#### IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE

### IN AND FOR NEW CASTLE COUNTY

CHRISTOPHER J. SPENCER,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	
	)	C.A. No. CPU4-12-003689
	)	
JENNIFER K. COHAN, DIRECTOR,	)	
DIVISION OF MOTOR VEHICLES	)	
THE STATE OF DELAWARE	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

Submitted: August 20, 2013 Decided: October 1, 2013

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# **OPINION**

Appellant Christopher Spencer (hereinafter "Spencer") brings this appeal pursuant to 21 *Del C.* § 2744 from a determination of the Division of Motor Vehicle revoking his license under 21 *Del*. *C.* § 2742(1). The facts presented at the Motor Vehicle Hearing indicate Spencer was arrested on

July 8, 2012, and charged with driving under the influence (DUI) in violation of 21 *Del. C.* § 4177(a)(1) following a traffic stop on Route 1 Southbound in Townsend, Delaware. Spencer alleges the hearing officer committed legal error in finding that probable cause existed for the police officer to arrest him and to subsequently require him to submit to chemical testing.

The State however counters that there exists substantial evidence in the record to support of the finding of probable cause, because the factors relied upon by the arresting officer, Corporal Downer (Downer), are almost identical to prior cases in which probable cause was found, including the traffic violation, Spencer's physical appearance, and the results of field tests.

## PROCEDURAL BACKGROUND

On July 8, 2012, Christopher Spencer (Spencer) was arrested and charged with a DUI offense, and transported to Delaware State Police Troop 9, where he refused to take the breath test. After his refusal to submit to testing, Spencer was issued a Notice of Revocation. On July 11, 2012, Spencer filed a Request for an Administrative Hearing, which was granted. The Hearing was held on September 10, 2012. On September 27, 2012, the Division of Motor Vehicles informed Spencer that the hearing officer ruled against him, and he had a right of appeal to the Court of Common Pleas within 15 days. Spencer filed his appeal with the Court on October 9, 2012.

# **FACTS**

Corporal Downer (Downer) of the Delaware State Police testified that on July 8, 2012, at 7:43 pm, he was on patrol on Southbound Route 1 in Townsend, New Castle County. Downer stated that after he had removed debris from the roadway, returned to his vehicle, and shut the door, he was passed by a vehicle traveling at a very high speed. Downer testified he activated his radar unit and clocked the vehicle traveling at a speed of 91 miles per hour in a 65 miles per hour zone. Downer testified he followed the vehicle and watched it pass multiple vehicles and weave in and

out of traffic while maintaining its high rate of speed. Once he caught up to the vehicle, he activated his lights, and the vehicle pulled over to the shoulder without incident. Downer approached the vehicle, which Spencer was driving, and observed Spencer's eyes were glassy and watery. After returning to his patrol car and writing a ticket, Downer made contact with Spencer again, and noticed the odor of alcohol. Downer asked Spencer to exit his vehicle, and the two talked face to face. Downer stated that the odor of alcohol was much more obvious, and he stated that Spencer was slurring some of his words. Downer asked Spencer to recite the alphabet, which Spencer did in a normal manner, with the exception of L-M-N-O-P, which he slurred. Spencer then stopped reciting the alphabet at the letter Q, and put his hands up to indicate that he was finished. Downer then requested that Spencer count backwards from 100 to 80, to which Spencer replied, "180?" Downer repeated his initial request, and Spencer, after heavily concentrating, began at 99 and continued to 80.

Following these tests, Downer began to administer a horizontal gaze nystagmus (HGN) test. He requested that Spencer remove his glasses, to which Spencer replied that he could not see without them. Downer thus allowed Spencer to wear the glasses while he performed the test. Downer reported that Spencer showed all six clues, which Downer considered a failure.<sup>2</sup> Downer testified that he did not administer the walk-and-turn nor the one-leg stand tests, but did administer the portable breathalyzer test (PBT), which Spencer subsequently failed. Downer showed Spencer the reading from the PBT, to which Spencer replied, "That can't be right."

Downer transported Spencer to Troop 9 for further chemical testing. Downer testified that he read the implied consent form, including the consequences of refusing to submit to chemical testing. Spencer requested to make a call to his father, and afterwards advised Downer that he was refusing to submit to testing. Spencer signed the implied consent form, confirming that he would

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<sup>&</sup>lt;sup>1</sup> Hearing Transcript at pages 5-6.

<sup>&</sup>lt;sup>2</sup> Downer did not testify to the specifics of the "clues."

not agree to the test. Downer testified that Spencer was then charged with DUI and released to his father.

