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Case Number 270,2025

IN THE SUPREME COURT OF THE STATE OF DELAWARE

HENRY C. TANG,	)	
	)	
Defendant Below-Appellant	)	
	)	
v.	)	No. 270, 2025
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-Appellee	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

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DATE: November 10, 2025

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NATURE AND STAGE OF THE PROCEEDINGS

On May 17, 2024, Henry C. Tang ("Tang") was arrested and, on June 25, 2024, charged by indictment with Driving Under the Influence of Alcohol and Failure to Use Headlights. (Super. Ct. Crim. Docket Item ("DI") 1, 3, Indictment; Ai, B1-2). Tang was arraigned on July 23, 2024, and the next day filed a "Notice of Demand for Speedy Trial." (DI 7-8; Ai). On September 23, 2024 and November 4, 2024, Tang requested to continue his scheduled case reviews, which the Superior Court granted. (DI 13, 17; Aii). Tang's first case review was held on January 13, 2025. (DI 19, 21; Aii).

On February 18, 2025, defense counsel filed two motions to suppress evidence. (DI 22-23; Aii). In one motion, Tang argued that the officer did not have reasonable articulable suspicion to stop Tang's vehicle and that he was improperly questioned in a custodial interrogation without receiving *Miranda* warnings. (B4-6). In the second motion, Tang argued that the first motion addressed the "constitutionality of the seizure of the vehicle," and argued that the officer did not have probable cause to arrest Tang for Driving Under the Influence, including an argument that the arresting officer "did not follow Standard Operating Procedures nor NHTSA in regards to the administration of the PBT[; therefore,] the Defendant's alleged breath result should not be included in the probable cause analysis." (B9-11). For both motions, Tang sought that all evidence be

suppressed. (B6, 12).

On March 19, 2025, the State responded to both motions. (DI 29; Aiii). The State argued that the officer had reasonable articulable suspicion to stop Tang's vehicle based on Tang operating the vehicle without headlights and Tang's subsequent erratic driving witnessed by the officer. (B15-16). The State argued that the officer had probable cause to arrest Tang for DUI based on the erratic driving, traffic violations and the results of Tang's performance on the DUI field tests. (B16-17).

On May 14, 2025, the Superior Court held a suppression hearing. (DI 30; Aiii, A1). Tang failed to appear. (A4). The Superior Court went forward with the hearing, finding Tang had waived his right to be present by failing to appear. (A2-14). At the hearing, the Superior Court found reasonable articulable suspicion for the officer to stop Tang, and deferred decision on probable cause. (A84). On May 16, 2025, the Superior Court denied the remainder of Tang's suppression motion. DI 36. (Aiv).

On the morning of May 23, 2025, defense counsel emailed the Superior Court asking the court to compel disclosure of the manual to the Intoxilyzer 9000, which defense counsel maintained was "indispensable for the Defendant to properly defend and confront the evidence." (A111-12). The Superior Court held an office conference by video later that day. (A87-110). At the office conference,

the prosecutor explained that "a manufacturer's manual regarding setup and use of the Intoxilyzer 9000 does not exist. The instrument software [is] specific to Delaware, and the officers are trained accordingly." (A92). The parties discussed a pending case in Superior Court in New Castle County, where the court held a hearing to determine whether the Intoxilyzer 9000 "works" and its output would be admissible, and that, in that case, the same information was entered as a "guide" for the operation of the machine as the State produced here.[1] (A92-93). The court noted that, at trial, defense counsel was "not going to be able to cross examine a road officer . . . on the intricacies of the new 9000, the difference between the 9000 and 5000EN and things of that nature. . .. What [defense counsel] is entitled to cross examine the officer on is what is his . . . training on this. . . machine." (A93-94). The State said it would email defense counsel "the entirety of the brief and attachments that were filed" in the New Castle County case. (A94, 99). Defense counsel continued to take the position that he needed a manufacturer-generated manual to fulfill Tang's confrontation rights. (A96). The Superior Court noted that the procedural posture of the case was "past the line of a motion *in limine* like" in the New Castle County case. (A97). The Superior Court explained the foundation the State would have to establish. The court ordered the State to "produce what I think was produced in [the New Castle County] hearing. And it

[1] The documentation provided by the State is included at A116-118.

sounds to me like that is everything that there can be on this Intoxilyzer 9000. . .. [L]et's do that and see where it takes us." (A98-99).

On May 27, 2025, defense counsel emailed the Superior Court after having "reviewed the totality of the submission in State v. Brown (ID No. 2403014753)." (A114). Tang sought suppression of the Intoxilyzer 9000 results, relying on the lack of a manufacturer-created manual for the machine, which the State maintained did not exist. (A113-114). Counsel cited no case law to establish that the manual was material to the admission of the results. *See* A113-114.

That same day, the Superior Court held another office conference by video. (A103-109). Defense counsel asked the court to suppress the Intoxilyzer 9000 results at trial, because the State had not produced a manufacturer-created manual for the machine. (A107). The Superior Court denied the motion. (A107).

Defense counsel then stated that Tang would waive his right to a jury trial and the parties would stipulate to the testimony at the suppression hearing, and the only additional testimony would address the issue of whether the results of the Intoxilyzer 9000 test would be admissible into evidence despite the State's inability to produce the manual that defense counsel believed should exist. (A107-108).

On May 28, 2024, the parties appeared for trial. Prior to trial, Tang made an unopposed motion to continue the trial until the Superior Court ruled on the

admissibility of the Intoxilyzer 9000 in the pending case in the New Castle County Superior Court. DI 41. (Aiv). The Superior Court denied the continuance request. *Id.* The trial proceeded. Tang waived his right to trial by jury, opting for a bench trial in which the judge would also find the facts of his prior convictions.[2] (DI 41, 47; Aiv-v, 121, 123). The parties stipulated to the facts presented during the suppression hearing,[3] and went on to address the Intoxilyzer 9000 evidence, which revealed Tang's BAC as 0.162. (A158). The Superior Court found Tang guilty on both counts. DI 42. (Av; 180-84).

Tang agreed to immediate sentencing. At sentencing, the State presented certified records of two prior convictions for alcohol-related offenses to establish this conviction as a third offense DUI. (A182). Defense counsel and the prosecutor agreed to recommend the minimum 90-day sentence for a third offense. (A183). The Superior Court followed the recommendation and sentenced Tang: (1) for a third DUI offense, to two years at Level V, to be suspended after the 90 day minimum sentence, followed by one year at Level III probation with alcohol monitoring, with credit for 4 days served, plus loss of his driver's license pursuant to statute; and (2) for Failure to Use Headlights, a $25 fine. (A185-87).

