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Case Number 270,2025

IN THE SUPREME COURT OF THE STATE OF DELAWARE

HENRY C. TANG,	:	
Defendant Below,	:	**No. 270, 2025**
Appellant,	:	
	:	
v.	:	**Appeal from Sussex County**
	:	**Superior Court**
STATE OF DELAWARE,	:	
Plaintiff Below,	:	
Appellee.	:	

APPELLANT'S REPLY BRIEF

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Date: December 4, 2025

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ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING THAT A MOBILE VIDEO RECORDING DEPICTING THE ALLEGED TRAFFIC VIOLATIONS THAT OCCURRED WITHIN THE JURISDICIONAL LIMITS OF LEWES, DELAWARE DID NOT EXIST AND THEREFORE ERRED IN FINDING DEBERRY V. STATE DID NOT APPLY AND REASONABLE ARTICULABLE SUSPICION EXISTED.

A. Defense Counsel needed not to retain an expert witness to testify to the MVR's capabilities. Sergeant Moyer could properly testify as to his understanding of and experience with the MVR. The State failed to raise the issue before the Trial Court; therefore, it is deemed waived.

Sgt. Moyer was the State's one and only witness. On direct examination, the State laid the foundation for Sgt Moyer's understanding of and experience with the MVR, asking Sgt. Moyer if his patrol vehicle had an MVR, what specific type of MVR he had, and what the MVR does. (A23) On cross-examination, Sgt. Moyer testified 1.) his patrol vehicle was equipped with an MVR, 2.) he was trained on use of the MVR, and 3.) there are multiple ways in which the MVR begins preservation of a recording. (A28) These questions went unobjected to by the State. Defense Counsel delved further into Sgt. Moyer's knowledge of the MVR. Sgt. Moyer testified that the MVR is constantly recording, the purpose of such is to give objective proof of the reason for the seizure, and once preservation is initiated, the MVR will automatically preserve the recorded 30 seconds prior. (A29, 30) These questions also went unobjected to by the State.

The State asserts, for the first time on appeal that, Sgt. Moyer is unqualified to testify as to the MVR's capabilities and whether and how it writes, stores, and retains data. (Ans. Br. at 30) Yet, in the same paragraph, the State claims Sgt. Moyer's testimony regarding the MVR's capturing of the 30 seconds prior to preservation "is an appropriate lay description of what happens to data collected by the MVR." (Ans. Br. at 30) The State cannot have it both ways. The State cannot cherry-pick testimony it finds acceptable. Further, the state cannot raise the issue for the first time on appeal. The assertion that a police officer cannot testify as to the workings of an MVR, a piece of equipment police officers are trained on and use daily, is illogical.

Mr. Tang asserts expert witness testimony was not necessary, so long as the Court accepts the testimony from Sgt. Moyer as true and accurate.[1] If the Court does not accept the testimony from Sgt. Moyer as true and accurate, thereby requiring testimony from an expert witness, Mr. Tang asserts the Court also cannot hear testimony from Sgt. Moyer as to his understanding, training, and experience with the Intoxilyzer 9000. For purposes of a DUI conviction, once a person's resulting drug or alcohol concentration has been established, that result is deemed to be the "actual alcohol or drug concentration in the person's blood, breath, or

[1] *State v. Aklilu*, No. 1503017997, 2017 WL 66340 (Del. Com. Pl. Jan. 4, 2017).

urine without regard to any margin of error or tolerance factor inherent in such tests," thereby depriving Defense Counsel of any means of challenging the result.[2] It follows that if an officer training and experience is sufficient to admit Intoxilyzer results, it is sufficient to submit the MVR and explain how it works.