# LEGAL STANDARD

The decision of the Division of Motor Vehicles revoking a operator's license is reviewable by this Court on the record under 21 *Del. C.* § 2744.<sup>3</sup> The review of an administrative board's decision is limited to an examination of the record for errors of law and a determination of whether substantial evidence exists to support the findings of fact and conclusions of law.<sup>4</sup> Substantial evidence equates to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>5</sup> If substantial evidence exists, this Court "may not re-weigh and substitute its own judgment for that of the Division of Motor Vehicles,"<sup>6</sup> because "the hearing officer is in the best position to evaluate the credibility of witnesses and the probative value of real evidence."<sup>7</sup> Findings of the hearing officer will not be overturned so long as they are "sufficiently supported by the record and [are] the product[s] of an orderly and logical deductive process."<sup>8</sup> However, "when the facts have been established, the hearing officer's evaluation of their legal significance may be scrutinized upon appeal."<sup>9</sup>

## **DISCUSSION**

The issue on appeal is whether the Division of Motor Vehicles' hearing officer erred as a matter of law in his determination that Trooper Downer had probable cause to arrest Spencer under 21 *Del. C.* § 4177, and thereby submit Spencer to chemical testing under 21 *Del. C.* § 2742. In

<sup>&</sup>lt;sup>3</sup> Ct. Com. Pl. Civ. R. 72.1(a) and 72.1(b); Shahan v. Landing, 643 A.2d 1357, 1359 (Del. 1994).

<sup>&</sup>lt;sup>4</sup> Histed v. E.I. Dupont de Nemours & Co., 621 A.2d 340, 342 (Del. 1993).

<sup>&</sup>lt;sup>5</sup> Howard v. Voshell, 621 A.2d 804, 806 (Del. 1992) (citing *Quaker Hill Place v. State Human Relations*, 498 A.2d 175 (Del. 1985); 21 *Del. C.* § 2742(c)).

<sup>&</sup>lt;sup>6</sup> Wayne v. Div. of Motor Vehicles, 2004 WL 326926, at \*1 (Del. Com. Pl. Jan 22, 2004) (citing Barnett v. Div. of Motor Vehicles, 514 A.2d 1145 (Del. Super. 1986); Janaman v. New Castle County Board of Adjustment, 364 A.2d 1241, 1242 (Del. Super. 1976)).

<sup>&</sup>lt;sup>7</sup> Voshell v. Addix, 574 A.2d 264, at \*2 (Del. 1990) (TABLE).

<sup>&</sup>lt;sup>8</sup> Eskridge v. Voshell, 593 A.2d 589 (Del. 1991) (quoting Levitt v. Bouvier, 287 A.2d 671, 673 (Del. 1972)).

<sup>&</sup>lt;sup>9</sup> Voshell, 574 A.2d at \*2.

order to find that Spencer fail to comply with § 2742, the State must prove, by a preponderance of the evidence, first that Downer had the requisite probable cause to believe that Spencer was operating a motor vehicle in violation of 21 *Del. C.* § 4177; and second, that Spencer refused to submit to chemical testing.<sup>10</sup> The Court must find that there exists substantial evidence to support the hearing officer's findings of fact and his ultimate conclusions of law.

"To establish probable cause, 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 criminal activity has been or is presently being committed." Thus, in the instant case, to determine probable cause, one must view the totality of the circumstances from the standpoint of a reasonable officer in light of his or her experiences and training. The police need only "present facts suggesting...that a fair probability exists that the defendant has committed a crime." The possibility that there may be a hypothetically innocent explanation for each of several facts revealed during the course of an investigation does not prevent a determination that probable cause exists for an arrest."

Under 21 *Del. C.* § 4177(a)(1), "[n]o person shall drive a vehicle...[w]hen the person is under the influence of alcohol." Under § 4177(c)(5), "under the influence' shall mean that the person is, because of alcohol...less able that 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."

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<sup>&</sup>lt;sup>10</sup> The State provided a signed copy of the informed consent form, which was signed by Spencer, and which outlines the consequences of a refusal to submit to testing. The State has therefore fulfilled this element by a preponderance of the evidence.

<sup>&</sup>lt;sup>11</sup> Parisan v. Cohan, 2012 WL 679072 \*3 (Del. Com. Pl. Feb. 29, 2011) (citing *Lefebvre v. State*, 19 A.3d 287, 293 (Del. 2011); *State v. Maxwell*, 624 A.2d 926, 928 (Del. 1993)).

<sup>&</sup>lt;sup>12</sup> Parisan, 2012 WL 679072 at \*3.

<sup>&</sup>lt;sup>13</sup> *Maxwell*, 624 A.2d at 926-30.