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[2] *See Erlinger v. United States*, 602 U.S. 821 (2024).

[3] The Superior Court had denied admission of the Portable Breath Test ("PBT") results at the suppression hearing because the State had not produced the PBT log at that time. (A69).

Tang appealed. This is the State's answering brief.

SUMMARY OF ARGUMENT

I. DENIED. The Superior Court did not err in finding that the footage at issue did not exist because it had not been captured when the officer activated his emergency lights, which activated the MVR. Tang has failed to establish an actual recording of the time period prior to that captured by the MVR existed or could have been retrieved.

II. DENIED. The Superior Court did not abuse its discretion in denying suppression of the officer's testimony about the events that occurred before the MVR recording began, as Tang failed to establish that would be the proper remedy, had the court found a discovery violation.

III. DENIED. The Lewes police officer had authority to pursue Tang outside the jurisdiction of Lewes both under Section 1911 and because he was in fresh pursuit. The Superior Court did not abuse its discretion in finding that the officer had reasonable articulable suspicion to stop Tang's vehicle and, later, probable cause to arrest Tang.

IV. DENIED. The Superior Court did not err in admitting the Intoxilyzer 9000 results even though the instrument does not have a manufacturer-created manual; the standard for admissibility is not the existence of a manual. Tang failed to establish any basis for his belief that the instrument did not operate properly or was not operated by a qualified officer. His remaining

arguments against suppression of the Intoxilyzer results were affirmatively waived below in deference to the pending New Castle County case; therefore, they were not adequately presented below and this Court need not consider them.

STATEMENT OF FACTS

Suppression Hearing

On May 14, 2025, the Superior Court held a hearing on Tang's February 18, 2025, motions to suppress the evidence in this case, arguing that the officer: (1) did not have reasonable articulable suspicion to stop Tang's vehicle; and (2) did not have probable cause to arrest Tang. (DI 22-23, 29, 35; Aii-iii). The Superior Court determined that Tang waived his right to be present at the hearing by failing to appear. (A4-15).

Seargeant Jonathan Moyer of the Lewes Police Department testified that, on May 17, 2024, he was assigned to patrol, meaning he would handle incoming complaints and conduct traffic enforcement within the City of Lewes. (A16-18). At approximately 11:30 p.m., he was on patrol in a marked vehicle, parked in the parking lot of the Rite Aid on Savannah Road in Lewes.[4] (A19-20, 28). Traffic was light at the time, and he observed a car traveling westbound on Savannah Road with no headlights. (A20, 31). He pulled out behind the vehicle, and the driver activated the vehicle headlights. (A21, 32, 34).

As Sgt. Moyer followed the vehicle, he noted it weaved within its lane,

[4] The Rite Aid parking lot is within the jurisdiction of Lewes, which extends another .5 to .75 miles west on Savannah Road. (A31, 33).

touched the fog line and the passenger-side wheels crossed the fog line.[5] (A21, 26, 33-36). The vehicle approached another car riding in the same lane, following it at a relatively close distance, and applied the brakes multiple times as if it was having trouble maintaining speed. (A22, 27, 41-42). The vehicle then crossed the center line with both driver's side wheels. (A22, 27). There was a truck in the oncoming lane, which made a left turn across the road. (A43). Sgt. Moyer activated his emergency lights to conduct a traffic stop. (A42).

The vehicle in front of the subject car pulled over, but the subject car continued travelling about 100 yards. (A22, 27). Sgt. Moyer used his horn, and, noticing no response from the vehicle, turned on his siren. (A22, 27). The vehicle applied its brakes and ultimately pulled over in the turn lane near Roadster's Liquors. (A22-23).

Sgt. Moyer did not manually activate his MVR.[6] (A44). The motor vehicle recording ("MVR") activated when Sgt. Moyer turned on his emergency equipment. (A23). The MVR captures video for 30 seconds prior to activation.

[5] These events are not captured on the MVR. (A37). The officer testified that he followed the car after witnessing the first two driving infractions because he wanted "to determine whether there were other issues going on." (A39-40, 44).

[6] Sgt. Moyer testified that the MVR activates when one of three things happens: (1) his vehicle goes over a selected speed, such as 75 mph; (2) he manually activates it; and (3) when he activates his emergency equipment. (A29). In any of these scenarios, the MVR captures video of 30 seconds before the MVR is activated. (A29-30).

(A23). The MVR was played at the hearing. (St. Ex. 1; A24-28).

The Superior Court first heard argument on whether the officer had reasonable articulable suspicion (RAS) to stop Tang's vehicle, then went on to hear evidence of what occurred after the stop, to then address whether there was probable cause to arrest Tang. (A24).

With respect to reasonable articulable suspicion for the stop, the State argued that Sgt. Moyer did not initially turn on his lights, activating the MVR, to "mak[e] sure that there was a reason to even bother with the video before he activated it." The State argued that the initial failure to use headlights, crossing the fog line, following the second car closely and braking repeatedly, crossing the center line established reasonable articulable suspicion for the officer to stop Tang. (A45). Defense counsel argued that the officer purposely waited until he was outside the jurisdiction of Lewes to turn on the MVR, losing the alleged recording of the initial period in which the officer viewed and followed Tang's vehicle. (A46). Defense counsel argued that crossing the center yellow line was not an issue because it was a turn lane, and no other vehicles were present (according to defense counsel).[7] (A47). Defense counsel argued that the officer did not have jurisdiction to stop Tang for a traffic violation outside Lewes' town limits. (A47-

[7] The trial judge injected, "It looked unsafe to me. . . . There was a truck that was pulling out and making a left-hand turn . . . right there." A49.

48).

The Superior Court noted that defense counsel: (1) had not raised a jurisdiction issue in his motions to suppress; (2) cited no case law to establish that *Deberry*[8] or *Lolly*[9] would apply to suppress evidence at a suppression hearing or otherwise before a judge rather than a jury. (A48, 52). The Superior Court found that the MVR recording did not capture the initial time period that the officer viewed and followed Tang and declined to apply *Deberry* or *Lolly*. (A51). The court reasoned that the recording was not captured "because the officer did not turn on the MVR until after the 30 seconds. . .. And in *Lolly* and *Deberry*, . . . the jury is given an instruction . . . what the evidence can be used for" and defense counsel cited no authority for applying *Lolly* or *Deberry* to a suppression hearing or a judge trial. (A52-54). Defense counsel argued that the MVR evidence observed within the jurisdictional limits of Lewes "would not be enough to stop this vehicle." (A54). The Superior Court found the facts established reasonable articulable suspicion:

> In determining whether reasonable suspicion existed, the court looks at the totality of the circumstances as viewed through the eyes of the reasonable trained police officer in the same or similar circumstances, combining objective facts with such officer's subjective interpretation. This officer testified he saw his car. He was driving down the road. It didn't have his lights on.

