

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARLIN P. MAULO,	§	
	§	No. 141, 2011
Defendant-Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware, in and for
v.	§	New Castle County
	§	
STATE OF DELAWARE,	§	Cr. I.D. No. 0501000079
	§	
Plaintiff-Below,	§	
Appellee.	§	

Submitted: August 17, 2011

Decided: August 30, 2011

Before **STEELE**, Chief Justice, **BERGER** and **JACOBS**, Justices.

**ORDER**

This 30<sup>th</sup> day of August 2011, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. Marlin P. Maulo (“Maulo”), the defendant-below, appeals from a Superior Court order denying his motion to suppress, and from his subsequent convictions of, and sentences for, driving under the influence of alcohol (“DUI”)<sup>1</sup> and failing to use a turn signal.<sup>2</sup> On appeal, Maulo claims that the trial court

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<sup>1</sup> 21 *Del. C.* § 4177.

<sup>2</sup> 21 *Del. C.* § 4155(b).

erroneously denied his suppression motion because the police lacked probable cause to administer a breathalyzer test. We find no error and affirm.

2. At about 9:00 a.m. on New Year's Day 2005, Corporal Brian Ritchie of the Delaware State Police was on routine patrol in the area of Old Baltimore Pike and Route 896 in Newark, Delaware. While at a stop sign, Corporal Ritchie observed a white Dodge Dynasty heading westbound on Old Baltimore Pike. Based on his experience with the area, Ritchie estimated that the car was traveling at least 10 miles an hour over the 45 miles per hour speed limit. Intending to obtain a radar reading on the car, Ritchie began following the Dodge Dynasty.

3. While Ritchie was following the car down Otts Chapel Road, the Dodge Dynasty made a right turn into a private residence driveway without using its turn signal. Acting on the assumption that the driver of the vehicle, later identified as Maulo, resided in the house,<sup>3</sup> Corporal Ritchie proceeded past the driveway, continued to watch the Dodge Dynasty, and saw Maulo leave the car and approach the front door. Maulo knocked on the door, but there was no answer.

4. At that point, as Corporal Ritchie pulled into the driveway, Maulo began to walk to the rear yard of the house. Ritchie got out of his patrol car and asked to speak with Maulo. When questioned, Maulo claimed to be performing

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<sup>3</sup> Corporal Ritchie testified that he was familiar with the houses on that street and knew that elderly people lived in those homes.

tree work for the homeowner's yard, but was unable to tell Ritchie the homeowner's name or telephone number. Nor could Maulo confirm the homeowner's address, even though he and Ritchie were standing in the driveway of that residence.

5. While talking to Maulo, Corporal Ritchie noticed that his speech was mumbled and slurred. Ritchie also detected a "strong odor of alcohol" on Maulo's breath, and observed that his eyes were "glassy, watery and bloodshot." Asked if he had been drinking, Maulo responded that he was drinking until about 2:00 a.m. at a party the night before. Although Maulo claimed not to have any identification on his person, he was able to produce a Social Security card and a Pennsylvania identification card from his wallet.

6. Upon receiving Maulo's identification card, Corporal Ritchie ran a computer check, which revealed that Maulo had an outstanding warrant for a third-degree assault charge and that Maulo's license had been suspended or revoked.<sup>4</sup> Ritchie then took Maulo into custody and placed him in the backseat of the patrol car.

7. During this exchange, the front door of the house opened and an elderly female appeared wearing a nightgown. Ritchie asked the woman if she knew

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<sup>4</sup> At the suppression hearing, Corporal Ritchie also testified that he was familiar with Maulo because he "ha[d] been to [Maulo's] house at least twice" to respond to domestic complaints.

Maulo and whether she had hired anyone to perform tree work. The woman told Ritchie that she had not hired anyone to do any tree work, that she did not know Maulo, and that when Maulo knocked on her front door earlier, she did not open the door because she was scared.

8. After Maulo was driven to the police station, Corporal Ritchie administered three field sobriety tests: the horizontal gaze nystagmus (HGN), finger-to-nose, and counting tests. Maulo failed all three. Also administered was a portable breathalyzer test (“PBT”), which revealed that Maulo had a blood alcohol content of 0.147.

9. Maulo was charged with, and indicted for, three offenses: (a) DUI; (b) driving with a suspended/revoked license; and (c) failing to signal. He moved to suppress the PBT results on the basis that the police lacked sufficient probable cause to administer the breathalyzer test. After a suppression hearing held on October 29, 2010, the trial judge denied Maulo’s suppression motion. At a bench trial on December 7, 2010, the trial judge found Maulo guilty of DUI and failing to signal, but not guilty of driving with a suspended/revoked license. Because that was Maulo’s fourth DUI conviction, he was sentenced to 5 years at Level V incarceration, suspended after 2 years for 1 year at Level III probation. Maulo directly appeals.

10. On appeal, Maulo claims that the Superior Court erroneously denied his motion to suppress evidence of the DUI, because the police lacked sufficient probable cause to administer the breathalyzer test. Specifically, he argues that in conducting its probable cause analysis, the trial court erred by: (a) giving unduly significant weight to his (non-responsive) answers to Corporal Ritchie’s questions, which he claims were not probative of intoxication; (b) considering Maulo’s “failure” of the counting test, which he claims to have completed successfully; and (c) admitting and relying upon the PBT results, for which he claims the State failed to lay a proper foundation.