#### The Facts Presented at the Hearing were Sufficient to Support a Finding of Probable Cause

Spencer argues that the hearing officer erred in his finding of probable cause for his arrest. Spencer first points to Downer's testimony that Spencer complied with all of Downer's requests, and that Downer noted that Spencer's complexion, walking ability, and balance were all normal. Spencer argues that his glassy, watery eyes and the odor of alcohol emanating from his car are only minor factors in the determination of probable cause. He acknowledges that he stopped reciting the alphabet and did not count backwards as instructed, but counters these facts by stating that such tests have no scientific basis as indicators of impairment. Finally, Spencer claims that his speeding cannot support a finding of probable cause because speeding on Route 1 is a common occurrence, not an indicator of intoxication.

In Parisan v. Cohan, the Delaware Court of Common Pleas found that an officer had probable cause to believe an individual was driving under the influence when the officer observed: the defendant's traffic violation; a strong odor of alcoholic beverages; the defendant's slurred speech; the defendant's glassy eyes; and the defendant's slow, deliberate action in retrieving necessary documents for the officer.<sup>14</sup> This instant case is almost identical to *Parisan* in that Spencer committed a traffic violation when he was speeding at 91 miles per hour in a 65 miles per hour zone; the officer detected an odor of alcohol emanating from Spencer's body when the two were face-to-face; Spencer slurred his speech in his attempt to say the alphabet; the officer observed Spencer's watery, glassy eyes; and Spencer failed to properly perform the counting test. The only difference between the symptoms serving as a basis for probable cause in Parisan and the symptoms in the instant case is the defendant's slow motion in retrieving documents in *Parisan*, which was not observed in this instant case. While, in this case, Spencer failed to properly

<sup>&</sup>lt;sup>14</sup> Parisan 2012 WL 679072 at \*4.

complete a counting test, which was a factor not observed in *Parisan* it is not critical to the finding of probable cause in these proceedings.

Similarly, in *Church v. State*, the Delaware Supreme Court upheld a finding of probable cause that the defendant was driving under the influence on the following facts: the defendant was involved in a single vehicle accident; appeared unstable; there was an odor of alcohol; the defendant's eyes were watery, glassy, and bloodshot; and the defendant refused to submit to field tests. Here, the hearing officer relied upon Downer's testimony that Spencer was driving at an excessive speed; there was an odor of alcohol emanating from his breath; his eyes appeared watery and glassy; and Spencer was unable to properly complete the alphabet and counting tests. While this Court has consistently held the is no provable value regarding the results of the counting and alphabet tests however the defendants speech pattern is a factor which may be considered where the Officer detects slurring.

Finally, in *Malone v. Voshell*, the Delaware Superior Court affirmed the hearing officer's finding of probable cause upon the basis of: the defendant's involvement in an accident; his poor results on an alphabet test, a balance test, and a finger to nose test; the defendant's bloodshot and glassy eyes; and the smell of alcohol emanating from the defendant. Similarly, Spencer, although not involved in an accident, was driving at a high rate of speed and weaving among traffic; he slurred his words when performing the alphabet and counting tests; his eyes were watery and glassy; and he had a odor of alcohol beverage.

In the aforementioned cases, the hearing officials relied on similar facts and observances to this instant case to determine that probable cause existed to believe individuals were driving under the influence. All of the cases contain some form of traffic violation, an odor of alcohol, glassy eyes, slurred speech and either a poor result on, or a failure to perform field sobriety tests.

<sup>16</sup> Malone v. Voshell, 1993 WL 489452, at \*3 (Del. Super. Oct. 4, 1993).

<sup>&</sup>lt;sup>15</sup> Church v. State, 11 A.3d 226, at \*2 (Del. 2010) (TABLE).

Spencer's Contention Regarding the Hearing Officer's Conclusion of the HGN test and the PBT Results Does Not Affect the Finding of Probable Cause

Spencer contends that the hearing officer committed legal error in admitting the results of

the HGN test and the results of the PBT. Spencer notes that Downer tested Spencer while Spencer

was wearing his glasses, which violates the National Highway Traffic Safety Standards, and also

that Downer failed to testify that the PBT device was properly calibrated.

The hearing officer did not utilize the results of the HGN in making his determination that

probable cause existed, and therefore Spencer's argument with regards to this issue is misplaced.

With regards to Spencer's argument that the hearing officer erred in admitting the results of

the PBT, even when the Court accepts Spencer's position on this issue, there still exists sufficient

facts related to Spencer's behavior and physical characteristics to support a finding that probable

cause existed in this case.

The facts relied upon by the hearing officer at the Division of Motor Vehicles hearing,

which include Spencer's excessive speed, his watery, glassy eyes, the odor of alcohol, Spencer's

slurred speech, and his failure to properly comply with instructions regarding field tests, support a

finding that probable cause exists. Therefore, I conclude that the hearing officer's decision and that

probable cause existed in this case was sufficiently supported by the record, and were the product of

a logical deductive process.

Accordingly, the decision of the Division of Motor Vehicles is AFFIRMED.

SO ORDERED.

The Honorable Alex J. Smalls

Chief Judge

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