IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
v.	)	C.A. No. 0910012068
	)	
AMBER WHITE	)	
	)	
Defendant.	)	

DECISION AFTER TRIAL

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Flickinger III, J.

The Court heard Defendant's Motion to Suppress on November 3, 1010. Upon the Court finding probable cause to believe that the Defendant was operating a vehicle while under the influence of alcohol, Defendant's Motion to Suppress was denied. The State moved to have all non-hearsay evidence from the suppression hearing to be admitted to the trial record. After trial on the matter the State and Defense Counsel submitted Memoranda of Law. After consideration, for the reasons cited below, the Court enters a verdict of NOT GUILTY to the charge of driving a vehicle under the influence of alcohol.

Facts

On October 16, 2009, at approximately 11:11 PM, Master Corporal Kurt E. Einbrod (hereinafter "Cpl. Einbrod") of Troop 9, Delaware State Police, was dispatched to the scene of a motor vehicle crash. The location was along DE Route 9 near Delaware City, New Castle County, Delaware. Cpl. Einbrod testified that the crash occurred at 11:06 PM and that he arrived at the scene at 11:24 PM, when he observed a vehicle overturned onto its hood. The 2006 Hyundai Sonata was located four (4) feet off of the westerly side of the Rt. 9 roadway. The radiator fluid was "still steaming" underneath the vehicle. The roadway was littered with debris and broken glass. Cpl. Einbrod described that area of Rt. 9 as "not well lit". While Cpl. Einbrod's crash report indicated that the weather conditions at the time of the report were "clear, cold", he indicated that earlier that evening there was "pretty violent weather". He described the road surface as "wet" and said that this particular area of Rt. 9 "floods a lot".

An ambulance was already on the scene when Cpl. Einbrod arrived. The overturned vehicle was unoccupied but there was an individual in the ambulance on a gurney. Upon investigation, Cpl. Einbrod learned that the individual on the gurney was Amber White (hereinafter "Defendant" or "Ms. White"). Cpl. Einbrod asked a paramedic if he could speak with Ms. White and was given permission to do so.

As Cpl. Einbrod entered the rear of the ambulance he noticed a "moderate odor of an alcoholic beverage in the ambulance". He was "2 to 3 feet inside the vehicle". He observed Ms. White on the gurney as having "bloodshot eyes and a flushed face". He did not recall whether or not Ms. White had an IV in her arm.

Cpl. Einbrod asked Ms. White what had happened. She indicated that she was coming from Delaware City and, while driving through a puddle, had hydroplaned, lost control of the vehicle, crashed and then crawled out from under the vehicle. When asked if she had been drinking, Ms. White took a few minutes before answering then replied that she had consumed five (5) rum and cokes at a bar in Delaware City. However, Cpl. Einbrod did not determine over what period of time the five (5) drinks had been consumed nor when the last drink was consumed.

While the ambulance was still at the scene of the crash Cpl. Einbrod asked Ms. White to perform the alphabet test. When he asked her if she knew the alphabet she replied yes, and immediately began, "A,B,C,D". Cpl. Einbrod stopped her and asked her to recite the alphabet beginning with "E" and ending with "R". Ms. White "waited a minute or so", then "gave a blank stare", saying nothing in response to his request.

While Ms. White was in the ambulance, on the gurney, Cpl. Einbrod conducted the Horizontal Gaze Nystamus (hereinafter "HGN") Field Sobriety Test. At trial, in response to questioning by the State, he stated that he had done so without determining if Ms. White had suffered a head injury. The State indicated that they would not be seeking to admit evidence regarding the results of the HGN test.

Cpl. Einbrod asked Ms. White to give a Portable Breathalyzer Test (hereinafter "PBT") sample to which she declined. He admitted that his PBT apparatus had not been calibrated within the previous year.

During this period of observation Cpl. Einbrod described Ms. White's speech as "good" and "understandable" and her attitude as "polite".

After the ambulance left the scene, further investigation by Cpl. Einbrod revealed that the vehicle's original point of impact was a tree on the easterly side of Rt. 9. The vehicle then crossed the road coming to rest, overturned, on the westerly side of Rt. 9.

Cpl. Einbrod then proceeded to the emergency room at Christiana Medical Center, where he stayed with Ms. White until she was taken into a "regular" emergency room. At 1:28 AM, now October 17th, he asked Ms. White to consent to the drawing of her blood for purposes of determining its blood alcohol content. Ms. White declined, saying "I don't understand what's going on, I'm in pain". Ms. White was eventually admitted as an inpatient and later diagnosed as having suffered fractures of the left humerus, radius and ulna, fractures of several ribs and a hematoma to her head.

At that point Cpl. Einbrod completed a Probable Cause Implied Consent Form, a Temporary Permit for her Motor Vehicle License and a Summons for (1) Driving Under the Influence and (2) Driving Without Proof of Insurance.[1]

Cpl. Einbrod interviewed one witness to the crash, William Yowell (hereinafter "Mr. Yowell"). His statement was admissible for the purpose of determining probable cause. However, as Mr. Yowell did not appear to testify at trial, the statement constitutes hearsay and may not be considered by the Court in determining whether Ms. White is guilty beyond a reasonable doubt. The State suggests that Mr. Yowell was excited when the officer arrived, but the Court finds that the circumstances do not constitute an excited utterance exception to the hearsay rule.[2]

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[1] At trial, documentary proof that the vehicle was insured was provided and the State entered a *nolle prosequi* on that charge; 21 *Del.C.* § 2118 (p).

