IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE	)	
	)	
	)	
	)	
v.	)	Case No.: 1508009495
	)	
LAURA ZANDA,	)	
	)	
Defendant.	)	
	)	

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Submitted: June 2, 2016
Decided: August 25, 2016

DECISION ON MOTION TO SUPPRESS

Defendant, Laura Zanda, was arrested on August 13, 2015, and charged with (1) Driving Under the Influence ("DUI") in violation of 21 *Del. C.* § 4177(a); and (2) Failure to Remain within a Single Lane in violation of 21 *Del. C.* § 4122(1). The defendant has filed a motion to suppress evidence in connection with her arrest alleging that the arresting officer lacked a reasonable and articulable suspicion for the traffic stop and lacked probable cause for the subsequent DUI arrest. The Court held an evidentiary hearing on the motion and reserved

decision. After careful consideration of the evidence and applicable law, the defendant's Motion to Suppress is DENIED.

FACTS

On August 13, 2015, shortly after 3:00 a.m., while travelling northbound on Route 13 in Kent County, Delaware, a Delaware State Trooper ("Officer") observed the defendant's motor vehicle drive off the roadway twice before turning on to Irish Hill Road. The Officer decided to follow the defendant's vehicle and observe it. As the defendant travelled eastbound on Irish Hill Road, the Officer observed the defendant's vehicle for almost a full minute. There was very little traffic on the road. The defendant's vehicle moved in a ping-pong fashion within its lane of travel, swerving from one side of the lane to the other. Then, the defendant applied her brakes just as it appeared as though her vehicle was about to cross the road's center line. Fearing that the defendant would drive off the road again, the Officer activated his emergency lights and pulled the defendant over.

Upon contact with the defendant, the Officer detected an odor of alcohol emanating from the defendant's person. The Officer observed that the defendant also had slurred speech, red and glassy eyes, and constricted pupils. The Officer asked the defendant whether she had been drinking. The defendant responded that she had not consumed alcoholic beverages that night.

Next, the Officer requested the defendant to exit the vehicle and perform both the alphabet and counting tests.[1] On both tests, the defendant failed to follow instructions. The Officer instructed the defendant to count from 87 to 79 and state the alphabet from C to Q. However, the defendant counted from 87 to 70, while skipping several numbers. On the alphabet

[1] The alphabet and counting tests are generally known as "pre-exit" tests according to the National Highway Traffic and Safety Administration ("NHTSA"). However, in this case both tests were conducted post-exit, as the Officer was concerned about his safety since he would need to stand in a lane of traffic while giving the tests.

test, she stated the alphabet from C to Z. In addition, the Officer testified that he conducted a horizontal gaze nystagmus test ("HGN") on the defendant, which measures impairment based on involuntary eye movements. The defendant exhibited six out of six clues of impairment. A "walk-and-turn" test was also performed where the defendant failed to follow instructions, started the test before instructed to do so, failed to walk straight on the provided line, almost fell on the turn and stopped before completing the required number of return steps. Finally, the Officer asked the defendant to perform a "one-leg stand" test, which the defendant also failed by raising her foot and then placing it down after only fifteen seconds, instead of the required thirty seconds.[2] The defendant was then arrested and subsequently charged with DUI and failure to remain within a single lane.

The defendant has filed the instant Motion to Suppress alleging that the Officer lacked reasonable and articulable suspicion to believe that a crime had been committed or was about to be committed when he stopped the defendant's vehicle. Furthermore, the defendant contends that the Officer lacked probable cause to believe that she was DUI.

DISCUSSION

I. Reasonable and Articulable Suspicion Existed to Stop the Defendant

The Fourth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, protects people against unreasonable searches and seizures. "When a person is detained by a traffic stop, a seizure occurs under the Fourth Amendment and the stop is subject to constitutional limitations."[3] The burden is on the State to prove that the officer conducting the traffic stop had a reasonable and articulable suspicion that a crime has occurred,

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[2] The "post-exit" field sobriety tests were performed in the roadway as additional police officers had arrived by that time and closed the road to traffic.

[3] *State v. Mulholland*, 2013 WL 3131642, at *3 (Del. Com. Pl. June 14, 2013).

is occurring, or is about to occur.[4] "Whether reasonable and articulable suspicion of criminal activity exists depends on the totality of the circumstances and the 'factual and practical considerations of everyday life on which reasonable and prudent [people] . . . act.' "[5] "Reasonable and articulable suspicion of criminal activity includes not just traffic offenses, but criminal activity such as drunk driving."[6]

In *West v, State*, the Delaware Superior Court noted that an "officer's observation of a vehicle weaving from side to side, albeit within a lane, and making sharp corrective turns to maintain the lane, for a distance of three to four miles at 2:00 a.m. could give rise to reasonable suspicion that the driver is impaired, and would justify initiating a traffic stop on the vehicle."[7] The Delaware Supreme Court later affirmed the Superior Court's decision in *State v. West* holding that mere weaving within the same lane alone is insufficient to show reasonable suspicion; however, there is reasonable suspicion where there is weaving within one's lane coupled with other observable facts of erratic driving.[8]