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[8] *Deberry v. State*, 457 A.2d 744 (Del. 1983).

[9] *Lolly v. State*, 611 A.2d 956, 960 (Del. 1992).

> Officer said he's seen that before, but he decided he better follow it, make sure everything's fine. Person turns their lights on. So he has . . . a right to stop the car because of the lights weren't on, but wanted to make sure. . . .
>
> The . . . officer testifies to this, but if there was no issue, probably seemed like he was just going to let the person go on about his business. Starts following the car. The car is weaving in the lane. I understand the case law with regards to weaving. . . . [D]ecides to turn his lights on.
>
> The officer testified, and although he couldn't give the speed or exactly what the driver was doing in front of him, the officer testified it concerned him that this person was riding on the bumper of the car in front of him and having to tap its brakes.
>
> So . . . it concerned the officer that he was not able to control his car in [a] safe distance behind the car in front of him. Right after that, the car . . . is fully in the other lane crossing double solid yellow lines.
>
> And although you say it didn't look scary, it looked pretty scary to me. Turns his siren on. The car in front immediately pulls over. Defendant's car continues on . . . . even further and [the officer] hits the horn. Then [the officer] has to hit the siren to get [defendant] to pull over. All of those things added together are clear, reasonable, articulable suspicion for this officer to stop the defendant.

(A55-56).

The Superior Court then heard testimony about the motor vehicle stop, additional facts to determine whether the officer had probable cause to arrest Tang. (A56). Sgt. Moyer testified that he approached Tang's vehicle and, when he was within three feet of Tang, noticed a strong odor of alcohol and Tang's "lethargic slurred speech." (A57-58). The officer asked Tang if he had had anything to drink that evening, and Tang told him he had two beers after arriving at Irish Eyes at about 10 p.m. (A59). The officer had Tang exit the vehicle, moved him to the side

of the road and continued with the pre-exit tests—alphabet and counting.[10] (A57). Tang completed both of those tests accurately, although he was very slow and methodical. (A60-61). Tang was cooperative, but continued to smell of alcohol and appear sleepy and lethargic and slur his speech. (A61). The officer performed the HGN test and then the walk and turn. (A61). Tang showed indications during the walk and turn, including raising his arms and failing to touch his heel to his toe on a few steps. (A62). Finally, the officer had Tang perform the one-legged stand. (A63). Tang's performance on that test was "piss poor," according to the officer. (A64). Tang touched his raised foot to the ground after only five seconds, was struggling to keep his arms at his side, and swayed during the test. (A64). His foot touched twice during the test. (A83). Tang did not complete the test as instructed. (A64). Based on what the officer had observed, the officer believed that Tang was under the influence of alcohol. (A65).

The officer then used another officer's PBT to conduct a preliminary roadside test. (A65). The State admitted it had not provided the PBT log to defense counsel in discovery, and the Superior Court did not allow those results to be entered into evidence. (A67-69). Video from the officer's body-worn camera

[10] Tang later testified that they were stopped in a turn lane on a road where cars travel at a higher rate of speed than he is accustomed. (A72). Also, with the odor of alcohol, the officer likes to separate the individual from the car, to see if he continues to smell alcohol on the individual. (A72).

(BWC) was played at the hearing. (St. Exs. 1 & 2; A24-28, 70). It showed that the officer asked Tang about any medical issues, including with his knees or legs, before conducting the post-exit tests. (A81-82).

The State argued that the officer had probable cause to arrest Tang based on the erratic driving, the odor of alcohol even after Tang exited the vehicle, Tang's admission to drinking two or three drinks at Irish Eyes in a period of just over an hour without much to eat, slurred speech, slowness in responding, awkwardness with the officer, and failure of the walk and turn and one legged stand field sobriety tests. (A78).

Defense counsel argued again that Tang's driving did not provide enough grounds to establish RAS for the stop, and that there was not probable cause to arrest Tang. Counsel argued that the pre-exit tests were improperly performed outside the car and the officer's claim it was for safety reasons was not valid. (A79). Defense counsel argued that Tang passed the two pre-exit tests. (A79).

At the conclusion of the hearing, the Superior Court reserved decision on the probable cause question. (A84). The Superior Court issued its decision two days later, on May 16, 2025, finding probable cause and denying the motions to suppress. DI 36. (Aiv).

Trial

The parties stipulated that the evidence that was produced during the suppression hearing would be used at trial. (A130-31). The State, however, still had to establish a foundation to admit the Intoxilyzer results. (A131).

The State called Sgt. Moyer of the Lewes Police Department as its sole witness. (A131). Sgt. Moyer picked up his testimony from the point at the conclusion of the field tests, by which time he had formed his opinion that Tang was driving under the influence. (A132-33). Sgt. Moyer testified that Tang was "placed under arrest and transported from the scene to Delaware State Police Troop 7. His vehicle remained on scene while the other officer contacted a tow truck to have it removed." (A133). At the troop, he conducted the breath test on Tang using the State-issued Intoxilyzer 9000. (A133). The officer explained how the instrument works:

> So with the Intoxilyzer 9000, you initially have to enter into the system, warm it up, enter into the system. It puts you into a cue. The machine will only allow you to wait 20 minutes prior to allowing you to go any further. Once the 20 minutes is up, the machine will allow you to enter in all the information in regards to [the subject's] basic information: driver's license, sex, age, state of license, whether they were involved in a crash, or if they had left an establishment at that point.
>
> The machine proceeds to go through its designated calibrations and checks. Once the machine clears, it will initially prompt you to conduct a breath sample, which you have a three-minute window in order the conduct that sample. The machine will tell you whether or not the individual provided a proper sample or not, and then it will proceed to give you the results, or it will create the results given to

> you at that point.
>
> The machine then goes into a second sample, which Mr. Tang did agree to. The second sample was provided. Again, it goes through the whole calibration, clearing, checking, three-minute sample, and then it provides results at that point.

(A133-34). Sgt. Moyer was a certified operator of the Intoxilyzer 9000 at the time of this test. (A134). He attended training in November 2023 at the Crime Lab. (A134, 145). His certification was entered into evidence as State Exhibit 1, without objection. (A135). Sgt. Moyer explained the training he underwent to become a certified operator:

> The training was approximately a half-day training in which we were presented a PowerPoint slide and explained how to operate the machine. towards the end of the class, we were required to operate the machine to demo that we know how to use it.

(A136). Sgt. Moyer testified that the machine he used had been certified and calibrated by the State Chemist, which is typically done once monthly. (A136-37). This machine was calibrated on April 25, 2024, Tang was tested on May 17, 2024, and the machine was calibrated again on June 6, 2024. (A160-61). The certifications were entered into evidence as State's Exhibits 2 and 3, without objection. (A137-41; St. Exs. 2 & 3).

