SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

July 28, 2006

Carole E.L. Davis, Esquire
114 E. Market Street
Georgetown, DE 19947

Eric G. Mooney, Esquire
11 South Race Street
Georgetown, DE 19947

RE: State v. Trager, Def. ID# 0501016623

DATE SUBMITTED: April 20, 2006

Dear Mrs. Davis and Mr. Mooney:

Pending before the Court is an appeal which the State of Delaware ("the State") has filed pursuant to 10 Del. C. § 9902[1] seeking a review of a decision of the Court of Common Pleas in

[1]In 10 Del. C. §9902, it is provided in pertinent part as follows:

> (b) When any order is entered before trial in any court suppressing or excluding substantial and material evidence, the court, upon certification by the Attorney General that the evidence is essential to the prosecution of the case, shall dismiss the complaint, indictment or information or any count thereof to the proof of which the evidence suppressed or excluded is essential. Upon ordering the complaint, indictment or information or any count thereof dismissed pursuant to the Attorney General's certification, the reasons of the dismissal shall be set forth in the order entered upon the record.
>
> (c) The State shall have an absolute right of appeal to an appellate court from an order entered pursuant to subsection (b) of this section and if the appellate court upon review of the order suppressing evidence shall reverse the dismissal, the

and for Sussex County ("CCP") suppressing evidence on the ground no probable cause existed to arrest Juergen Trager ("defendant") on a charge of violating 21 Del. C. § 4177.[2] This is my decision on the appeal.

FACTS

The following evidence was presented regarding the suppression matter.

On January 20, 2005, defendant and his wife were having marital problems and defendant was very upset with his wife. They had had contact throughout the day, both in person and by telephone. At one point, defendant mentioned to his wife that he had a weapon with him and the subject of suicide came up. Ultimately, defendant's wife ended up at her sister-in-law's house

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defendant may be subjected to trial.

[2]In 21 Del. C. § 4177, it is provided in pertinent part as follows:

(a) No person shall drive a vehicle:
(1) When the person is under the influence of alcohol;
(2) When the person is under the influence of any drug;
(3) When the person is under the influence of a combination of alcohol and any drug;
(4) When the person's alcohol concentration is .08 or more; or
(5) When the person's alcohol concentration is, within 4 hours after the time of driving .08 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, without 4 hours after the time of driving .08 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.
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(c) For purposes of subchapter III of Chapter 27 of this title, this section and § 4177B of this title, the following definitions shall apply:
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(5) "While under the influence" shall mean that the person is, because of alcohol or drugs or a combination of both, less able than the person would ordinarily have been, either mentally or physically, to exercise clear judgment, sufficient, physical control, or due care in the driving of a vehicle. [Emphasis added.]

and the Delaware State Police became involved. Two Delaware State Police officers went to the sister-in-law's home. When defendant called his wife again, the police had her tell him where she was so that he would come there.

Both defendant's wife and the Delaware State Trooper who testified explained that there is a sharp turn into the sister's driveway with gullies on both sides. Both witnesses testified that defendant negotiated that maneuver with no problems. The only other testimony regarding his driving was that he was driving fast when he turned into the driveway. The remaining testimony concerned what occurred after he got out of his van.

Trooper Mark Windsor, a K-9 Patrol Officer, was present at the scene, to assist the other Delaware State Trooper. When defendant arrived, the other officer was in the residence with the wife, and Trooper Windsor was in the driveway between two vans. He waited about fifteen to twenty minutes when he heard a van traveling at a high rate of speed on the road. The van "made a quick right off the roadway and it was driving pretty fast up the driveway. ... He made an abrupt turn, right turn off the driveway into where I was and made an abrupt stop." Transcript of CCP Proceedings on May 23, 2005 at 18 ("Trans. at ___").

Defendant got out of the van. The Trooper did not observe that defendant exhibited any balance problem at that time. When defendant exited the van, the Trooper instructed him to show him his hands and get on the ground. Defendant cursed him, told him he was not going to do anything. Defendant had something in his right hand; the Trooper could not determine what it was. After making two canine announcements, the Trooper deployed his canine. The Officer testified several times that defendant's behavior was very threatening to him and he thought defendant might be armed. The Trooper further explained:

A. After my canine deployed, it engaged his left arm and it took several more attempts for me to ask him and tell him let me see your hand, throw out what you have in your hand and it ended up being a cell phone. So, once that was done, my dog had gotten him to the ground by that point, and I was able to get the dog off on first command and they went in to handcuff him.

