IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

MARY L. SUTHERLAND,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	ID. No.: 0505005126
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

Submitted: January 18, 2006
Decided: April 28, 2006

Louis B. Ferrara, Esq., Ferrara, Haley & Bevis, Wilmington, Delaware, for Appellant.

Kathleen A. Dickerson, Esq., Department of Justice, Dover, Delaware, for Appellee.

Upon Consideration of Appellant's Appeal
From Decision of Court of Common Pleas
AFFIRMED

VAUGHN, President Judge

Sutherland v. State
ID. No. 0505005126
April 28, 2006

OPINION

Mary Sutherland ("the Defendant") appeals her July 13, 2005 conviction for Driving Under the Influence and two counts of Vehicular Assault in the Second Degree after a bench trial in the Court of Common Pleas.

FACTS

On the evening on May 7, 2005, Veronica Hinton ("Hinton") and her mother, Gwenda Williams Hall ("Hall") were traveling northbound on Route 13 when they were hit from behind. Both women suffered injuries as a result of the accident.

Although the accident occurred within State Police jurisdiction, Officer Shyers ("Shyers") of the Harrington Police Department was dispatched to the accident scene because he was the closest law enforcement officer. Shyers was told that a white Mercury ("the Mercury") had fled the scene. The officer located the Mercury on the shoulder of Route 13 approximately one-half to three-quarters of a mile from the original accident scene. The Defendant was the only person in the car. The car had severe front-end damage and the air bags had deployed. Sutherland said to the officer that she had no idea what had happened. She did not appear to be injured and did not request medical attention. Shyers noted that the Defendant had a strong odor of alcohol about her, had slurred speech, and there were cans of beer on the passenger side floor. He placed her in the rear of his police cruiser to await the arrival of Trooper Rindone ("Rindone") of the Delaware State Police.

Since paramedics were already attending to Hall and Hinton at the scene of the

accident, Trooper Rindone proceeded directly to Sutherland's vehicle. Shyers told Rindone of the odor of alcohol, confusion as to the damage to the car, and the presence of the beer cans. Rindone administered four DUI field tests to Sutherland on the shoulder of the highway. She failed the alphabet test, the counting test because she ended too early and again had slurred speech, the walk and turn test, and leg stand test. Following the tests, the Defendant was taken by Trooper Rindone to the accident scene, to the hospital for blood tests, and then to Troop 3 where she was Mirandized and interviewed. During her videotaped interview, she exhibited slurred speech, admitted drinking beer and wine, and described the accident as being the result of an unknown object being in the middle of the road.

Prior to the start of trial, two objections were made by the defense. The first was that the Defendant was not provided with a copy of the blood test report until the morning of trial. For that reason, and because the defense did not have an opportunity to subpoena the phlebotomist, the Trial Judge excluded the report. Second, the defense objected to the tape being admitted into evidence. The Deputy Attorney General prosecuting the case claimed that she had not become aware of the existence of a videotape which recorded the Defendant being interviewed at Troop 3 until the day before. She then (the day before) faxed a letter to defense counsel advising him of the tape now in her possession. The judge denied the motion to exclude the tape, but offered a continuance, without objection from the State, to allow Sutherland to view the tape prior to trial, to which defense counsel responded, "No, I'd rather just keep going, Your Honor." The court believed that suppressing the tape

was too extreme a remedy for the late production of the evidence.

CONTENTIONS OF THE PARTIES

The Defendant contends that (1) the first police officer on the scene had no probable cause to arrest her; (2) the Defendant's statements made prior to and after being given *Miranda* warnings were admitted at trial in error and the field sobriety tests were testimonial in nature and should have been excluded; (3) the State failed to prove the negligence element of vehicular assault in the second degree beyond a reasonable doubt; and (4) the court abused its discretion by allowing the admission of the videotape.

The State asserts that the first officer did have probable cause to arrest the Defendant; the statements made by the Defendant were admissible and the field tests were not testimonial in nature; the trial court correctly ruled that negligent driving had been proven beyond a reasonable doubt; and the videotape was properly admitted.

STANDARD OF REVIEW

When addressing appeals from the Court of Common Pleas, this Court sits as an intermediate appellate court.[1] As such, its function is the same as that of the Supreme Court.[2] The court's role is to "correct errors of law and to review the factual findings of the Court below to determine if they are 'sufficiently supported by the

[1] *State v. Richards,* 1998 Del. Super. LEXIS 454.

