IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
	)	
v.	)	Case No. 1510011162
	)	
	)	
ARTHUR MILLER	)	
	)	
Defendant	)	

Submitted: October 18, 2016
Decided: November 15, 2016

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MEMORANDUM OPINION AND ORDER
ON DEFENDANT'S MOTION TO SUPPRESS

The defendant, Arthur Miller (hereinafter the "Defendant"), brings this motion to suppress evidence obtained in connection with a Driving Under the Influence ("DUI") investigation. The Defendant asserts the State lacked reasonable articulable suspicion to initiate a traffic stop and further lacked probable cause to arrest the Defendant on suspicion of DUI.

On October 18, 2016, a hearing was convened to allow the parties to present oral argument. After reviewing the parties' briefs and arguments, the Court determined that the Defendant's Motion to Suppress would be best addressed by a written opinion. This is the Final Decision of the Court on the Defendant's Motion to Suppress.

FACTS

During the hearing convened on October 18, 2016, the Court heard from Delaware State Police Trooper Johnson ("Trooper Johnson"), the sole witness, and observed the Mobile Video Recording ("MVR") from Trooper Johnson's patrol vehicle. Trooper Johnson testified he was parked along Kirkwood Highway, in the vicinity of St. James Church Road, in New Castle, Delaware, at approximately 12:40 a.m. on October 18, 2015, when he observed a fellow officer, Trooper Digati, initiate a traffic stop. Trooper Johnson drove his vehicle and made contact with the second officer.

Trooper Johnson was reportedly advised the Defendant had been traveling at a rate of sixty-five miles per hour in an area with a posted speed limit of forty-five miles per hour. There was no testimony as to how this determination was made, what the circumstances of the initial observation entailed, or anything beyond the bare assertion of the reported speed. Upon making contact with the Defendant, Trooper Digati observed an open beer can in the rear seat of the Defendant's vehicle. After the arrival of Trooper Johnson, Trooper Digati turned the DUI investigation over to Trooper Johnson.

When Trooper Johnson made contact with the Defendant, Trooper Johnson likewise observed the beer can, while also detecting an odor of alcohol. When asked whether the Defendant had consumed any alcohol that evening, the Defendant advised he had five or six beers "not long" beforehand. Trooper Johnson testified the Defendant's words were "slightly" slurred during this exchange and subsequent conversations.

Trooper Johnson administered the alphabet and counting tests, with the Defendant performing "as expected" and without any significant issues. After instructing the Defendant to exit the vehicle and then asking whether the Defendant would perform field sobriety tests, the

Defendant began asking questions about the necessity of the tests and the consequences of refusal. Trooper Johnson permitted the Defendant to enter the Defendant's vehicle, unsupervised, and to call an unnamed friend of the Defendant's for advice. Finally, after approximately ten minutes, the Defendant exited the vehicle and agreed to undergo the field sobriety tests.

The first test administered by Trooper Johnson was the horizontal gaze nystagmus ("HGN") test. Trooper Johnson testified that he was trained in DUI detection and the proper procedures for administering the HGN, as well as the walk and turn and one-leg stand tests. According to Trooper Johnson, the Defendant exhibited four out of six possible clues. During cross examination, Trooper Johnson testified that he did not know how long he held the stimulus after completing each pass, but that he was trained for the entire pass to take approximately four seconds. Trooper Johnson then administered the walk and turn and one-leg stand tests, which the Defendant performed "flawlessly."

Lastly, Trooper Johnson administered a portable breathalyzer test ("PBT"). The Defendant reportedly failed the PBT, and was subsequently placed under arrest and taken to Troop 6 for further investigation.

PARTIES' CONTENTIONS

The Defendant argues the State lacked a reasonable articulable suspicion to initiate the underlying traffic stop. Specifically, the Defendant argues the Court has only heard a single statement of hearsay evidence, alleging the Defendant was speeding, and cannot determine the reasonableness of that conclusion without additional evidence. Additionally, the Defendant argues the State lacked probable cause for an arrest. The Defendant points to his "flawless"

performance of the alphabet, counting, one-leg stand, and walk and turn tests, while also arguing Trooper Johnson failed to administer the HGN test in accordance with NHTSA standards.

The State argues reasonable articulable suspicion existed because evidence was introduced as to the Defendant's alleged speed. While recognizing the statement was hearsay, the State contends hearsay is admissible and sufficient in the case *sub judice*. The State argues speeding is appropriate lay witness testimony and, therefore, does not require any further evidence. Lastly, the State argues Trooper Johnson had probable cause to arrest on account of the Defendant's slurred speech, admission to drinking five or six beers, an open container of alcohol in the vehicle, the detection of four out of six clues on the HGN, and a failed PBT.