In addition, Mr. Tang's position is *not* that Sgt. Moyer had a duty to record the totality of any and all alleged traffic violations that may have been committed in his presence. Mr. Tang's position is that Sgt. Moyer had a duty to preserve the MVR recording depicting the totality of the alleged traffic violations alleged in Mr. Tang's case because it existed and would have been "material to the preparation of [Mr. Tang's] defense.[3] Mr. Tang's position is two-fold and rooted in the testimony of Sgt. Moyer. Sgt. Moyer testified 1.) his MVR was constantly recording, and 2.) aware that his MVR was constantly recording, he continued to follow Mr. Tang to, "collect the evidence," and decide "whether it was enough for anything as far as the traffic stop." (A29, 32, and 33) Therefore, when Sgt. Moyer initiated a seizure of Mr. Tang, the reason for the seizure was based upon the collection of evidence, i.e., all alleged traffic violations. Yet only some of the alleged traffic violations were preserved on MVR.

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[2] 21 *Del. C.* § 4177(g)

[3] *Deberry v. State*, 457 A.2d 752 (Del. 1983) *Cf. United States v. Bailleaux*, 685 F2d 1105 (9th Cir. 1982); *United States v. Felt*, 491 F.Supp 179 (D.D.C 1979)

The New Castle County Court of Common Pleas declined to suppress evidence obtained in connection with a DUI investigation pursuant to *Deberry*, holding the State did not have a duty to preserve "whatever temporary recording may have existed," referring to MVR footage that was not preserved due to the police officer's "conscious decision not to record the proceedings of the investigation."[4] The *Aklilu* Court reached a conclusion similar to the one the State requests this Court to reach, a lack of expert testimony regarding the inner workings of an MVR, begs the question of whether or not the recordings actually exist and therefore must be preserved.[5] While it is not clear what the "transient recordings" would have shown in *Aklilu*, it is clear that the unpreserved video would have been relevant and potentially indispensable to Mr. Tang's defense.

However, the New Castle County Court of Common Pleas seemed to answer their own question, stating "these temporary recordings are inherently transient, yet nevertheless *exist* in digital format."[6] The acknowledgement that the recordings *exist* is the answer to the relevant question at bar. "Where there is no duty to create, there is no violation of *Deberry* for failure to preserve that which was not created,

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[4] *State v. Aklilu*, No. 1503017997, 2017 WL 66340 (Del. Com. Pl. Jan. 4, 2017).
[5] *Id.* at WL 66340
[6] *Id.*

however, once evidence exists, it must be preserved only if there is a further duty of preservation.[7]

In the case at bar, pursuant to *Deberry v. State*, and the arguments made by Mr. Tang in his Opening Brief, there was a duty to preserve MVR footage that existed and, captured the only objective evidence of the reason for the seizure of Mr. Tang's vehicle.[8] Considering Sgt. Moyer's training and belief that the MVR is constantly recording, that the MVR will preserve the recorded 30-seconds prior to the initiation of preservation, and Sgt. Moyer's intent to "collect" evidence, Mr. Tang asserts, a recording did exist, Sgt. Moyer knew a recording existed, however, Sgt. Moyer failed to preserve said recording and that the recording would have been relevant because it would have shown the alleged traffic violations. (A29, 30, 32, 33, 44) Sgt. Moyer's failure to preserve the recording violated Mr. Tang's Fourth and Sixth Amendment rights.

Current Delaware law does not impose an affirmative duty on police officers to record all DUI investigations.[9] Mr. Tang understands the fear of, and does not wish to impose, a "duty to affirmatively create evidence by making an MVR of every citizen interaction that occurs near a patrol car" or "interpret precedent such

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[7] *Id. See also State v. Noonan*, 2007 WL 1218032, at *2 (Del. Com. Pl. Jan. 31, 2007).
[8] 457 A.2d 744 (Del. 1983).
[9] *DeLoach v. State*, 2012 WL 2948188, at *4 (Del. Super. Jul. 16, 2012).

as *Deberry* in a way "which would lead to unreasonable or absurd results."[10] It is submitted that the facts of the case at bar do not impose such a burden or interpretation.

Sgt. Moyer testified his MVR is constantly recording, providing a 30-second preview, and 2.) the purpose of the 30-second preview is to provide some objective proof of the reason for the stop of the vehicle. (A29, 30,) Therefore, Mr. Tang submits, the MVR's mere system design (constantly recording & ability to produce a 30-second preview) was created with the intention to ensure preservation of the totality of the objective evidence justifying intrusions onto citizen's 4th Amendment and Article 1 Section 6 protections.