Q. Okay. So, did he comply?

A. No, he didn't. I mean, he was fighting my dog.

Trans. at 19.

Later during the hearing, the Trooper provided more detail about defendant fighting with his dog.

Q. ... But when you deployed the canine on him, he stood right there?

A. Uh-huh (affirmative response). Yes, he ...

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A. He wanted a piece of it supposedly.

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A. He came to him and the fight was on.

Q. The dog latched onto his arm and you say that he was fighting with the dog and when you say fighting, he wasn't punching and kicking but...

A. He, yeah, he was engaging right with him.

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A. Which is unheard of really.

Trans. at 49.

After he was handcuffed, the Trooper smelled a strong odor of alcohol from defendant's breath. He smelled it from two or three feet away from defendant. Defendant's eyes were

bloodshot and glassy. His speech was loud and slurred.

At 9:15 p.m., the Trooper saw defendant's vehicle. It took about ten minutes with the fight. The Trooper testified that he arrested defendant on the driving under the influence charge at 9:25. "[A]t about 9:25 when I got close to him and I smelled the alcohol, I could see his eyes, the way he was speaking, I said to myself I know I have a case with DUI also." Trans. at 33. The Trooper further clarified:

> ... When the cuffs were on, it was about 21:25 and that was for the resisting. And then, once I got close enough to him I could smell the alcohol, the bloodshot eyes, the glassy eyes, the way he was talking slurred, I knew at that point that I would be proceeding with also a DUI.

Id,

The Trooper explained that at 9:25, defendant was under arrest for resisting arrest. He clarified again that at 9:25, he arrested defendant on the driving under the influence charge. Id. at 52. Consequently, the Trooper arrested defendant for resisting arrest and driving under the influence at the same time.

Defendant thereafter was taken to the emergency room. There, the two officers were:

> just talking to him, the alcohol was very strong and he had made statements that he had smoked some crack cocaine. So, he admitted to me that he had drank about four rum and Cokes and that he had took five hits off of crack cocaine, but he said the he was, I guess, cheated in a way ... because this stuff was junk that he bought, the crack.

Id. at 24.

According to the Officer, defendant agreed to a blood test and it was taken.

The motion to suppress sought to keep out defendant's admissions regarding alcohol and

drug consumption and the results of the drug test. It is not clear from the testimony at what time Miranda warnings were given, although the officer testified he does not give those warnings until he begins interrogating a suspect. Based on the procedural posture of the case, it is not clear if there is any Miranda issue. Thus, this decision does not address any Miranda issue, assuming one even exits.

The Court below then ruled on whether the Trooper had probable cause to arrest defendant on the charge of driving under the influence at the time he arrested defendant.

> The arrest occurred, according to the officer, for the DUI at 9:25. ... There were four things that he relied on: the odor being strong, the bloodshot eyes, the fight with the canine, and the speech. After he made those four observations he believed and he testified that he had probable cause to arrest and, in fact, he did make the arrest at 9:25 for the DUI, simultaneous with the arrest for the resisting arrest. ***
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> ***
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> The DUI, on the other hand, is not quite so clear. I have no erratic driving at all. In fact, the testimony is that the little bit of driving that was observed was good that the maneuvers were sharp and had the gullies on each side; he had no problem executing those maneuvers.
>
> The fact that it sounded like he may have been speeding I give that whatever weight I deem appropriate. It's much easier to determine by visual observation, but I acknowledge that this officer's been out on the road long enough that he probably can get a sense of speed of a vehicle on hearing it. But, I don't think the driving helps me in this determination at all, because really the testimony I have, from two independent witnesses, the little bit of driving they both observed was that he had no difficulty executing the maneuvers.
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> ***
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> So, I have an odor of alcohol, I have bloodshot eyes and then I have the fight with the dog which quite frankly is not indicative to me of someone who's under the influence. A reasonable officer looking at someone being taken down by a dog who's got their arm in his mouth that to me does not show any type of impairment. It shows a spontaneous reaction to being taken down. So, that does not really help me although that is one of the factors that the officer said he considered in determining whether he had probable cause to arrest.
>
> So, now I have the speech, the odor of alcohol and the bloodshot eyes. I have no driving problems. No balance problems at the scene. So I have to determine whether this officer with this experience, viewing those facts subjectively and