DISCUSSION

On a Motion to Suppress, the State bears the burden of proving the legality of the underlying stop and subsequent arrest by a preponderance of the evidence.[1] The standard for proving the legality of the underlying stop has been well settled:

> In *Terry v. Ohio,* the Supreme Court held that a detention could only be lawful where it was premised on reasonable and articulable suspicion of criminal activity. Articulable suspicion "does not deal with hard certainties, but with probabilities." Delaware has defined reasonable suspicion as "the officer's ability to 'point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion.' "In determining if there is reasonable suspicion, a court looks at the totality of the circumstances, coupled with "inferences and deductions that a trained officer could make which 'might well elude an untrained person.' "[2]

[1] *State v. Anderson*, 2010 WL 4056130 at *3 (Del. Super. Oct. 14, 2010).
[2] *State v. Hignutt*, 2006 WL 1579806, at *2 (Del. Super. Mar. 10, 2006) (citations omitted).

I. Reasonable Articulable Suspicion

As a preliminary matter, the Court acknowledges hearsay is admissible for making pretrial determinations in a motion to suppress.[3] The matter before the Court is not whether the testimony that the Defendant was allegedly speeding is admissible, but rather, whether it is sufficient on its own to constitute the necessary reasonable articulable suspicion.

Delaware courts have considered numerous factual scenarios where hearsay has given rise to reasonable articulable suspicion for an investigatory stop. In *Bloomingdale v. State*, the officer "received a general broadcast of a possible drunk driver "driving all over the roadway" near James Street and Route 141. The broadcast described the make, model, and color of the vehicle, gave the license tag number. The broadcast also identified the driver's race and travel route, but did not identify the source of the information."[4] While the officer corroborated the details of the vehicle, he did not corroborate the alleged criminal conduct.[5] The Supreme Court ruled the anonymous tip was sufficient to give rise to reasonable articulable suspicion because it "provided a sufficient quality and quantity of information to give rise to reasonable suspicion."[6]

In summarizing the law regarding anonymous tips, the Court noted "the reasonable suspicion standard "requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." "[7] In addition, "The anonymous tips that have been held to be insufficiently reliable to create reasonable suspicion have related largely to concealed, possessory crimes. . . . We find that an anonymous report of contemporaneously-observed erratic driving does not suffer from the same lack of indicia of reliability."[8]

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[3] Delaware Rule of Evidence 104(a).
[4] *Bloomingdale v. State*, 842 A.2d 1212, 1213 (Del. 2004).
[5] *See id.* at 1219.
[6] *Id.* at 1222.
[7] *Id.* at 1217 (quoted *Florida v. J.L.*, 529 U.S. 266 (2000).
[8] *Id.* at 1219.

In *State v. Brown* (2010), one officer observed the defendant fail to come to a complete stop at a stop sign, while also failing to use a turn signal while turning.[9] That officer relayed the information to a second officer, with the second officer then conducting the traffic stop.[10] Notably, only the second officer testified at the suppression hearing.[11] The Superior Court found the State had adequately demonstrated reasonable articulable suspicion to justify the stop.[12]

However, in *State v. Holmes*, the Superior Court refused to allow hearsay evidence to support a finding of probable cause. The Superior Court noted "all relevant evidence stemming from the stop is based on hearsay which is uncorroborated and lacking in detail."[13] Furthermore,

> the Court could not ascertain what the arresting officers said, how the occupants responded, or what those officers were thinking. Without at least some corroborating details other than hearsay as to exactly what transpired, the Court is left solely with Detective Hurd's assumptions and conclusions. While the State is permitted to rely on hearsay in even large part to show that police action met the appropriate legal standard(s), *under the circumstances of this case*, its burden cannot be predicated entirely on hearsay.[14]

While the Defendant cites *Holmes* in support of his argument, the Court notes *Holmes* focused on a probable cause standard.[15] Accordingly, the Court gives little weight to *Holmes* in the matter *sub judice*.