[2] *Baker v. Connell,* 488 A.2d 1303 (Del. 1985).

record and are the product of an orderly and logical deductive process.'"[3] If substantial evidence exists for a finding of fact, this Court must accept that ruling. It must not make its own factual conclusions, weigh evidence or make credibility determinations.[4] Errors of law are reviewed *de novo*.[5] Findings of fact are reviewed only to verify that they are supported by substantial evidence.[6] The standard of review when considering the sufficiency of the evidence on an appeal is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[7]

DISCUSSION

1. Officer lacked probable cause to arrest the Defendant.

The Delaware Supreme Court has held that a police officer has probable cause to believe a defendant has violated 21 *Del.C.* § 4177 (Driving under the Influence of Alcohol) "when the officer possesses 'information which would warrant a reasonable

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[3] *State v. Huss,* 1993 Del. Super. LEXIS 481, at *2 (citing *Levitt v. Bouvier,* 287 A.2d 671, 673 (Del. 1972)).

[4] *Johnson v. Chrysler,* 213 A.2d 64 (Del. 1965).

[5] *Downs v. State,* 570 A.2d 1142, 1144 (Del. 1990).

[6] *Shahan v. Landing,* 643 A.2d 1357 (Del. 1994).

[7] *Dixon v. State,* 567 A.2d 854, 857 (Del. 1989); *Davis v. State,* 453 A.2d 802, 803 (Del. 1982); *see Jackson v. Virginia,* 443 U.S. 307, 319 (1979).

man in believing that [such] a crime has been committed.'"[8] 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.[9] 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 a crime.[10] When Officer Shyers located the Defendant on the side of the road a half mile to three-quarters of a mile from the accident scene, he noticed severe front end damage to her vehicle which matched the information he received regarding the accident, there was at least one can of beer in the car, the Defendant's speech was slurred, he detected an odor of alcohol on her, and she did not know what had caused the air bags to deploy. The Defendant includes in her brief a laundry list of questions the officer could have asked or things he could have made notice of but did not. It appears that the Defendant would require the police to first eliminate all possible innocent explanations prior to determining the existence of probable cause. However, the Delaware Supreme Court ruled in *State v. Maxwell* that the police are under no duty to so do.[11] "The possibility that there may be a hypothetically innocent explanation

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[8] *State v. Maxwell,* 624 A.2d 926, 929-930 (Del. 1993).

[9] *Id. at 930.*

[10] *Id.* (citing *Jarvis v. State, 600 A.*2d 38 42-43).

[11] *State v. Maxwell,* 624 A.2d 926 (Del. 1993).

for each of several facts revealed during the course of an investigation does not preclude a determination that probable cause exists for an arrest."[12] In *Maxwell*, the officers were told by witnesses that the defendant admitted to drinking prior to the accident, there were open beer cans in the truck, and there was an odor of alcohol in the vehicle. When an officer located Maxwell at the hospital, he observed his eyes as being glassy. The court stated that any one of these facts, considered in isolation, may not be sufficient to establish probable cause but taken in total, they revealed to the officers, based on their training, experience, investigation, and rational inferences drawn therefrom, a "quantum of trustworthy factual information, 'sufficient in themselves to warrant a man of reasonable caution' to conclude that probable cause existed to believe Maxwell was driving under the influence of alcohol at the time."[13] In this case, the Trial Judge properly found that Officer Shyers had made sufficient observations of the vehicle and the Defendant to determine that, taken in total, probable cause existed.

2. Defendant's pre- and post-*Miranda* statements and field sobriety test results admitted in error.

The Defendant asserts that the trial court erred in admitting her statements made to Trooper Rindone because the court ruled she had been arrested by Officer Shyers. The Defendant also argues that the statements made after *Miranda* warnings

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[12] *Id.* at 930 (citing *Jarvis v. State,* 600 A.2d 38 at 41-42 (Del. 1991).).

[13] *Id.* at 931.

should have been excluded as well. Additionally, the Defendant argues that the tests administered by the trooper were testimonial in nature and they too should have been excluded from trial.