> reasonably, would believe that he had sufficient evidence to make an arrest for this charge. ***
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> I'm not convinced that those three factors when combined with the other observations this officer made... and again no balance problems in really being able to execute the driving the maneuvers, and when he took into account what he did know; he knew that this was a person who was upset, involved in a domestic.
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> Some of the things that he saw, I think, reasonably were things that were exhibited because of this individual being extremely emotionally upset about the situation with his wife. Had there been anything else ..., I would be finding that there was probable cause.
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> I am not satisfied based on those three factors that were given to me today. While I think they were good ... a hunch and may have established reasonable articulable suspicion I am not satisfied it was enough to arrest for the DUI at the time that arrest occurred at 9:25.

Id. at 75-8. The Court suppressed the evidence.

The State then certified that the suppressed evidence was essential to the prosecution of the case, and filed an appeal with this Court pursuant to 10 Del. C. § 9902.

DISCUSSION

The applicable standards of review for appeals from CCP to the Superior Court are de novo for legal determinations and "clearly erroneous" for findings of fact. State v. High, Del. Super., C.A. No. 90-09-0243, Toliver, J. (March 7, 1995). If the factual findings of the court below are "sufficiently supported by the record and are the product of an orderly and logical deductive process, they must be accepted notwithstanding the fact that the Superior Court may have reached opposite conclusions." Id. Accord State v. Karg, Del. Super., Def. ID# 9911000194, Babiarz, J. (May 31, 2001).

The sole issue here is whether the officer had probable cause to arrest defendant for violating 21 Del. C. § 4177(a). The standard to apply for reviewing a probable cause determination on appeal is set forth as follows in Lopez v. State, 861 A.2d 1245, 1248-49 (Del.

2004):

"The probable cause standard is incapable of precise definition ...because it deals with probabilities and depends on the totality of the circumstances." n3 Nevertheless, the substance of all the definitions of probable cause is a reasonable ground for belief of guilt, that is particularized with respect to the person to be arrested. n4 A determination of probable cause for an arrest is grounded, first, in the events leading up to the arrest and, second, in the decision whether those events amount to probable cause as a matter of law. n5 "The first part of the analysis involves only a determination of historical facts, but the second is a mixed question of law and fact ...." n6

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n3 Maryland v. Pringle, 540 U.S. 366, 124 S. Ct. 795, 800, 157 L. Ed. 2d 769 (2003).

n4 Id.

n5 Ornelas v. United States, 517 U.S. 690, 696, 134 L. Ed. 2d 911, 116 S. Ct. 1657 (1996).

n6 Id. Accord Purnell v. State, 832 A.2d 714, 719 (Del. 2003).

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Findings of historical fact are subject to the deferential "clearly erroneous" standard of review. n7 This deferential standard applies not only to historical facts that are based upon credibility determinations but also to findings of historical fact that are based on physical or documentary evidence or inferences from other facts. n8 "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." n9 Once the historical facts are established, the issue is whether an undisputed rule of law is or is not violated. n10 Accordingly, appellate courts review de novo whether there is probable cause for an arrest, as a matter of law. n11

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n7 Ornelas v. United States, 517 U.S. at 696.

n8 See id. Accord Anderson v. City of Bessemer, 470 U.S. 564, 574, 84 L. Ed. 2d 518, 105 S. Ct. 1504 (1985).

n9 Anderson v. City of Bessemer, 470 U.S. 564, 574, 84 L. Ed. 2d 518, 105 S. Ct. 1504 (1985).

n10 Ornelas v. United States, 517 U.S. at 696-97 (quoting Pullman-Standard v. Swint, 456 U.S. 273, 289, n. 19, 72 L. Ed. 2d 66, 102 S. Ct. 1781 (1982)).

n11 Id. at 697.

---------- End Footnotes -----------

The probable cause definition in the context of a driving under the influence case is more fully explained in Evon v. State, Del. Super., Def. ID# 9804017675, Barron, J. (July 26, 1999) at 10-13:

> An officer has probable cause when he has information which would cause a reasonable person to believe that such a crime has taken place. n12

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n12 State v. Maxwell, Del. Supr., 624 A.2d 926, 929-30 (1993) (citing Clendaniel v. Voshell, Del. Supr., 562 A.2d 1167, 1170 (1989)).