Turning to the matter of speeding generally, there are numerous decisions where the reasonable articulable suspicion derived from allegations of speeding. Preliminarily, when an

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[9] *See State v. Brown*, 2010 WL 2878246, at *1 (Del. Super. Jul. 22, 2010).
[10] *See id.*
[11] *See id.*
[12] *See id.*
[13] *State v. Holmes, 2015 WL 5168374, at *9 (Del. Super. Sep. 8, 2015)*
[14] *Id.* (emphasis added).
[15] The Court in *Holmes* is unclear as to whether it found the State unable to meet its initial burden of showing reasonable articulable suspicion for the underlying stop or whether the State met that burden and failed to establish probable cause. Because the actual discussion involved post-stop activities, such as K9 drug detection, ID checks, and subsequent observations, this Court interprets *Holmes* as passing on the matter of reasonable articulable suspicion and deciding the suppression motion on the basis of a lack of probable cause.

officer uses a radar device to determine speed, the officer must testify to certain foundational elements regarding calibration.[16] However, failure to calibrate a radar device is not fatal in determining the validity of the stop.[17]

In *Brown v. State* (2009), the officer testified to his six years of training as a police officer, along with his previous work with radar detectors, and other factors allowing the officer to determine whether an individual was speeding.[18] The officer's experience, taken in conjunction with the officer's observations of the defendant, allowed the Court to find the officer possessed a reasonable articulable suspicion that the defendant was speeding.[19] In *Crockett v. State*, the officer testified that, while he did not use a radar gun, he had driven behind the defendant's vehicle at the posted speed limit and observed the lights from the defendant's vehicle as increasing in distance.[20] This was sufficient to find reasonable articulable suspicion.

Turning to the matter *sub judice*, the Court must determine whether the bare hearsay assertion of the Defendant traveling at sixty-five miles per hour, in an area with a posted speed limit of forty-five miles per hour, is sufficient to determine if reasonable articulable suspicion exists to justify the stop. As discussed *supra*, hearsay is admissible at this stage of the proceedings. The Court must consider whether the testimony from Trooper Johnson relayed sufficient evidence to allow this Court to make a determination as to the existence of reasonable articulable suspicion.

The Court is persuaded by the reasoning in *Bloomingdale*. Under settled Delaware and United States case law, reasonable articulable suspicion can arise from anonymous tips describing an actual, observable crime. If a tip from an anonymous civilian is sufficient when it

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[16] *See State v. Jarwan*, 2000 WL 33113846 (Del. Super. Dec. 8, 2000).
[17] *See State v. Barton*, 2003 WL 1787957, at *2 (Del. Com. Pl. Feb. 24, 2003).
[18] *See Brown v. State*, 2009 WL 659070, at *3 (Del. Super. Mar. 13, 2009).
[19] *See id.*
[20] *See Crockett v. State*, 2003 WL 22683007, at *2 (Del. Super. Oct. 22, 2003).

reports contemporaneously-observed erratic driving, then a face-to-face conversation with a known police officer, reporting contemporaneously-observed speeding, is equally sufficient. The Defendant has not pointed to any indicia of unreliability in the circumstances surrounding Trooper Digati's observations of the Defendant.

The State is not required at this juncture to provide proof beyond a reasonable doubt, or even meet the burden of probable cause. Our Supreme Court has noted, "Reasonable suspicion also is a less demanding standard than probable cause and requires a showing considerably less than a preponderance of the evidence."[21] In finding reasonable articulable suspicion, this Court is entitled to all reasonable inferences from the testimony provided, including "inferences and deductions that a trained officer could make which 'might well elude an untrained person.' "[22] As discussed *supra*, the State is not required to provide calibration records to justify an initial stop. Likewise, the State has numerous means to justify a determination of speeding, including the training and experience of the officer.

The Court heard testimony on Trooper Johnson's qualifications, while also hearing testimony implying Trooper Digati possessed superior qualifications and had greater experience as a Delaware State Trooper. This testimony provides sufficient foundation for the Court to consider the inferences and deductions available to Trooper Digati as a trained police officer. Accordingly, the Court finds the State has met its burden and has established a reasonable articulable suspicion to justify the stop.

II. Probable Cause

Next, the Defendant contends Trooper Johnson lacked probable cause to arrest the Defendant. By way of summary, the testimony provided at the hearing, as it relates to factors

[21] *Harris v. State*, 806 A.2d 119, 126 (Del. 2002) (internal quotations and citations omitted).
[22] *Hignutt*, *supra*.

indicating possible intoxication, included a traffic violation, an admission to drinking five or six beers, an open container of alcohol within the vehicle, slightly slurred speech, four out of six clues on the HGN, and a failed PBT.[23] After reviewing the MVR of the incident, the Court does not agree with Trooper Johnson's characterization of the Defendant as slurring his speech and will therefore give that factor little weight.