Because the Trial Court had ruled that the Defendant was arrested, any statements made by her should not have been admitted into evidence because *Miranda* requires that unwarned admissions be suppressed.[14] However, although the unwarned statements should not have been admitted, the U.S. Supreme Court in *Oregon v. Elstad* has held that "a subsequent administration of Miranda warnings can remove the condition that had precluded the admission of the earlier statement."[15] In *Missouri v. Siebert,* the court expressed its concern as to police utilizing a two-step process of questioning suspects in order to coerce confessions.[16] In *Siebert*, the officer admitted that he would question suspects until he got a confession. A short break would be taken and then questioning would resume after proper *Miranda* warnings were given. The questioning would continue until the officer was able to again elicit a confession from the suspect. The court ruled that if such tactics were permitted it would work to completely circumvent the purpose of *Miranda* warnings. The court has required that "courts must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the

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[14] *Miranda v. Arizona,* 384 U.S. 436 (1966).

[15] *Oregon v. Elstad*, 470 U.S. 298, 314 (1985).

[16] *Missouri v. Seibert,* 542 U.S. 600 (2004).

voluntariness of his statements."[17] The *Elstad* court ruled that "a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings."[18]

In this case there is no evidence that Trooper Rindone was using a two-step questioning process to coerce a confession. In fact, the evidence showed at the time of questioning, that neither he nor Officer Shyers believed the Defendant was in custody. The trooper believed his line of questioning to be investigatory in nature. After he questioned her on the scene and decided to arrest her, she was taken to the accident scene, to the hospital for blood tests, transported to Troop 3, read her *Miranda* rights, which she understood and voluntarily waived, and interviewed, during which she made similar admissions. The case law is clear in that if there is a significant break in questioning the 'taint' of the unwarned statements can be overcome.

Because no evidence was presented that showed Trooper Rindone attempted to overcome the Defendant's will to knowingly and voluntarily waive her *Miranda* rights, and there was a break in the questioning, the Trial Judge ruled her subsequent statements were admissible at trial. Although her statements made prior to the *Miranda* warnings should not have been admitted at trial, such admission resulted in

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[17] *Elstad at 318.*

[18] *Id.*

only harmless error as her subsequent statements contained virtually the same admissions and were properly admitted at trial.

The Defendant further asserts that the trial court should have excluded the results from the field sobriety tests because they elicited testimonial information from her prior to being Mirandized. However, the Delaware Supreme Court has previously held that the right against self-incrimination does not extend to evidence as to the defendant's conduct or demeanor, even while in custody.[19] Field sobriety tests, as a measure of the ability of a defendant to conduct himself or herself in a manner that does or does not indicate impairment, are not "testimonial."[20]

The Defendant cites to *Pennsylvania v. Muniz* to bolster the assertion that the field sobriety tests elicited testimonial evidence.[21] However, in that case the U.S. Supreme Court was clear in differentiating real or physical evidence from testimonial evidence. The court reiterated that "in order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate to a factual assertion or disclose information."[22] Exhibiting physical characteristics while not disclosing any

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[19] *See State v. Bliss,* 238 A.2d 848 (Del. Supr. 1968); *State v. Durrant,* 188 A.2d 526 (Del. Supr. 1963); *State v. Smith,* 91 A.2d 188 (Del. Supr. 1952).

[20] *Smith* at 192.

[21] *Pennsylvania v. Muniz,* 496 U.S. 582 (1990).

[22] *Id.* at 594.

knowledge a suspect may have is not considered testimony.[23] Performing the field sobriety tests is just that - the demonstration of physical characteristics which in this case was the ability to control one's muscles or to show slurred speech.[24] In *Muniz* the Court did find that Muniz's response to the question asking the date of his sixth birthday was testimonial in nature because it required him to divulge a fact and therefore should have been suppressed. In the case at bar, the officer did not attempt to elicit this type of information from the Defendant. Therefore, the trial court did not err in permitting the admission of the field sobriety tests as non-testimonial evidence.

3. The state failed to prove negligence beyond a reasonable doubt.

The Defendant claims that the evidence produced at trial as to negligence was insufficient to sustain a guilty verdict. At trial, and to this Court, the Defendant points out that the victims had no recollection of the accident. There were inconsistencies in their testimony - Ms. Hinton says they were talking at the time of the accident and Ms. Hall testified that she was asleep. Ms. Hinton's and Officer Shyers' testimony as to the time of the accident differs significantly. Further, the State introduced no evidence as to analysis of the accident scene and no tests were performed on the Hinton vehicle to verify the tail lights were operational.