The facts at bar illustrate the importance and necessity of complete MVR footage. Sgt. Moyer testified, if stopping someone for DUI, the goal is to show an individual struggling to maintain control of the vehicle, and "of themselves individually," an individual not having their lights on and weaving within the lane does not meet that goal. (A39) Sgt. Moyer testified, after allegedly observing the vehicle traveling without it's lights on, he made the decision to "collect" additional evidence and decide whether it was enough for anything as far as the traffic stop. (A32, 33) If Sgt. Moyer manually initiated preservation of the MVR footage

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[10] *State v. Wise*, 2016 WL 7468058 (Del. Super. Ct. Dec. 22, 2016); *State v. Aklilu*, No. 1503017997, 2017 WL 66340 (Del. Com. Pl. Jan. 4, 2017).

immediately following the alleged observation of the vehicle traveling without it's lights on, the totality of the footage would presumably have shown the vehicle traveling with lights out, the weaving within the lane, and the vehicle's cross of the fog line, the totality of the alleged infractions justifying a seizure of the vehicle. However, Sgt. Moyer's failure to preserve the only objective evidence of the alleged infractions prevented Mr. Tang from challenging or disputing the infractions in any meaningful way. (A44) All Sgt. Moyer had to do was push a button on the MVR system within 30 seconds of observing the vehicle allegedly traveling without its lights on. Such a simple requirement does not impose an unreasonable or unattainable burden on law enforcement. It must be restated that Sgt. Moyer's intent was to follow and collect additional evidence to justify the stop of Mr. Tang's vehicle.

B. The Trial Court erred in finding that either a missing evidence instruction created in *Deberry v. State* or suppression of all related evidence did not apply to Suppression Hearings and or Bench Trials.

Mr. Tang submits it is dangerous to adhere to the logic of the State and impermissibly shift the burden and therefore require a Defendant to prove the existence of evidence that is within the sole custody and control of the government. (Reply Brief P. 30) However, Mr. Tang submits he has established that MVR evidence, depicting the totality of the infractions allegedly justifying a seizure of

the vehicle, was created and not preserved, therefore either a missing evidence instruction or suppression of all related evidence was required.

The specific remedies provided in *Deberry* and *Lolly*, both jury trials, were an inference that the missing evidence would be exculpatory in nature, requiring a stipulation on retrial by the State that if the missing evidence were introduced it would not contain any incriminating evidence.[11] "That inference, once established by the trial judge's legal ruling of materiality, may not be further conditioned on the existence or non-existence of other facts in evidence."[12] However, Courts have utilized the *Deberry* test in settings outside of jury trials, including bench trials and suppression hearings, and have considered remedies outside of the specific remedies promulgated in *Deberry* and *Lolly.*[13] Therefore, Defense Counsel's

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[11] *Deberry v. State*, 457 A.2d 754 (Del. 1983).
[12] *Lolly v. State*, 611 A.2d 961 (Del. 1992).
[13] *State v. Aklilu*, No. 1503017997, 2017 WL 66340 (Del. Com. Pl. Jan. 4, 2017) (New Castle County Court of Common Pleas, during a suppression hearing, analyzed three grounds for suppression of evidence obtained as the result of a DUI investigation, one being the Defendant's assertion that the State was responsible for destroying or failing to preserve evidence in the form of the MVR. A full *Deberry* analysis was conducted.); *State v. Price*, 2009 WL 406785 (Del. Super. Ct. Feb. 4, 2009) (Kent County Superior Court, during oral arguments on Defendant's motion to dismiss arguing the State breached its duty to preserve the GSR evidence was a result of gross negligence and the only appropriate remedy was dismissal, after a full *Deberry* analysis, declined to dismiss the action but allowed for an inference permitting the jury to infer that the GSR test results, if available, would have been exculpatory.) *Schaffer v. State*, 184 A.3d 841 (Del. 2018) (This Court heard an appeal from a bench trial in Family Court where a full *Deberry* analysis was conducted after the Defendant requested a favorable evidence instruction

request at Defendant's Suppression Hearing, that any evidence and testimony regarding the Defendant's alleged commission of traffic violations within the jurisdictional limits of Lewes, Delaware, be suppressed and not considered in a Reasonable Articulable Suspicion analysis was proper. To permit otherwise could encourage a government actor to fail to preserve or destroy exculpatory evidence and claim that the accused must meet the impossible burden of proving first that the evidence existed and second, what the evidence would have shown.