Concerning the HGN, the testimony from Trooper Johnson establishes, and the Court so finds, that Trooper Johnson failed to follow proper NHTSA protocols in administering the test. The Court takes judicial notice of the NHTSA DWI Detection and Standardized Field Sobriety Testing manual (the "NHTSA manual").[24] According to the NHTSA manual, the proper procedure for evaluating the second clue – distinct and sustained nystagmus at maximum deviation – is to conduct a pass and then hold the stimulus for four seconds.[25] Trooper Johnson testified that he was trained, and so conducts the HGN, to make each pass, including holding the stimulus, across a total of four seconds.

While Trooper Johnson did not follow proper NHTSA protocols, the HGN is still admissible at this stage as evidence supporting a finding of probable cause. The Supreme Court has provided guidance on this matter:

> Regarding the HGN evidence, we have held that "prior to the admission of HGN evidence the State must provide [a] proper foundation ... by presenting testimony from an expert with specialized knowledge and training in HGN testing and its underlying principles...." We held that the trial judge abused his discretion by admitting HGN results when the administering officer "did not testify about the standards set forth in the NHTSA training manual" or "that the [administered] test was performed in accordance with NHTSA standards."[26]

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[23] On the matter of the PBT, the Court notes the Defendant was expressly offered – and rejected – the opportunity to challenge the admission of the PBT. Accordingly, the Court will give full weight to the results of the PBT.
[24] *See Dattanie v. State*, 2013 WL 6225240 (Del. Super. Nov. 20, 2013).
[25] *See* NHTSA manual, Session 8, page 30.
[26] *Miller v. State*, 4 A.3d 371, 374 (Del. 2010).

Here, Trooper Johnson did testify on his training and experience with the NHTSA standards, while also testifying that he performed the HGN test as per his training. While there is some question as to the accuracy of that training, the Court finds any "discrepancy [to be] one of the factors that the Court of Common Pleas may properly use to analyze the testimony put forth by [the officer] to determine what weight to give the HGN test results."[27] Therefore, while the Court affords little weight to the HGN, the evidence is nonetheless admissible.

The Court further accepts Trooper Johnson's testimony as to the Defendant performing "as expected" on the alphabet and counting tests and "flawlessly" on the walk and turn and one-leg stand tests. However, as noted in *Lefebvre v. State*, successful performance on field sobriety tests does not necessarily preclude a finding of probable cause.[28] The matter at hand bears numerous similarities with *Lefebvre*. In *Lefebvre*, the defendant's "speech was understandable . . . she passed the alphabet test, passed the counting test, exited her car without issue, passed the finger-dexterity test, passed the walk-and-turn test and passed the one-leg stand test."[29] Despite those factors weighing against probable cause, the defendant in *Lefebvre* also committed a traffic offense, had a strong odor of alcohol, a flushed face, bloodshot and glassy eyes, an admission of drinking, was flustered and argumentative, and implied she was drunk.[30]

In the instant case, the Defendant demonstrated many of the same factors as the defendant in *Lefebvre*. While the Defendant did not have a flushed face, bloodshot or glassy eyes, and was not argumentative, the Defendant did appear flustered, had a moderate odor of alcohol, admitted to drinking, possessed an open beer can in his vehicle, and failed the PBT. These facts are stronger than the factors noted in *Bease v. State*, where, even when excluding the

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[27] *State v. Ministero*, 2006 WL 3844201, at *5 (Del. Super. Dec. 21, 2006).
[28] *See Lefebvre v. State*, 19 A.3d 287 (Del. 2011).
[29] *Id.* at 294.
[30] *See id.* at 293.

HGN and PBT, probable cause was established because the defendant spoke "in a rapid manner . . . 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."[31]

Even if the Court were to exclude the HGN and the contention of slurred speech entirely, the record would still reflect sufficient evidence to meet the standard of probable cause. The Defendant did not admit merely to drinking, but rather, to drinking five or six beers "not long" before. That admission, taken in conjunction with the open container of alcohol in the Defendant's vehicle and the failed PBT, constitutes substantial evidence of impairment. In light of the evidence presented at the hearing, the Court finds Trooper Johnson had probable cause to arrest the Defendant under suspicion of DUI.

CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED** this 15th day of November, 2016, that Defendant's Motion to Suppress is **DENIED.**

The Honorable Carl C. Danberg
Judge

cc: Diane Healy, Judicial Case Management Supervisor

[31] *Bease v. State*, 884 A.2d 495, 499-500 (Del. 2005).