The State claims that when the Defendant chose to drive while under the influence, she assumed the risk of the consequences of her behavior, including the

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[23] *Id.*

[24] The *Muniz* Court chose not to address whether or not counting was considered testimonial. In Delaware counting and alphabet tests are routinely used.

possibility of falling asleep. During her interview with Trooper Rindone, she admitted she may have fallen asleep thus explaining why she had no recollection of the incident. Ms. Hinton testified that her vehicle was hit from behind and Ms. Sutherland's car, found near the accident scene, had sustained heavy front end damage. All of this, asserts the State, leads to the logical conclusion that the Defendant fell asleep at the wheel after consuming alcohol and did not operate her vehicle in accordance with the common law and statutory duty of lookout.

In its decision, the trial court ruled as follows:

> Now, on the negligent driving, as defense counsel has pointed out, the evidence is clear that there are physical injuries, if not serious physical injuries to two victims, and I've already held the defendant was driving under the influence. Therefore, the remaining question is whether there was negligent driving that caused the injuries. Based on the evidence that I'll recite now I find the State has established beyond a reasonable doubt negligent driving.
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> There's evidence that the defendant said she hit something. She indicated that she may have fallen asleep. There's front-end damage to the vehicle not far away from the scene, and close to the time the accident had occurred. The victims testified they were hit in the rear-end. Therefore, I conclude that driving a vehicle where you hit the other car in the rear-end is negligent driving.

> And as to the issue that this is only circumstantial evidence, our Supreme Court has held [th]at circumstantial evidence is equally as good as direct evidence.

It is clear from the Trial Judge's ruling that his decision was well thought out and he did acknowledge the fact that the decision was based in large part upon circumstantial evidence and thus pointed out the Supreme Court has previously held that such evidence may be considered as effective as direct evidence in proving the statutory elements beyond a reasonable doubt. Therefore, this Court finds that the Trial Judge's decision is sufficiently supported by the record and is the product of an orderly and logical deductive process.

4. The trial court abused its discretion by allowing the admission of the videotape.

The Defendant argues that the videotape of her interview with Trooper Rindone should have been excluded because it was produced by the State the afternoon before trial. The Defendant asserts that the State could have made more of an effort to find out if the police were in possession of any duly discoverable tapes, thus avoiding a discovery violation. Testimony from the trooper at trial was that the police were in possession of the tape since the interview and he believed he told the prosecutor a week or so before trial. And lastly, the Defendant asserts that the videotape was highly prejudicial because the Trial Judge relied on it in rendering his decision as to her guilt of being under the influence of alcohol.

Court of Common Pleas Criminal Rule 16(d)(2) delineates the court's options when addressing a discovery violation. According to the rule:

> If at any time during the course of the proceedings it is brought to the attention of the Court that a party has failed to comply with this rule, the Court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing the evidence not disclosed, or it may enter such other order as it deems just under the circumstances.

As the State argues, the trial judge has "broad discretion" to determine the proper remedy for a discovery violation.[25] Thus, the court may remedy the violation without excluding the contested evidence.[26]

The prosecutor asserted at trial that she was unaware of the existence of the tape as it was not noted in any of the reports received from the police. Upon becoming aware of the videotape, she immediately notified the defense. On the day of trial, the judge offered to delay the trial in order to give the Defendant an opportunity to view the tape and later offered a continuance when the objection was renewed during trial.

As the rule clearly states, the trial judge has the discretion to determine what remedy he or she will utilize. In this case, the Trial Court offered various remedies

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[25] *DeJesus v. State,* 655 A.2d 1180, 1207 (Del. 1995).

[26] *Seward v. State,* 723 A.2d 365, 375 (Del. 1999)(citing *DeJesus*, 655 A.2d.1180.)

but chose not prohibit the introduction of the videotape. The Trial Judge did not abuse his discretion by permitting the videotape to be entered into evidence.

Accordingly, the decision of the Court of Common Pleas is ***affirmed.***

IT IS SO ORDERED.

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President Judge

oc: Prothonotary
cc: Order Distribution
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