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> Probable cause has no precise definition; it lies somewhere between suspicion and sufficient evidence to convict. n13 In State v. Maxwell, the Delaware Supreme Court reiterated the federal Supreme Court's statement that the standard of probable cause is "only the probability, and not a prima facie showing." n14 It is now well established that probable cause must be measured "by the totality of the circumstances through a case by case review of 'the factual and practical considerations of everyday life on which reasonable and prudent [people], not legal technicians, act.'" n15

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n13 Thompson v. State, Del. Supr., 539 A.2d 1052 (1988).

n14 State v. Maxwell, 624 A.2d at 928 (quoting Illinois v. Gates, 462 U.S. 213, 235, 76 L. Ed. 2d 527, 103 S. Ct. 2317 (1983) (quoting Spinelli v. United States, 393 U.S. 410, 419, 21 L. Ed. 2d 637, 89 S. Ct. 584 (1969)).

n15 624 A.2d at 928 (quoting Illinois v. Gates, 462 U.S. at 231).

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The Maxwell Court, when reviewing the factors the police had relied upon for establishing probable cause in that case, stated that any one of the facts, considered in isolation, may be insufficient to establish probable cause. However, the totality of the circumstances presented reveals that based upon their observations, their training, their experience, their investigation, and rational inferences drawn therefrom, the police possessed a quantum of trustworthy factual information "sufficient in themselves to warrant a [person] of reasonable caution" to conclude that probable cause existed to believe Maxwell was driving under the influence of alcohol at the time of the accident. n16

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n16 624 A.2d at 931 (quoting Brinegar v. United States, 338 U.S. 160, 175-76, 93 L. Ed. 1879, 69 S. Ct. 1302 (1949)(emphasis added)).

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A presumption of innocence is inapplicable at the threshold determination of probable cause. The question the court below had to ask was whether, viewing the totality of the circumstances known to the officer at that time, a reasonable person would believe a fair probability existed that the defendant violated 21 Del. C. § 4177(a). State v. Maxwell, 624 A.2d 926, 930 (Del. 1993). There is no factoring in of innocence or considering a possible innocent explanation for each of the objective indications of impairment. Id.

Probable cause is a practical, common sense judgment based on the information known to the officer. State v. Woo, Del. Super., Cr. A. No. IN89-06-1080, Balick, J. (Oct. 27, 2989), aff'd,

571 A.2d 788 (Del. 1990). A "defendant's conduct, demeanor, statements, and attitude are vital evidence on his sobriety...." State v. Lynch, 274 A.2d 443, 444 (Del. Super. Ct. 1971).

Under the totality of the circumstances here, was there a fair probability that the defendant was less able than ordinarily to exercise clear judgment to drive because of alcohol or drugs or a combination of both?

The Trooper testified that the fight with the dog, the bloodshot, glassy eyes,[3] the slurring of speech, and the odor of alcohol gave him probable cause to arrest defendant for driving under the influence.[4] The Court below refused to consider the fact defendant fought with the dog, actually took him on, to be a factor which should be considered in determining if defendant was exercising impaired judgment. That was error. The Officer testified that fighting with a canine is "unheard of". That action was a significant indicator of defendant's judgment; people exercising clear judgment do not actively engage in fights with a police canine. A police officer may consider irrational, erratic, or belligerent behavior in making his or her probable cause determination. Sizemore v. Indiana, 308 N.E.2d 400 (Ind. App. 1974); Louisiana v. Janise, 528 So.2d 245 (La. App. 3 Cir. 1988); Chadwick v. Moore, 551 N.W.2d 783 (N.D. 1996); Oregon v.Spruill, 948 P.2d 726 (Ore. App. 1997). Objectively, the Officer, considering the other signs of impairment, reasonably could make a common sense judgment that only a person under the influence of alcohol and/or drugs would act this way.

The Court below also attributed defendant's conduct in fighting the dog and resisting

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[3]The Court below ignored the "glassy" factor, which should have been considered.

[4]The State argues the fact defendant urinated on himself was another factor to consider. The Officer never testified to that and the Court ignores that factor.

arrest to be attributable to his emotional state about his marriage. That, incorrectly, was considering an innocent explanation for this single factor, something that does not take place in a probable cause analysis. State v. Maxwell, supra.

