twenty-minute observation period before administering the test.[19] Additionally, Appellant informed Corporal Mark that he was not wearing dentures.[20] Finally, Corporal Mark testified that the Appellant did not, nor could not, have consumed any alcohol between the time he first observed the Appellant driving through the parking lot and when he underwent the Intoxilyzer test.[21] Appellant registered a blood alcohol reading of 0.111.

Appellant's Contentions

[16] Tr. of Trial at 24.
[17] Tr. of Trial at 25-37.
[18] Tr. of Trial at 37.
[19] Tr. of Trial at 47.
[20] Tr. of Trial at 48.
[21] *Id*.

In his brief, Appellant asserts that, upon exiting his vehicle, during the short period of approximately fifteen seconds that he alleges he was not observed by Corporal Mark, he reached in the back seat for the birthday cake and gifts, and simultaneously, drank a quarter pint of Southern Comfort, tossing the bottle in the grass.[22] Appellant's female passenger corroborated this story. He further contends that he properly parked his vehicle between the marked parking lanes and that he did not stumble or stagger as he approached Corporal Mark. He justified his slurred speech as the consequence of having his jaw broken in two places and having undergone reconstructive surgery.[23] And, he claimed that the smell of alcohol emanating from his person may have been the result of beer spilt on him earlier in the day when he was at a bar drinking.[24] Appellant purports that Corporal Mark acted on a hunch and that he was forced to submit to field sobriety tests without the requisite articulable suspicion.

Appellant was involved in an automobile accident in 1996 as a result of which he sustained a crushed skull, broke his jaw in two places, split the roof of his mouth, and knocked out his teeth. He underwent reconstructive surgery for a metal bridge for his lower teeth and metal plates and screws across the front of his jaw.[25] He testified that he told Corporal Mark that five or six of his teeth were removable

[22] Tr. of Trial at 120-22.
[23] Tr. of Trial at 78, 95-96.
[24] Tr. of Trial at 78.
[25] Tr. of Trial at 95-96.

and that he had dentures, a plate and bridges.[26] Based on these facts, he alleges that Corporal Mark did not sufficiently interview him to determine if the condition of his mouth and teeth were such that residual alcohol content was trapped therein, providing a false positive BAC reading. Appellant also contends that he did not voluntarily submit to the Intoxilyzer test, but was coerced.[27]

Finally, Appellant asserts that Corporal Mark lacked the requisite good cause to remove him from the scene in order to conduct field sobriety tests at Troop 6. Therefore, according to Appellant, the trial court committed error or abused its discretion: 1) in not suppressing the arrest; and 2) in admitting into evidence the Intoxilyzer reading of his blood alcohol content.

Standard and Scope of Review

[26] Tr. of Trial at 124,130.
[27] Tr. of Trial at 78.

In *Levitt v. Bouvier*, the Delaware Supreme Court set forth the proper scope of review of an appeal in a non-jury Superior Court case to the Supreme Court.[28] In *State v. Cagle*, the Court extended the same procedural standard and scope of review set forth in *Levitt* to an appeal on the record from the Court of Common Pleas to this Court.[29] In essence, when reviewing appeals from the Court of Common Pleas, the Superior Court sits as an intermediate appellate court, and as such, its function is the same as that of the Supreme Court.[30]

Therefore, the applicable standard of review for appeals from the Court of Common Pleas to the Superior Court is *de novo* for legal determinations and "clearly erroneous" for findings of fact.[31] While errors of law are reviewed *de novo*,[32] findings of fact are reviewed only to confirm and verify that they are supported by substantial evidence.[33] Therefore, the Court's role is to correct