Sgt. Moyer testified that he conducted the 20-minute deprivation period, and that the machine will not allow a test prior to the 20-minute wait. (A143). Sgt. Moyer confirmed that Tang did not have dentures and observed there was nothing in Tang's mouth before the 20-minutes began or during the 20 minutes. (A143).

At the conclusion of the 20 minutes, Tang entered his information into the machine. (A143-44).

At this point, defense counsel conducted a voir dire of Sgt. Moyer. (A145-52). He confirmed the machine did not have a manual, unlike the Intoxilyzer 5000, the previous version. (A147-48). He confirmed there was a guide or list of steps to use the machine. (A147). He explained the training class in more detail. (A149). He confirmed there is no effective date on his operator card, and he is not aware, to date, of any re-certification process that will be required. (A150). The materials used in the training course, to his knowledge, were created by officials within the State, not by the manufacturer. (A151). Sgt. Moyer testified that all patrol officers with the Lewes Police Department were certified on the machine over a three-day period. (A153-54).

Sgt. Moyer testified that when he used the Intoxilyzer 9000 with Tang, he had forgotten his card and used Officer Menoche's card to get the machine going.[11] (A154-55, 162). Officer Menoche is another officer with the Lewes Police Department. (A161). Sgt. Moyer then testified regarding the process he underwent to utilize the Intoxilyzer 9000 to obtain Tang's results, including that they indicate the operator was Officer Menoche. (A157-59). He testified that

[11] On the form produced by the machine, it lists Officer Menoche's "certification date" as June 30, 2026. (A162). It appears this is the expiration date of Officer Menoche's certification, as the date remains in the future.

Tang's first result was .166 and the second result, performed after an "air blank," or diagnostic test, "which it passed," and a two-minute wait, was .162. (A158). The officer testified that "[t]he result is based on the lowest of the two samples." (A158; St. Ex. 4). As of the date of trial, this was the only Intoxilyzer 9000 test Sgt. Moyer had carried out, other than during training. (A166).

Over defense counsel's objections (discussed more fully below) the court admitted the Intoxilyzer 9000 results into evidence. (A168-77). Sgt. Moyer then testified that the legal limit in Delaware for blood alcohol is .08, and Tang's results were twice the legal limit. (A178). Tang presented no witnesses on his behalf. (A180). The Superior Court summarized the evidence, including that Tang was driving without headlights, and found Tang guilty of Driving Under the Influence and failure to have his headlights on. (A180-83). The State then presented certified driving records of a DUI First Offender's Program dated September 25, 2009 and a disposition of Reckless Driving-Alcohol-Related in the Court of Common Pleas on March 26, 2014. (A182; St. Exs. 5 & 6).

I. THE SUPERIOR COURT DID NOT ERR IN FINDING THAT THE RECORDING AT ISSUE DID NOT EXIST; THEREFORE, IT NEED NOT BE DISCLOSED AND DEFENDANT FAILED TO ESTABLISH A BASIS TO SUPPRESS TESTIMONY RELATED TO THE SAME FACTS. THE SUPERIOR COURT WAS CORRECT THAT THE OFFICER HAD REASONABLE ARTICULABLE SUSPICION TO STOP TANG AND PROBABLE CAUSE TO ARREST HIM.[12]

Questions Presented

Whether the Superior Court erred in finding that there was no recording of the traffic stop for the time from when the officer first saw Tang's vehicle until the recording triggered by the officer activating his patrol vehicle's lights. Whether *Lolly* or *Deberry* stand for the premise that all evidence related to alleged missing evidence should be suppressed, rather than a lesser remedy. Whether, in the case of alleged missing evidence, the remedy of suppression applies at a suppression hearing or a bench trial. Whether the Lewes police officer had authority to arrest Tang for DUI pursuant to Section 1911. Whether the Lewes police officer was in fresh pursuit of Tang and, therefore, had authority to pursue him outside the jurisdiction of Lewes in response to a traffic violation or other crime pursuant to Section 1935 of Title 11. Whether the officer had reasonable articulable to stop Tang and probable cause to arrest him.

[12] This argument addresses Tang's first three claims.

Scope and Standards of Review

"This Court reviews a denial of a motion to suppress for an abuse of discretion. Factual findings are reviewed 'for whether the trial judge abused his or her discretion in determining whether sufficient evidence supported the findings and whether those findings were clearly erroneous.'"[13] "To the extent the trial judge's decision is based on factual findings, we review for whether the trial judge abused his or her discretion in determining whether there was sufficient evidence to support the findings and whether those findings were clearly erroneous."[14] "Generally, this Court reviews a trial court's evidentiary rulings for an abuse of discretion."[15] "Where the underlying facts are not in dispute, a finding of probable cause to arrest for driving under the influence constitutes a legal determination that is subject to *de novo* review."[16] Finally, in determining whether reasonable articulable suspicion ("RAS") exists, "objective facts are viewed through the lens of a reasonable, trained police officer," the finding "depends on the totality of the circumstances," and the "reviewing court should 'appropriately recognize certain

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[13] *Rybicki v. State*, 119 A.3d 663, 670 (Del. 2015) (quoting *Miller v. State*, 4 A.3d 371, 373 (Del. 2010)).

[14] *Lopez-Vazquez v. State*, 956 A.2d 1280, 1285 (Del. 2008).

[15] *Rybicki* 119 A.3d at 672.

[16] *Id.* at 670 (citing *Lopez–Vazquez v. State,* 956 A.2d 1280, 1284–85 (Del. 2008); *State v. Maxwell,* 624 A.2d 926, 928 (Del. 1993)).

driving behaviors as sound indicial of drunk driving,'" not "separate out each separate episode," but "must review the events as a whole." [17]

Argument

Tang's first three arguments are intertwined. Tang argues: (1) the Superior Court erred in its factual finding that there was no MVR recording for the time period prior to the MVR recording produced by the State (Argument I); (2) the proper remedy for the alleged "missing" MVR recording was to suppress all evidence, including the officer's testimony about what happened during that time (Argument II); and, (3) the Superior Court erred in finding reasonable articulable suspicion to stop Tang's vehicle based on that evidence and because the officer's observations of Tang's driving occurred outside of Lewes' jurisdiction (Arguments II and III). These arguments have no merit because: (1) municipal police officers have jurisdiction to arrest individuals outside their jurisdiction for driving under the influence pursuant to Section 1911, which extends DUI jurisdiction statewide, and also when they are in fresh pursuit outside of their jurisdiction, pursuant to Section 1935 of Title 11 (Argument III); (2) the Superior Court did not abuse its discretion in finding that no recording was created for the period prior to the time triggered by the officer turning on his MVR (Argument I); and (3) the Superior

[17] *State v. Richardson*, 2018 WL 11683649, *6 (Del. Super. Sept. 21, 2018) (quoting *West v. State*, 143 A.3d 712-17 (Del. 2016)) (additional citations omitted).