The Trooper, by law, was to consider the totality of the circumstances. A reasonable conclusion could be reached that defendant was impaired before when quickly turning and driving "pretty fast" in the confined area of the driveway and making an "abrupt turn" and "abrupt stop." As noted above, the fight with the dog and the threatening behavior towards the Officer were factors to consider. Also among the facts known were the defendant's abusive and profane language which accompanied his belligerence toward the Officer, factors which frequently support probable cause determinations. DeSalvatore v. State, 163 A.2d 244 (Del. 1960); Zern v. Division of Motor Vehicles, Del. Super., C.A. No. 93A-08-014, Del Pesco, J. (July 1, 1994). These factors were combined with the bloodshot, glassy eyes, slurred speech, and strong odor of alcohol. This Court finds, based upon the totality of the circumstances, that probable cause existed and reverses the Court below on this issue.

In light of the above ruling, it is not necessary to address the State's other argument on appeal, but I do so to provide guidance should the issue arise again. When the Court below ruled the arrest for the driving under the influence charge was invalid, the State argued that the evidence acquired and statements made after that invalid arrest could not be suppressed because the statements were made and the blood test was obtained after a valid arrest on another crime (the resisting arrest charge). The Court below rejected the State's contention that the evidence and statements made after the arrest on the driving under the influence charge could not be

suppressed because defendant was under a valid arrest for resisting arrest.[5]

The law does not permit the bootstrapping the State seeks. To adopt the State's position would allow for the Court to ignore the requirements of probable cause. Evidence must be seized pursuant to a valid arrest on the crime alleged. Moore v. State, 187 A.2d 807, 811 (Del. Super. 1963) ("[Probable cause] depends on the facts known, at the time of the arrest, to the person by whom the arrest is made, from which it follows that an arrest cannot be justified by what a subsequent search discloses."); State v. Torrence, Del. Super., Cr. A. No. IN92-010564-66, Goldstein, J. (May 28, 1992) at 15; Anderson v. Maryland, 553 A.2d 1296, 1301 (Md. App. 1989); Domsch v. Dir. of Revenue, 767 S.W.2d 121 (Mo. App. 1989). The Maryland Court of Special Appeals well stated the principle of law:

> Although the arrest need not literally precede its search incident, the justification for the arrest must precede both the arrest and its incident. The search incident may not "bootstrap" itself by using its results to provide its own justification. No search may justify itself on the basis of what it finds. The probable cause for arrest, therefore, must predate both the arrest and its search incident, whatever the secondary sequence between those two effects may be. Cause-and-effect in this particular manifestation becomes probable-cause-and-effect. Thus, although the attendant search need not technically be "subsequent to," it must still be "incident to" its predicate lawful arrest.

Anderson v. Maryland, supra. The point in time to make a probable cause analysis for the specific crime alleged to have been committed is at the time of the arrest. Brown v. State, 897

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[5]This situation is not one where a person is under arrest for one crime and, as events unfold, the officer develops probable cause to arrest the defendant on another crime. Nor is it the situation where there was an illegal arrest warrant but the search was valid and that valid search led to the discovery of evidence which led to charges. See State v. Hunter, Def. ID# 9904014932, Gebelein, J. (April 10, 2000), aff'd, 783 A.2d 558 (Del. 2001) (evidence was admissible absent a valid arrest warrant since it was discovered pursuant to a lawful protective detention and pat-down).

A.2d 748 (Del. 2006); Darling v. State, 768 A.2d 463 (Del. 2001); Jarvis v. State, 600 A.2d 38 (Del. 1991); Woo v. State, Del. Supr., 571 A.2d 788 (Del. 1990). Thus, the Court below correctly ruled that if there was not probable cause to make the arrest for the driving under the influence charge, then the evidence coming thereafter had to be suppressed. State v. Brown, Del. Super., Cr. A. No. N94-08-1734AC, et al., Goldstein, J. (June 1, 1995) at 6, aff'd, Del. Supr., No. 226, 1995, Walsh, J. (Dec. 18, 1995) (Police officer could not administer intoxilyzer test in order to charge defendant with driving under the influence when police officer (who had charged defendant with underage consumption) did not have probable cause to believe defendant was intoxicated prior to administering the test, and the results should have been suppressed for that reason).

For the foregoing reasons, I reverse the decision of the Court of Common Pleas and remand the matter for further proceedings consistent with this decision.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary's Office
Court of Common Pleas, Clerk's Office