In the instant matter, based on the totality of the circumstances, the Officer had a reasonable and articulable suspicion of criminal activity sufficient to stop the defendant's vehicle. The Officer testified that he observed the defendant drive off the roadway on Route 13 twice before turning onto Irish Hill Road. While on Irish Hill Road, the Officer testified, and the mobile video recording ("MVR") from the Officer's patrol vehicle confirmed, that the defendant's vehicle continuously ping-ponged from one side of its lane to the other for almost a full minute before the Officer initiated the stop. Once the defendant hit her brakes, just as she was about to cross the road's center line, the stop was made. Looking at the totality of

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[4] *Id.*
[5] *West v. State*, 2016 WL 3634288, at *4 (Del. July 6, 2016) (citation omitted).
[6] *Id.* at *3.
[7] *West v. State*, 2015 WL 5121059, at *4 (Del. Super. Aug. 20, 2015), *aff'd*, 2016 WL 3634288 (Del. July 6, 2016).
[8] *West v. State*, 2016 WL 3634288, at *4-5 (Del. July 6, 2016).

circumstances, consisting of (1) erratic weaving within a lane for a full minute just after 3:00 a.m., plus (2) driving off the roadway twice, and (3) braking for no apparent reason except to avoid going over the roadway's center line, the Court concludes that the defendant's driving behavior in this case was indicative of drunk driving and, therefore, gave the Officer reasonable and articulable suspicion that the defendant was driving under the influence.[9]

II. Probable Cause Existed to Arrest the Defendant for DUI

The State has the burden to establish that probable cause existed for DUI before the Officer arrested the defendant for that offense. To establish probable cause in a DUI case, the totality of the facts and circumstances within the Officer's knowledge at the time of the arrest must be sufficient to warrant a person of reasonable caution to believe that the defendant drove the vehicle while impaired.[10] Because probable cause rests upon the observations of the arresting officer, the arresting officer must be able to point to facts, such as defendant's performance on field sobriety tests, that support a finding of probable cause for a DUI arrest.[11]

In *State v. Hackendorn*, the Delaware Superior Court found probable cause for DUI without considering HGN or PBT test results where the evidence showed erratic driving, a moderate odor of alcohol emanating from the defendant's person, blood shot eyes, and failed walk-and-turn and one-leg stand tests.[12]

The Court concludes that the State has met its burden in the instant case to prove that probable cause existed to arrest the defendant for DUI. There is sufficient credible evidence to establish probable cause for the DUI arrest. The evidence shows that at some time after

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[9] The Court also finds reason for the stop under the Community Caretaker Doctrine as discussed in *West v. State*, 2015 WL 5121059 (Del. Super. Aug. 20, 2015). The Officer testified that he was afraid the defendant would drive off the road again and, thereafter, decided to initiate the stop.

[10] *Mulholland*, 2013 WL 3131642 at *3-4.

[11] *Id.* at *4.

[12] *State v. Hackendorn*, 2016 WL 266360, at *6 (Del. Super. Jan. 13, 2016).

3:00 a.m., the defendant was driving erratically by ping-ponging within her lane of travel, driving off the roadway twice, and braking for no apparent reason. Additionally, an odor of alcohol emanated from the defendant's person. She had red and glassy eyes and constricted pupils. She failed the walk-and-turn test and one-leg stand test, along with the alphabet and counting tests. Considering the totality of the facts and circumstances, the Court concludes that such evidence supports a finding of probable cause for DUI.[13]

CONCLUSION

Based on the foregoing analysis, the Court finds that under the totality of the circumstances, the Officer had a reasonable and articulable suspicion to stop the defendant and probable cause to arrest the defendant for DUI. Therefore, the defendant's Motion to Suppress is DENIED.

IT IS SO ORDERED.

CHARLES W. WELCH
JUDGE

[13] In concluding that sufficient credible evidence was introduced at the defendant's suppression hearing to establish probable cause for her DUI arrest, the Court notes that it did not consider the Officer's testimony concerning the results of the HGN test. Evidence of a field sobriety test that was not administered in accordance with National Highway Traffic and Safety Administration ("NHTSA") standards is not a reliable indicator that the driver is impaired and thus should not be considered in determining whether probable cause existed. In the current case, the HGN test was not administered in accordance with NHTSA guidelines. NHTSA requires the HGN test to be performed just slightly above the subject's eye level. The Officer in this case was six feet tall, approximately one foot taller than the defendant, and the MVR showed the Officer performing the HGN test at approximately his eye level, which was significantly more than "slightly" above the defendant's eye level. In addition, the Court finds that the evidence does not show that the defendant had slurred speech. In responding to the Officer's questions, the MVR showed that the defendant's speech was clear and articulate.