Court correctly found that police did not have a duty to preserve a recording Tang failed to establish existed (Argument II), and that suppression of all evidence related to the time period of that alleged "missing" recording would neither be the sole nor the proper remedy.

A. The Lewes Police Officer Had Jurisdiction to Arrest Tang Outside the City of Lewes.

Tang argues that pursuant to Section 1911 of Title 11, the Lewes police officer did not have authority to act outside his jurisdiction unless Tang committed or attempted to commit a crime which creates a substantial risk of physical injury or death or is violating Section 4177 of Title 21. *See* Op. Br. at 31-32. Tang argues that, as a result, evidence of impairment in Tang's driving outside Lewes' City limits should be suppressed in determining whether the officer had RAS to stop Tang. Finally, Tang argues that even if his erratic driving outside the Lewes city limits is considered, the officer lacked RAS to stop Tang. These arguments fail for two main reasons: (1) the Lewes officer had jurisdiction both under Section 1911 and pursuant to Section 1935, the fresh pursuit statute; and (2) the Superior Court did not abuse its discretion in finding RAS to stop Tang.

Tang raised the jurisdiction argument for the first time during the suppression hearing. (A46). When the Superior Court correctly noted that Tang failed to raise jurisdiction in his motions to suppress, Tang argued that the jurisdictional argument cannot be waived. (A48). Even if Tang did not waive the

jurisdiction issue, his argument fails.

Tang misconstrues Section 1911 to argue that the Lewes police officer did not have jurisdiction to make an arrest outside the town limits of Lewes. Not only does 1911 allow this arrest, but it expressly provides for it. Section 1911(c) provides that "[a]n 'on-duty' police officer may *arrest* upon view and without a warrant at any location within the State any person when *probable cause* exists to believe the person is committing . . . any crime which creates a substantial risk of death or serious personal injury… or which constitutes a violation of § 4177 of Title 21."[18] Section 4177 prohibits "Driving a vehicle while under the influence or with a prohibited alcohol or drug content."[19] In *State v. Davis*, the Superior Court addressed the application of Section 1911(c) and noted "the legislative intent to expand rather than restrict the authority of Delaware police officers," and explained that it "confers statewide authority on any 'police officer,' . . . to make a warrantless arrest for the designated offenses if the offense occurs within the officer's presence and the officer is 'on-duty' even when outside the officer's jurisdiction."[20] The officer had RAS to stop Tang, and only needed probable cause for DUI to arrest Tang. Tang remained in a continuous course of DUI conduct while he continued to operate his vehicle, regardless of jurisdiction. Tang violated

[18] 11 *Del. C.* § 1911.

[19] 11 *Del. C.* § 4177.

[20] *State v. Davis*, 1993 WL 54540, *2 (Del. Super. Ct. Jan. 29, 1993).

the motor vehicle code by operating his vehicle without headlights[21] and went on to commit additional traffic violations, including following too closely, crossing the center line and crossing the fog line.[22] The officer observed these traffic violations, suspected Tang of driving under the influence, conducted a stop, observed additional indicia of DUI and arrested Tang. In *Bease v. State*, where the officer observed defendant's improper lane change, this Court found:

> It is undisputed that there was both a reasonable articulable suspicion to stop [defendant's] motor vehicle and probable cause to issue a traffic citation to [defendant] for the improper lane change. Not only was the initial stop of [defendant's] motor vehicle . . . "justified at its inception by reasonable suspicion of criminal activity," but the police officer's approach of the motor vehicle and inquiry of the operator was reasonably related to the purpose of the motor vehicle stop.[23]

The officer had probable cause for the stop and the arrest.[24]

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[21] 21 *Del. C.* § 4331(a) (When Lighted Lamps are Required) ("Every vehicle upon a highway within this State at any time from sunset to sunrise . . . shall display lighted lamps.") This is also indicia of a violation of Section 4176 of Title 21, which prohibits careless or inattentive driving.

[22] *See* 21 *Del. C.* § 4123 (Following Too Closely), 21 *Del. C.* § 4122 (Driving on Roadways Laned for Traffic) and the definitions of "Highway" and "Roadway" in Sections 101(29) and 101(71) of Title 21.

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

[24] *See Bease*, 884 A.2d at 498-99 (holding the Superior Court's finding of probable cause was "consistent with this Court's prior precedent" where the Superior Court considered defendant's "abrupt driving movement, the odor of alcohol on his breath, his classy and bloodshot eyes and his admission to having consumed beer or chardonnay the night before.") (collecting cases); *State v Richardson*, 2018 WL 11683649, *6 (Del. Super. Ct. Sept. 21, 2018) (reversing lower court, finding the lower court "substituted [its] own view of the objective evidence for that of a police officer's[, where] the videotape and the officer's testimony provided evidence of a number of specific and objective driving events, or cues, which led

In addition to Section 1911(c), the fresh pursuit statute, Section 1935, also allowed for the Lewes police officer to pursue Tang outside the city limits. "Fresh pursuit" is defined in Section 1931:

> "Fresh pursuit" includes fresh pursuit as defined by the common law, and also the pursuit of a person who has committed a felony or a misdemeanor or a violation of the Motor Vehicle Code of this State or who is reasonably suspected of having committed a felony or a misdemeanor or a violation of the Motor Vehicle Code of this State, and also includes the pursuit of a person suspected of having committed a supposed felony or misdemeanor or violation of the Motor Vehicle Code of the State though no violation of the law has actually been committed, if there is reasonable grounds for believing that a violation of the law has been committed; however, fresh pursuit as used in this subchapter does not necessarily imply instant pursuit, but pursuit without unreasonable delay.[25]

Accordingly, Section 1935 provides:

> Any peace officer of a duly organized county, municipal, town, interstate bridge or university peace unit or a law-enforcement officer of the Department of Natural Resources and Environmental Control, but not county sheriffs or their deputies, may carry out fresh pursuit of any person anywhere within this State, regardless of the original territorial jurisdiction of such officer, in order to arrest such person pursued, when there is reasonable grounds to suspect that a felony, misdemeanor, or violation of the Motor Vehicle Code has been committed in this State by such person.[26]

In *State v. Cochran*, the Delaware Supreme Court applied Section 1935 in a DUI

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the officer, based upon his training and experience, to suspect appellee was impaired.").