C. <u>If, pursuant to *Deberry v. State*, any evidence and testimony regarding the Defendant's alleged commission of traffic violations within the jurisdictional limits of Lewes, Delaware had been suppressed or a favorable evidence instruction had been given as to the missing MVR footage, the Trial Court would not have found Reasonable Articulable Suspicion existed.</u>

The State has misconstrued Mr. Tang's argument regarding Reasonable Articulable Suspicion and thereby misapplying 11 *Del. C.* § 1935. Mr. Tang argues Sgt. Moyer's observations of alleged traffic violations committed within the jurisdictional limits of Lewes cannot be considered in a Reasonable Articulable Suspicion analysis because the only objective evidence of the alleged violations was created and not preserved in violation of *Deberry v. State*.[14] The Trial Court should not have been able to hear testimony as to the alleged traffic violations

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regarding the State's failure to locate and turn over an iPad which may have contained favorable evidence for the Defendant).

[14] 457 A.2d 744 (Del. 1983)

committed within the jurisdictional limits of Lewes, the same violations that allowed Sgt. Moyer to invoke the statute and engage in fresh pursuit, therefore, § 1935, the fresh pursuit statute, is inapplicable.

The question then becomes; can a municipal officer seize a vehicle outside of their jurisdiction for the alleged commission of minor traffic violations? Pursuant to 11 *Del. C.* § 1911, the answer is no. The statute provides specific enumerated instances where a police officer may arrest without a warrant at any location in the State, including when the officer has probable cause to believe that the person is committing or attempting to commit any crime which creates a substantial risk of death or serious physical injury to another person or which constitutes a violation of § 4177 of Title 21, the DUI statute.[15]

While outside of the jurisdictional limits of Lewes, Sgt. Moyer alleges to observe Mr. Tang 1.) weave within the lane, 2.) approach the vehicle ahead of him, 3.) utilize his breaks multiple times, and 4.) briefly cross over the center yellow line.[16] It is submitted that Sgt. Moyer did not have probable cause to arrest Mr. Tang pursuant to § 1911. It is further submitted that Sgt. Moyer did not have jurisdiction to seize Mr. Tang outside of the jurisdictional limits of Lewes, Delaware. Even if the alleged observations occurring outside the jurisdictional

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[15] 11 *Del. C.* § 1911(c)
[16] Op. Br. at 31, 32.

limits of Lewes, Delaware, occurred inside the jurisdictional limits, the observations would not amount to Reasonable Articulable Suspicion to seize Mr. Tang's vehicle.

II. THE TRIAL COURT ERRED IN ADMITTING THE INTOXILYZER RESULTS WITHOUT THE PROPER FOUNDATION OVER DEFENDANT'S OBJECTION.

Defense Counsel was not required to raise the issue of the lack of a manufacturer's manual for the Intoxilyzer 9000 as a basis to prevent introduction of Mr. Tang's breath alcohol concentration in a motion to suppress. The admissibility of Intoxilzyer results is a foundational issue that can be raised prior to trial or upon timely objection at trial. "This Court has held that the admissibility of Intoxilyzer results center on the State providing an adequate evidentiary foundation for the test result's admission," therefore Defense Counsel's challenge to the admissibility of Mr. Tang's Intoxilyzer results was properly and timely raised in Zoom conferences conducted on May 23rd and 27th, in a Motion in Limine e-mailed to chambers on May 27th, and at trial.[17]

The first Zoom conference, on May 23, 2025, was held regarding Defense Counsel's Motion to Compel the manufacturer's manual for the Intoxilyzer 9000. Defense Counsel argued that for a proper confrontation to occur and for the Trial Court to rely on whatever the Intoxilyzer result is, Defense Counsel needed the Intoxilyzer 9000 manufacturers manual. (A96) As a result of the Zoom

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[17] *Clawson v. State*, 867 A.2d 187 (Del. 2005). *See McConnell v. State*, No. 293, 1993, 1994 WL 43751, at *1 (Del. Feb. 3, 1994). *Cf. Best v. State*, 328 A.2d 141 (Del. 1974).