[28] *Levitt v. Bouvier*, 287 A.2d 671 (Del. 1972).
[29] "An appeal from a decision of the Court of Common Pleas for New Castle County, sitting without a jury, is upon both the law and the facts. In such appeal, the Superior Court has the authority to review the entire record and to make its own findings of fact in a proper case. However, in exercising that power of review, the Superior Court may not ignore the findings made by the Trial Judge. The Superior Court has the duty to review the sufficiency of the evidence and to test the propriety of the findings below. If such findings are sufficiently supported by the record and are the product of an orderly and logical deductive process, the Superior Court must accept them, even though independently it might have reached opposite conclusions. The Superior Court is only free to make findings of fact that contradict those of the Trial Judge when the record reveals that the findings below are clearly wrong and the Appellate Judge is convinced that a mistake has been made which, in justice, must be corrected. Findings of fact will be approved upon review when such findings are based on the exercise of the Trial Judge's judicial discretion in accepting or rejecting 'live' testimony. *See Barks v. Herzberg*, 206 A.2d 507(Del. 1965). If there is sufficient evidence to support the findings of the Trial Judge, the Superior Court sitting in its appellate capacity must affirm, unless the findings are clearly wrong." *State v. Cagle*, 332 A.2d 140, 142 (Del. 1974) (citing *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972)).
[30] *See generally State v. Richards*, 1998 WL 732960, at *1 (Del. Super. Ct.); *State v. Huss*, 1993 WL 603365, at *1 (Del. Super. Ct.); *Baker v. Connell*, 488 A.2d 1303, 1309 (Del. 1985).
[31] *See State v. Roberts*, 2001 WL 34083579, at *1 (Del. Super. Ct.); *accord State v. High*, 1995 WL 314494, at *2 (Del. Super. Ct.); *State v. Cagle*, 332 A.2d 140, 142 (Del. 1974); *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972).
[32] *Downs v. State*, 570 A.2d 1142, 1144 (Del. 1990).
[33] *Shahan v. Landing*, 643 A.2d 1357, 1359 (Del. 1994).

errors of law and to review the factual findings of the court below to determine if they are "sufficiently supported by the record and are the product of an orderly and logical deductive process."[34] If so, they must be accepted notwithstanding the fact that the Superior Court may have reached opposite conclusions.[35]

Additionally, the standard and scope of review applicable to the consideration of a motion to withdraw and an accompanying brief under Rule 26(c) is twofold: (a) this Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for arguable claims; and (b) this Court must conduct its own review of the record and determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.[36]

Discussion

In his brief, Appellant raises several arguments. First, he contends that he did not drive or operate a motor vehicle while under the influence of alcohol, but drank an alcoholic beverage only after driving or operating his motor vehicle. This

[34] *See also Virdin v. State*, 780 A.2d 1024, 1030 (Del. 2001); *accord Richards*, 1998 WL 732960, at *1; *Downs*, 570 A.2d at 1144; *Baker*, 488 A.2d at 1309; *Levitt*, 287 A.2d at 673.
[35] *Roberts*, 2001 WL 34083579, at *1; *High*, 1995 WL 314494, at *2; *Levitt*, 287 A.2d at 673.

affirmative defense is specifically authorized by 21 *Del. C*. 4177 (b)(2)a. and b. [37] Appellant asserts that the trial court made its ruling only after considering subsection (2)a., without considering or applying subsection (2)b. The trial court properly determined that Appellant could not employ subsection (2)a. of 21 *Del. C*. 4177 (b) as an affirmative defense because the evidence revealed, and Appellant himself testified, that he had consumed alcohol prior to arriving at Vince's Sport Center. Likewise, it is intuitively clear that, the affirmative defense contained in subsection (2)b. of 21 *Del. C*. 4177 (b) is not available to the Appellant for the same reason.

Second, Appellant asserts that he was forced to submit to the field sobriety tests without the requisite articulable suspicion and that his motion to suppress should therefore have been granted. As the trial court explained in its denial of the motion, there existed sufficient articulable suspicion, based on Appellant's appearance (watery, glassy, bloodshot eyes), speech, strong odor of alcohol, and responses to Corporal Mark's questions, for the officer to have detained Appellant

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[36] *Penson v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967); *Wing v. State*, 690 A.2d 921, 923 (Del. 1996).