[25] 11 *Del. C.* § 1931.

[26] 11 *Del. C.* § 1935.

case, determining:

> [T]he fresh pursuit statute should be construed as follows:
>
> (1) Once a peace officer has probable cause to believe that an offense of the type specified has been committed within his territorial jurisdiction he may invoke the statute and engage in fresh pursuit.
> (2) To make an arrest outside the officer's territorial jurisdiction the pursuit must be immediate and continuous.
> (3) The pursuing officer may arrest for any violation which occurs during the pursuit regardless of the place of the offense.
> (4) The validity of the pursuit and any resulting arrest are not dependent upon a subsequent conviction for an offense which occurred within the officer's territorial jurisdiction.[27]

In *Cochran*, this Court determined that the standards for an arrest in fresh pursuit are not "much higher," contrary to what Tang argues.[28] Op Br. at 36 ("[T]he standard for a municipal officer to initiate a seizure outside of their jurisdiction is much higher."). Tang violated the motor vehicle code by operating his vehicle without his headlights in violation of 21 *Del. C.* § 4331.[29] "A traffic violation creates probable cause for a traffic stop."[30] That triggered Sgt. Moyer's pursuit of Tang here while he was still within Lewes' town limits. The pursuit continued

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[27] *State v. Cochran*, 372 A.2d 193, 196 (Del. 1977).

[28] *Id.* at 196 ("We conclude that the Trial Court erroneously construed § 1935 in that it required the State to meet a standard higher than probable cause for arrest and/or the Court required proof beyond a reasonable doubt of an offense committed within the pursuing officer's territorial jurisdiction.").

[29] Tang also arguably violated Section 4176 of Title 21, which prohibits inattentive driving.

[30] *State v. Tann*, 2010 WL 4060304, *2 (Del. Super. Ct. Sept. 23, 2010) (citing *State v. Drummond*, 2000 WL 703250, at *2 (Del. Super. Ct. Apr. 25, 2000)).

while the officer witnessed additional traffic violations, including following too closely, crossing the center line and crossing the fog line.[31] The officer then conducted a traffic stop, and determined that Tang appeared to be operating his vehicle under the influence of alcohol. All four requirements of the fresh pursuit statute were met. In *State of Vermont v. Griffin*, the Supreme Court of Vermont interpreted its "Fresh Pursuit" statute, Section 4(12) of Title 23 of the Vermont Code, which is worded similarly to Delaware's statute:

> "'Fresh pursuit' . . . includes fresh pursuit as defined by the common law, and also the pursuit of a suspected violator of the criminal laws or other laws of this state, for which he is, or might be, subject to arrest, by an enforcement officer. Fresh pursuit . . . is not necessarily instant pursuit, but pursuit without unreasonable delay."[32]

The Vermont court found that "[p]olice officers are vested with the authority to pursue a suspected violator under [the fresh pursuit statute], and probable cause for arrest is not required when the pursuit begins. The defendant's operation of the vehicle in [the officer's jurisdiction] was sufficient to raise a suspicion in the officer's mind, and the pursuit into the adjoining town was authorized."[33] Other jurisdictions have reached similar conclusions regarding fresh pursuit of suspected

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[31] *See* 21 *Del. C.* § 4123 (Following Too Closely), 21 *Del. C.* § 4122 (Driving on Roadways Laned for Traffic) and the definitions of "Highway" and "Roadway" in Section 101(29) and 101(71) of Title 21.

[32] *State v. Griffin*, 565 A.2d 1340, 1341 (Vt. 1989) (quoting 23 V.S.A. § 4(12)).

[33] *Id.*

drunk drivers.[34] Here, Sgt. Moyer had statutory authority to pursue and arrest Tang under Delaware's fresh pursuit statute.

The Superior Court did not err in concluding that the officer had RAS to stop Tang. In fact, the officer had probable cause to arrest Tang as soon as he witnessed the Tang driving without headlights, in violation of 21 *Del. C.* § 4331. "Under 11 *Del. C.* § 1904(a)(1) and 21 *Del. C.* § 701(a)(1), officers are permitted to make a warrantless arrest for 'violations of this title committed in their presence.' . . . Officers have the authority to make warrantless arrests *for traffic violations* under both Delaware statutory law and the Fourth Amendment."[35] Sgt. Moyer testified that Tang operated his vehicle without headlights. Although that gave the officer sufficient probable cause to arrest Tang, the officer followed him and witnessed several more traffic infractions.

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[34] *See Commonwealth v. Magazu*, 722 N.E.2d 488, 468 (Mass. App. Ct. 2000) (finding that the police officer "did not activate his siren or lights or attempt to overtake or stop [defendant], we . . . conclude that he was in 'pursuit,' within the meaning of [*Mass. Gen. Laws Ann.* Ch. 41, § 98A ("Arrest on fresh and continued pursuit")] at the time of the defendant's arrest [in another jurisdiction]."); *City of Overland Park v. Zabel*, 95 P.3d 124, 126-27 (Kan. Ct. App. 2004) (finding jurisdiction over DUI offense where officer first observed a traffic violation and proceeded in fresh pursuit to another jurisdiction).

[35] *Caldwell v. State*, 780 A.2d 1037, 1050 n.33 (Del. 2001). "Title 21, § 701 of the Delaware Code permits an officer, after observing a vehicle code violation, to make an arrest instead of issuing a citation." *State v. Drummond*, 2000 WL 703250, *2 (Del. Super. Apr. 25, 2000) (citing *State v. Walker*, 1991 WL 53385 (Del. Super. March 18, 1991)).

B. When The Officer Activated His Lights, His MVR Captured Video That Occurred 30 Seconds Prior. The Superior Court Did Not Err in Finding That No Video Prior to Those Thirty Seconds Was Captured.

The Superior Court did not abuse its discretion in finding that no recording existed prior to that triggered when the officer activated his lights. Tang asserts additional "recording" must have occurred based on the Lewes police officer's general statement that, when his MVR is triggered, it captures video from 30 seconds prior to being triggered, and that the "MVR is constantly recording." Op. Br. at 18. Tang has failed to establish that video footage from the questioned time period was recorded. Although the officer's understanding that the MVR captures the 30 seconds prior to being triggered is an appropriate lay description of what happens to data collected by the MVR, the statement was not made in the context of the officer being qualified as an expert on the MVR, its capabilities and whether and how it writes, stores and retains data. At the suppression hearing, Tang could have presented facts to attempt to establish his assertion, including, for example, an expert to testify about the MVR to lay a proper foundation. Tang did not do so, and thus failed to establish that there was any recording that police failed to preserve.