11. We review a trial court’s denial of a motion to suppress for abuse of discretion.<sup>5</sup> To the extent a claim of error rests on the trial court’s legal conclusions, we apply *de novo* review to determine whether the trial court erred in formulating or applying legal precepts.<sup>6</sup> But where the claim of error rests on the trial court’s factual findings, our review is limited to whether those findings were “clearly erroneous.”<sup>7</sup>

12. To establish probable cause, the police need only present facts that, when viewed in the totality of the circumstances, suggest that a fair probability

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<sup>5</sup> *Miller v. State*, 4 A.3d 371, 373 (Del. 2010).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

exists that the defendant has committed a crime.<sup>8</sup> “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.”<sup>9</sup> As we have explained, “[p]robable cause exists where the facts and circumstances within the police officer’s knowledge, and of which the police officer had reasonably trustworthy information, are sufficient in themselves to warrant a person of reasonable caution to believe that an offense has been or is being committed.”<sup>10</sup>

13. The trial court correctly concluded that Corporal Ritchie had probable cause to administer the breathalyzer test. Maulo urges that the trial court erroneously considered his answers to Ritchie’s questions in its probable cause analysis. We find that argument to be without merit. The test for whether probable cause exists requires us to look at the totality of the circumstances.<sup>11</sup> Maulo’s confused answers and inability to identify his whereabouts cannot be considered in a vacuum. Rather, those answers must be considered together with the following facts: (a) Corporal Ritchie believed that Maulo had been speeding;

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<sup>8</sup> *Bease v. State*, 884 A.2d 495, 498 (Del. 2005).

<sup>9</sup> *State v. Maxwell*, 624 A.2d 926, 930 (Del. 1993).

<sup>10</sup> *Bease*, 884 A.2d at 498.

<sup>11</sup> *Id.*

(b) Maulo failed to use his turn signal; (c) Corporal Ritchie detected an alcoholic odor emanating from Maulo; (d) Maulo's speech was mumbled and slurred; and (e) Maulo's eyes were glassy, bloodshot, and watery.

14. Nor was it improper for the Superior Court to rely on the results of the counting test. Maulo was asked to count backwards from 72 to 53. After complaining that he was unable to complete that test because of his lack of education, Maulo slowly and hesitantly performed the test, but stopped at 50 instead of 53. When asked whether he "would . . . consider that a pass or a fail," Corporal Ritchie testified that he "would consider it a fail." Even if (*arguendo*) the trial court should have concluded that Maulo had passed the counting test, that does not negate a finding of probable cause. As we have explained, "[m]ixed results in field sobriety tests do not extinguish probable cause if other sufficient factors are present."<sup>12</sup>

15. Maulo also claims that the State failed to lay a proper foundation to admit the PBT results into evidence, because although Corporal Ritchie was trained to operate the test, the State never established that he had calibrated the PBT device before administering the test. The record does not support that claim. The trial transcript discloses that after defense counsel objected to the admission of the PBT results on foundational grounds, Corporal Ritchie testified that his

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<sup>12</sup> *Perrera v. State*, 852 A.2d 908 (Table), 2004 WL 1535815, at \*1 (Del. 2004).

department calibrated the PBT device “once a month.” Moreover, the trial judge found that “even if I don’t consider [the PBT results], [Corporal Ritchie] had probable cause” to suspect that Maulo had been driving under the influence. Therefore, even if (counterfactually) the PBT results were erroneously admitted, Maulo’s claim fails.

16. As the trial judge noted, “the probable cause in this case was so overwhelming,” given Maulo’s failure to use his turn signal; his admission that he was drinking until 2:00 a.m. the night before; his confusion as to his whereabouts; the smell of alcohol emanating from his breath; his glassy, bloodshot, and watery eyes; his slurred and mumbled speech; and his failure to pass the three field sobriety tests. These circumstances were sufficient to support a finding of probable cause that Maulo had been driving under the influence of alcohol.<sup>13</sup> On that basis, the trial court properly denied Maulo’s motion to suppress.

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<sup>13</sup> See, e.g., *Miller v. State*, 4 A.3d 371, 374-75 (Del. 2010) (noting that even “[e]xcluding the results from the PBT and HGN tests, the alcoholic odor from two or three feet away, glassy watery eyes, failed walk-and-turn and one-legged standing tests, and [defendant’s] admission of having consumed two beers about two hours before sufficiently supported probable cause that [defendant] drove under the influence of alcohol.”); *Bease*, 884 A.2d at 499-500 (“The record reflects that [the defendant] spoke in a rapid manner to [the police], smelled of alcohol, admitted that he consumed alcoholic beverages the night before, had bloodshot and glassy eyes, and had just committed a traffic violation by making an improper lane change in an abrupt manner.”).



NOW, THEREFORE, IT IS ORDERED that the judgments of the Superior Court are **AFFIRMED**.

BY THE COURT:

/s/ Jack B. Jacobs  
Justice