[37] Section 4177 (b) provides, in part:

In a prosecution for a violation of subsection (a) of this section:

(2)a. No person shall be guilty under subsection (a)(5) of this section when the person has not consumed alcohol prior to or during driving but has only consumed alcohol after the person has ceased driving and only such consumption after driving caused the person to have an alcohol concentration of .10 or more within 4 hours after the time of driving.

b. No person shall be guilty under subsection (a)(5) of this section when the person's alcohol concentration was .10 or more at the time of testing only as a result of the consumption of a sufficient quantity of alcohol that occurred after the person ceased driving and before any sampling which raised the person's alcohol concentration to .10 or more within 4 hours after the time of driving. DEL. C. ANN. tit. 21 § 4177 (b)(2)a. and b. (1995 & Supp. 2002).

and administered the field sobriety tests, even though he had already been placed under arrest in connection with the terroristic threatening complaint.

For the same reasons, in addition to the Appellant failing the HGN and the PBT tests, it follows that Corporal Mark properly perceived sufficient probable cause to administer the Intoxilyzer test to Appellant. Under the doctrine of "totality of the circumstances," there was a fair probability that Appellant had violated 11 *Del. C*. § 4177(a)(5).[38] Therefore, Appellant's third defense has no merit. Moreover, from the testimony presented, there is no evidence of impropriety or coercion on the part of Corporal Mark, or any indication that he administered this test outside the parameters required by standard operating procedures.

From the testimony presented, Appellant's contention that he was not sufficiently interviewed by Corporal Mark to reveal the fact that he had a removable plate, bridge and dentures in his mouth, which potentially might adulterate the BAC reading giving a false positive, belies the testimony offered by Corporal Mark. Based on the evidence presented, the trial court believed Corporal Mark's testimony to be more credible. This Court will give great deference to the

[38] *State v. Maxwell*, 624 A.2d 926, 929-30 (Del. 1993) (holding that probable cause to believe a defendant has violated 21 *Del. C*. § 4177 exists when the officer possesses information which would warrant a reasonable man in believing that such a crime has been committed and, that to establish probable cause, the police are only required to present facts which suggest, when those facts are viewed under the totality of the circumstances, that there is a fair probability that the defendant has committed the crime).

findings of the trial court which has observed the testimony of witnesses first hand, enabling it to make effective judgments of credibility and to draw reasonable inferences from the testimony. The trial court weighed the conflicting testimony and found Corporal Mark's recollection to be more convincing and plausible. Accordingly, this claims fails as well.

Finally, Appellant contends that Corporal Mark lacked good cause to remove him from the scene of the arrest and require him to submit to field sobriety tests at Troop 6. Appellant argues that field tests accompanying a DUI investigation are done at the scene of the stop. Consequently, according to Appellant, the trial court committed error, or in the alternative, abused its discretion in not suppressing the arrest and in admitting into evidence the Intoxilyzer reading of his blood alcohol content.

It is a well established Fourth Amendment precept that an investigatory detention must be minimally intrusive and reasonably related in scope to the circumstances justifying the interference.[39] The Delaware Supreme Court has specifically established that only in very limited circumstances may the police transport a suspect from the scene without probable cause as part of an investigatory detention.[40] In addition, in *Williams v. Shahan*, this Court

[39] *State v. BoKang*, 2001 WL 1729126, at *7 (Del. Super. Ct.); *State v. Maxwell*, 1996 WL 658993, at *2 (Del. Super. Ct.) (citing *Hicks v. State*, 631 A.2d 6, 11 (Del. 1993) (citing *Terry v. Ohio*, 392 U.S. 1, 22 (1968)).
[40] *State v. Maxwell*, 1996 WL 658993, at *2 (Del. Super. Ct.).

acknowledged that there are certain limited circumstances that permit the police to transport a suspect from one location to another without probable cause as part of an investigatory detention when such transportation is "necessary and reasonable."[41] In order to detain someone to administer field sobriety tests, an officer need only have a reasonable articulable suspicion of the existence of criminal activity.[42]