In addition, the officer had no duty to record a video of Tang's traffic violations. In *State v. Wise*, the Superior Court found:

The State was under no obligation to make a video record of the

> traffic stop and, by the officer's testimony, did not appear to have made an MVR which would have given rise to a duty to preserve.
> . . .
> While an MVR of the incident, if it existed, would have been subject to disclosure, the police had no duty to create an MVR. The officer did not breach any duty by failing to record the interaction simply because he had the tools to make a recording. While it is unclear whether he omitted to record through inadvertence, equipment malfunction, or simply because he viewed the interaction as routine, it is clear that his failure to make the recording was not a breach of any duty.[36]

The Superior Court reasoned, "[I]t cannot be read to impose a duty to affirmatively create evidence by making an MVR of every citizen interaction that occurs near a patrol car."[37] In *DeLoach v. State*, the MVR evidence presented contained no visual footage and only ambient road noise, and police were unable to explain why.[38] The Superior Court held, "First, there is no evidence that the State breached any duty to preserve a video recording of the portable breathalyzer tests when it inadvertently failed to collect such a recording in the first place."[39] Tang has failed to establish that the officer had a duty to record the alleged missing footage.

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[36] *State v. Wise*, 2016 WL7468058, *6 (Del. Super. Ct. Dec. 22, 2028)).

[37] *Id.*

[38] *DeLoach v. State*, 2012 WL 2948188, at *2 (Del. Super. Ct. July 16, 2012).

[39] *Id.* at *4.

C. The Superior Court Correctly Held that Tang Failed to Establish that: (1) *Deberry* or *Lolly* Would Require Suppression of All Evidence that Would Have Been Seen on a Video that Police Had No Duty to Record; and (2) the Suppression Remedy Would Apply at a Suppression Hearing or a Bench Trial.

Tang argues that *Deberry* and *Lolly* applied to evidence that would have appeared on a recording the officer started as soon as he saw the vehicle, and that the appropriate remedy under those cases is to suppress any evidence of the facts that would have been covered by the allegedly "missing" video. Opening Br. at 26, 31-35.[40] Tang's argument fails because: (1) neither *Deberry* nor *Lolly* provide for suppression of all related evidence as a remedy; and (2) Tang failed to establish that either case applied to suppress evidence at a suppression hearing or during a bench trial. In *Deberry*, the Court explained:

> The last step in [the] analysis is whether the State has breached its duty to preserve evidence, and if so, what effect such breach has on this conviction. In making that analysis, [the Court drew] a balance between the nature of the state's conduct and the degree of prejudice to the accused. The State must justify the conduct of the police or prosecutor, and the defendant must show how his defense was impaired by loss of the evidence. In general terms, the court should consider "(1) the degree of negligence or bad faith involved, (2) the importance of the lost evidence, and (3) the sufficiency of the other evidence adduced at the trial to sustain the conviction."[41]

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[40] Tang argues, *inter alia*, that the events that occurred prior to the MVR activation "should not have been considered in a Reasonable Articulable Suspicion analysis" and "the Trial court erred in considering the arresting officer's testimony reading the allege contents of the MVR footage." Op. Br. at 26, 29.

[41] *Deberry*, 457 A.2d at 752.

The remedy in *Deberry*, a rape case where the court attributed the defendant's lost clothing evidence to the State, was a stipulation on retrial that the lost evidence would not incriminate the defendant.[42] In *Lolly*, the Court addressed blood evidence the State did not collect from the scene of a burglary, and determined that the defendant was entitled to a jury "instruction which accords him a favorable inference based on the missing evidence."[43] Here, Tang seeks to suppress all evidence related to the alleged missing MVR footage, including the officer's testimony of what transpired. The Superior Court correctly denied Tang's argument:

> [I]t requires a fin[ding] that there should have been evidence that was taken by the authorities and wasn't, or was taken and lost. Here, it was never taken because the officer didn't turn the MVR on until after the 30 seconds. So I'm not fin[d]ing this is a Lolly or DeBerry. And in Lolly and DeBerry there then the jury is given an instruction . . . [about] what the evidence can be used for. This is a suppression hearing.
>
> ….[Y]ou cited no authority that it applies in suppression hearings and other type[s] of hearings that are not in front of a jury.

(A52). In *Arbolay v. State*, the Superior Court found "since there were no video recordings, there could be no *Deberry* violation for failing to preserve the non-existent recordings."[44] In *State v. Sapp*, the Superior Court rejected a similar argument, holding, "[t]he fact that Corporal Foraker did not make an MVR does

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[42] *Id.* at 754.

[43] *Lolly v. State*, 611 A2d. at 961.

[44] *Arbolay v. State*, 2020 WL 2770761, *2 (Del. Super. Ct. May 28, 2020).

not entitle [defendant] to have the evidence suppressed, because he had no duty to make an MVR in the first place."[45] Because Tang fails to establish that the video was recorded or recorded in retrievable form or that the State had a duty to record the entire pursuit, Tang's claim that the Superior Court erred in denying him a missing evidence instruction pursuant to *Deberry* and *Lolly* also fails.

[45] *State v. Sapp*, 2017 WL 57840, at *4 (Del. Super. Ct. Jan. 4, 2017).

II. THE SUPERIOR COURT DID NOT ERR IN ADMITTING THE INTOXILYZER RESULTS EVEN THOUGH THE MACHINE DOES NOT HAVE A MANUFACTUER-CREATED MANUAL.[46]

Question Presented

Whether the admission of the Intoxilyzer 9000 results is improper because there is no manual like that for the Intoxilyzer 5000 that describes how the machine functions.

Scope and Standards of Review

"Generally, this Court reviews a trial court's evidentiary rulings for an abuse of discretion."[47] Claims not raised below are waived unless consideration is required in the interests of justice.[48] Claims raised below that he has not addressed on appeal are deemed waived.[49]

Argument

Tang did not raise the issue of the lack of a manufacturer's manual for the Intoxilyzer 9000 as a basis to suppress Tang's breathalyzer test in his two motions to suppress, and in fact, did not raise the issue until after Tang's suppression hearing. Tang now argues on appeal not only that the Superior Court erred in denying his request to suppress the Intoxilyzer results based on the lack of manual,

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[46] This argument addresses Tang's Fourth Claim.

[47] *Rybicki v. State*, 119 A.3d 663, 672 (Del. 2015).

[48] Supr. Ct. R. 8; *Hardin v. State*, 844 A.2d 982, 984 (Del. 2004).