Conference, the State produced exhibits from New Castle County Superior Court Case, *State v. Lambert Brown*, 2403014753, however, the State did not produce the manufacturer's manual for the Intoxilzyer 9000. As a result, Defense Counsel requested the Trial Court preclude entering into evidence the results of the Intoxilyzer 9000 in Mr. Tang's case. (A114) A Zoom conference was held May 27, 2025, wherein Defense Counsel reiterated his request. (A107) The request was denied. (A107) At trial, Defense Counsel acknowledged the denial of his request and in the alternative, requested Mr. Tang's trial or the admission of the Intoxilzyer 9000 result be delayed until the *Daubert/Kumho Tire* analysis being performed in the *Brown* case concluded. (A125) Defense Counsel's request was again denied. (A129) It is submitted that Mr. Tang's challenge to the admittance of the Intoxilyzer results without the proper foundation over his objection is properly before this Court.

Sgt. Moyer testified the Intoxilyzer 5000 had a manufacturer's manual, and when necessary, he would consult the manufacturer's manual. (A146, 147) After certification on the Intoxilyzer 9000, Sgt. Moyer testified that he left the training with only his certification card. (A148) Agents of the State, the Trial Deputy and now the Appeals Deputy have made representations that a manufacturer's manual for the Intoxilyzer 9000 does not exist. It flies in the face of the Due Process Clause and the Confrontation Clause that a machine that computes a complicated

scientific result does not have a manufacturer's manual. It is akin to trusting the great and powerful OZ without being able to look behind the curtain.

Mr. Tang submits if a manufacturer's manual does not exist for the Intoxilyzer 9000 the infringement upon an accused's Due Process and Confrontation rights is further exacerbated by Delaware Statute prohibiting *any* challenge to the alcohol or drug concentration once established.[18] Once established the trier of fact must accept the alcohol or drug concentration as true and accurate and, if above 0.08, must convict the accused.

In order to establish the alcohol or drug concentration, the State must lay a proper foundation for admission of the result by developing testimony from the officer, commonly in the form of "this is the machine, I was trained on it, it was tested before, *I followed the steps as the manufacturer says I'm to do*, I got this result, it appeared as if the machine operated properly, [and] the machine was tested afterwards." (A97) (emphasis added) Mr. Tang asserts and the Trial Court agreed, the only way to ensure an officer has followed the steps regarding the admission of the Intoxilyzer 9000 as the manufacturer requires, is to review the manufacturers manual. (A97) The Fifth District Court of Appeals of Florida agreed as well, prohibiting the introduction of breath results into evidence after finding the

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[18] 21 *Del. C.* § 4177(g)

State violated a relevant Discovery rule by failing to produce the requested operator's manuals, maintenance manuals, and schematics of the Intoxilyzer 5000.[19] "It seems to us that one should not have privileges and freedom jeopardized by the results of a mystical machine that is immune from discovery, that inhales breath samples and that produces a report specifying a degree of intoxication."[20]

The manufacturer's representations regarding the Intoxilyzer 9000's accuracy, reliability, error codes, and remedial measures bear directly on the accused's ability to avail themselves to the Due Process and Confrontation Clause. Without it, a proper foundation cannot be laid to establish the alcohol or drug concentration and thereby move the results of the Intoxilyzer 9000 into evidence. Therefore, Defense Counsel asserts the Trial Court erred in admitting the Intoxilyzer 9000 results without a proper foundation over Defense Counsel's objection.

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[19] *State v. Muldowny*, 871 So. 2d 911 (Fla. Dist. Ct. App. 2004)
[20] *Id.* at 913.

CONCLUSION

For the foregoing reasons, Appellant, Henry Tang, respectfully requests this Court reverse the judgment of the Sussex County Superior Court.

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1. This reply 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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