In the case, *sub judice*, the circumstances are unusual because Corporal Mark had initially placed the Appellant under arrest for the terroristic threatening complaint. While proceeding to execute an arrest for that criminal charge, the officer immediately became aware of Appellant's inebriated state and properly put forth questions to the Appellant with respect to his consumption of alcohol. Once he determined the requirement to administer field sobriety tests to the Appellant, Corporal Mark undertook an evaluation of the conditions at the scene to determine if they were suitable for the testing to be undertaken there. Corporal Mark's testimony satisfies the issue of reasonable and necessary cause. He was concerned about his safety and about the safety of the alleged victim and witness, both males, who were in close proximity, and had identified the Appellant as the perpetrator of the terroristic threatening. It was entirely proper for Corporal Mark to take the

[41] *See Williams v. Shahan*, 1993 WL 81264 (Del. Super. Ct.) (holding that it was reasonable and necessary to transport a suspect to the police station to conduct field sobriety tests when the roadway was narrow and highly curved, it was raining, and the nearby driveway was unpaved).
[42] *BoKang*, 2001 WL 1729126, at *8; *State v. Quinn*, 1995 WL 412355, at *3 (Del Super. Ct.).

Appellant into custody, handcuff him, which is normal operating procedure, put him in the police vehicle, and transport him to Troop 6. Once there, Corporal Mark removed the handcuffs and administered the requisite field sobriety tests on Appellant after obtaining Appellant's voluntary consent. Therefore, the trial court properly concluded that the circumstances of the arrest and subsequent field testing at Troop 6 satisfied the "necessary and reasonable" narrow exception for transportation of a defendant to continue a custodial investigation as demonstrated in *Williams*.

The Court has examined the seven additional issues or points of concern raised by Appellant in his response to counsel's Rule 26(c) motion to withdraw and duly incorporated in his appeal brief. The Court finds that Appellant's points all deal with credibility issues and/or irrelevant facts, i.e., whether there were lights in the parking lot, whether Corporal Mark was exactly fifty or one hundred feet away from Appellant at the time Appellant parked his vehicle, whether Appellant was alone or accompanied by his female witness when Corporal Mark met him in the parking lot. Appellant attempts to controvert Corporal Mark's testimony, which the lower court found to be more credible, in his unflinching desire to substantiate his "drinking after driving" defense. In this instance, the trial judge assessed the demeanor and truthfulness of the Appellant first hand, weighed the conflicting testimony of Appellant and Corporal Mark, drawing reasonable inferences from

the testimony, and believed Corporal Mark's testimony had greater merit and veracity. This Court will not disturb the credibility determination of the lower court upon review.

Thus, the issue on appeal is not whether this Court would have reached the same finding as the trial court, or even whether this Court agrees with that finding, but whether the reasoning of that court was logical and whether the decision is sufficiently supported, both legally and factually, by the court's findings. This Court finds that there was reasonable articulable suspicion warranting field sobriety tests, sufficient probable cause supporting an Intoxilyzer test, and that the lower court's decision was logical, reasonable and contained the appropriate application of legal principles. As such, the Court finds that the trial court properly applied established legal principles in ruling that Corporal Mark correctly determined that probable cause existed to take the Appellant into custody for violation of 21 *Del. C.* § 4177, and to administer field and Intoxilyzer tests, and that there was sufficient evidence to support that finding. Accordingly, upon review of the lower court's decision, this Court concludes that there were no errors of law and that the factual findings of the court below were sufficiently supported by the record and are the product of an orderly and logical deductive process.

Further, in consideration of Appellant's counsel's motion to withdraw and accompanying brief under Rule 26(c), the Court has carefully reviewed the record,

transcript and evidence admitted at trial and has concluded that Appellant's appeal is wholly without merit and devoid of any arguably appealable issues.

This Court is also satisfied that Appellant's counsel has made a conscientious effort to examine the record and has properly determined that the Appellant has not raised a meritorious claim in this appeal.

For all the foregoing reasons, the State's motion to affirm is hereby **GRANTED**. The judgment of the Court of Common Pleas is hereby **AFFIRMED**. The motion to withdraw is moot.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

cc: Sean P. Hughes
Saagar B. Shah, Esquire
Robert G. Carey, Esquire
Presentence
Prothonotary