[49] *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993).

but also that the Intoxilyzer evidence should not have been admissible because the State failed to lay the proper foundation beyond the manual. The Superior Court effectively determined that the latter of these arguments was waived due to Tang's failure to timely raise the issue before trial. (A97) ("We're a little past the line of a motion in limine like having a full Judge Miller hearing, I'm going to tell you that."). At the May 23, 3025 office conference, defense counsel did not argue the elements of *Daubert.* The only issue Tang argued then and at trial was the lack of basis for admission of the test due to the nonexistence of a manufacturer's manual. Any expansion beyond that claim in his argument on appeal is not properly before the Court because it was not adequately raised below.[50]

A. Background

a. Pretrial

As discussed above, after the suppression hearing, defense counsel asked the Superior Court to compel the State to produce a manual for the Intoxilyzer 9000. (A111-12). At an office conference, the parties noted that a New Castle County court was considering the admissibility of the Intoxilyzer 9000, but the case was yet to be decided. (A92-93). In Tang's case, however, the court held that the time had passed for him to file a motion in limine. (A97).

Nonetheless, the court ordered the State to provide defense counsel with the

[50] Supr. Ct. R. 8.

filings in the New Castle County case. (A98-99). After reviewing those submissions, Tang requested suppression of the Intoxilyzer 9000 results, relying, without citing any caselaw, on the lack of a manufacturer-created manual, which the State maintained did not exist. (A113-14). The Superior Court denied Tang's request. (A107).

Defense counsel raised the issue again on the day of trial, arguing: (1) "the defense is entitled to documentation, manuals, other type of writings from CMI with regard to the Intoxilyzer 9000. The absence of which prevents any meaningful challenge, cross-examination, or otherwise questioning the result of that test;" and (2) "since it appears as though there is . . . a *Daubert Kumho Tire* analysis being performed in the Superior Court that . . . either the trial and/or the admission of the Intoxilyzer be delayed until that process has been complete." (A124-125).

In turn, the prosecutor confirmed she had inquired about the documentation defense counsel sought, and that the prosecutor involved in the New Castle County hearing and the State Chemist:

> both confirmed that the Intoxilyzer 9000 does not have a manual. It does have those operating sheets. [The State Chemist] did indicate that when the State chemists were trained on the machine there was a PowerPoint presentation that was running while they were being trained, but it was not a manual.
>
> The State Chemist would be willing to allow anyone to review those [PowerPoint slides] by appointment as long as both parties are present. . . . It was just a set of screens during the training that they

did. . . .

> And my understanding from when I spoke to both [the prosecutor involved in the hearing] and [the State Chemist] was that the Intoxilyzer 9000 can actually be modified from state to state to do a number of different types of procedures based upon the State law in that state. It could be modified for a 15-minute observation periods, 20 minutes, one breath test, two breath tests. There is a series of modifications that can be made. So a single manual for that machine would not apply to each state, and so . . . my understanding is that there [isn't] one.
>
> . . . . Again, I have forwarded to the defense an email that . . . contained the entirety of the brief and all of the exhibits that was part of that hearing on the *Brown* case in New Castle County before Judge Miller.

(A126-27). The State did not oppose a continuance and noted that it could be several months before the decision in *State v. Brown*, as the matter had been set for briefing. (A128).

The Superior Court denied the continuance request, finding:

> Well, I just don't see how we can just stall the entire docket for DUIs, and I'm not saying Judge Miller has made a decision. But in speaking with her, her explanation of the Intoxilyzer 9000 was it really just makes the process more simple. It does not allow the officer using the machine to go to the next step until the prior step is fully completed.
>
> And I'm looking at the attachment, the Intoxilyzer 9000 Exception Message Information Guide. If for some reason there is a problem with the machine or the sample, it will produce that message error. I haven't heard the evidence in this case whether there was any type of message error produced in this case.
>
> So I'm going to deny the continuance request, and having made the record, go forward.

(A128-29).

b. Trial

At trial, defense counsel opposed the admission of Tang's Intoxilyzer 9000 test results because, *inter alia*,[51] there was no testimony that anything from the manufacturer (a manual) had been utilized to train on the machine, and thus there was insufficient evidence about the training to allow the results to be presented. (A168-69). The State countered that it could not produce a manual that does not exist. (A173-74). The Superior Court permitted the results to be admitted into evidence as State's Exhibit 4:

> So the first argument about the training and we don't know everything about the training. I heard officer Moyer testify in detail about the training he received on the Intoxilyzer 9000 , how it was a step-by-step process, and again, I'm rejecting that argument. Simply because there's no manual, it doesn't make the machine unreliable or the training unreliable. There's no indication of that. . . .
>
> So with regards to argument one, I am not precluding the test result on that basis.
>
> ***
>
> And this officer, again, indicated he was trained on the use of this machine and used the machine, and the first result was .166, the second was .162. . . . [T]here was no evidence that the machine appeared to be improper or that any of the . . . exception message codes, were indicated by the Intoxilyzer 9000 on May 17th of 2024.
>
> So I am allowing the admission of . . . the test result.

(A175-77).

The only issue Tang presented fairly below and preserved on appeal is

[51] Tang's other arguments were based on Sgt. Moyer's lack of memory about whether the machine was calibrated in May 2024 and that he used another officer's certification card to perform the test. (*See* A170-73).

whether the Intoxilyzer 9000 test results for Tang should be excluded from evidence because he did not receive a copy of a manufacturer's manual for operating the machine. By the time Tang raised the issue, the deadline for filing a motion in limine in his case had passed. Tang instead tried to defer analysis under *Daubert* and *Kumho Tire* to the New Castle County case, asking the court to delay the trial until that determination was made: "I guess it's a *Daubert/Kumho Tire* analysis being performed in the Superior Court . . . either the trial and/or the admission of the Intoxilyzer be delayed until that process is complete." (A125). However, defense counsel did not seek to delay the trial so that he could engage experts to testify about the Intoxilyzer or otherwise independently address the issue, for example, by seeking to question the State Chemist, the manufacturer, or anyone, regarding how the machine works, in an attempt to disqualify the test results. Thus, Tang has waived those arguments and this Court need not consider them.[52]

The Superior Court did not abuse its discretion in finding that the absence of a manufacturer's manual "doesn't make the machine unreliable or the training unreliable." (A175). Tang has cited no authority that supports his position or counters the Superior Court's legal finding. This argument has no merit.

[52] *See King v. State*, 239 A.3d 707, 708 (Del. 1968) (explaining the difference between an affirmative waiver and the absence of an objection).

CONCLUSION

The judgment of the Superior Court should be affirmed.

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DATE: November 10, 2025

IN THE SUPREME COURT OF THE STATE OF DELAWARE

HENRY C. TANG, Defendant Below- Appellant, v. STATE OF DELAWARE, Plaintiff Below- Appellee.	)))))))))	No. 270, 2025 On Appeal from the Superior Court of the State of Delaware

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word.

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DATE: November 10, 2025

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