[2] *Delaware Rules of Evidence Rule 803(2).* states: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness: (2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

The State offered as evidence a Certified Copy of the Christiana Care Health Information Management Services Record as the full, true and correct copy of the medical records for Amber White. The record consisted of 239 pages and is Medical Record Number 900720518. It was accompanied by a covering affidavit of V. Butler, Custodian for Health Information Management Services, Christiana Care, stating that, the record was a full, true and correct copy of Amber White's records which were prepared in the ordinary course of business by authorized personnel on or about the time for the event. After considerable argument the record was admitted into evidence.[3]

Subsequent to the admission of the Defendant's medical record, Stephen Robert Johnson (hereinafter "Mr. Johnson") testified on behalf of the State. He is a clinical biochemist at Christiana Hospital with 25 years of experience.

After reviewing Ms. White's medical records Mr. Johnson testified that, at 12:05 AM on October 17, 2009, Ms. White had an Ethyl Alcohol Level of 227 milligrams per deciliter (mg\dl). Mr. Johnson explained that this was a "serum alcohol" level. He was asked by the State if he could perform a mathematical calculation to convert the "serum alcohol" into a "whole blood" measurement. He explained that the conversion could be made by dividing the number of milligrams per deciliter (227) by one thousand two

[3] *Delaware Rules of Evidence Rule 902(11).* states: "Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: Certified domestic records of regularly conducted activity. The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or otherwise qualified person, in a manner complying with any law of the United States or of this State, certifying that the record (A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; (B) was kept in the course of the regularly conducted activity; and (C) was made by the regularly conducted activity as a regular practice. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them."

hundred (1,250). The resulting quotient would be "approximately 0.18 weight\volume" whole blood result.

Analysis

In Delaware the offense of Driving a Vehicle While Under the Influence is prosecuted under 21 *Del. C.* § 4177. Subsection (a) of that statute provides six different sets of circumstances under which a person may be found guilty of the offense.[4] The charging document may allege a violation of subsection (a) of this section without specifying any particular paragraph of subsection (a) of this section and the prosecution may seek conviction under any of the paragraphs of subsection (a) of this section.[5]

The evidence here would, if proven beyond a reasonable doubt, lead to a conviction under one of two subsections of the statute:[6]

> (a) No person shall drive a vehicle:
>
> (1) When the person is under the influence of alcohol;[7]
>
> OR
>
> (5) When the person's alcohol concentration is, within 4 hours of the time of driving .08 or more;[8]

[4] 21 *Del.C.* § 4177 (a)(1) – (a)(6).
[5] 21 *Del.C.* § 4177 (b)(4).
[6] The Court will not consider a conviction under 21 *Del.C.* § 4177 (a)(4) as Cpl. Einbrod testified that the crash occurred at 11:06 PM during the trial portion of the case and that evidence was uncontroverted and accepted as a finding of fact. The blood sample was taken at 12:05 AM, less than 4 hours from the time of driving.
[7] 21 *Del.C.* § 4177 (a) (1).
[8] 21 *Del.C.* § 4177 (a) (5).

I. Analysis under 21 *Del. C.* § 4177 (a)(5)

The testimony of Steven Johnson regarding the certified medical records of Ms. White must be considered in deciding whether the Defendant's alcohol concentration was, within 4 hours of driving .08 or more.[9] In this regard, the following definition applies:

> (1) "Alcohol concentration of .08 or more" shall mean:
>
> a. An amount of alcohol in a sample of a person's blood equivalent to .08 or more grams of alcohol per hundred milliliters of blood;[10]

Mr. Johnson referred to a Therapeutic Drug Levels and Toxicology Report performed by Christiana Care Health Services, Department of Pathology and Laboratory Medicine. That report indicates that, at 12:05 AM on October 17, 2009, Amber White's ethyl alcohol level was 227 milligrams per deciliter (mg\dl). This level of ethyl alcohol was from a specimen sample taken within one hour of the time of the crash.

Mr. Johnson's sole purpose in testifying was, as previously stated, to convert the serum blood concentration (mg\dl) to a whole blood concentration. Mr. Johnson's testimony was consistent with the conversion formula stated on the Toxicology report, i.e., to divide the 227 mg\dl by 1,250. The result of that calculation produces a whole blood concentration of "approximately" .018 weight\volume.

The Court considers this conversion to be procedurally admissible and reliable evidence. However, a problem arises in comparing the whole blood (weight\volume) concentration to the concentration in the statutory definition of ".08 or more", namely

[9] 21 *Del.C.* § 4177 (a) (5).
[10] 21 *Del.C.* § 4177 (c) (1) (a).

"grams per 100 milliliters" of blood (g\100ml). Nowhere in the record does the witness interpret "weight per volume" as it relates to "grams per 100 milliliters".

Without that connection made by the State's witness the Court is left to decide how far it may go, beyond the record, to make that connection. The State concedes in its post trial memorandum that the Court may not go outside the record to obtain facts necessary to come to a conclusion regarding the blood alcohol conversion.[11]

The State further concedes that this issue is not appropriate for consideration by judicial notice:

> (b) Finder of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.[12]

Therefore, the Court may not come to the factual conclusion based on the record of evidence before it, that Defendant Amber White was driving a vehicle when her blood alcohol concentration was, within 4 hours of driving .08 or more grams of alcohol per hundred milliliters of blood.

[11] State's Brief at 1.
[12] *Delaware Rules of Evidence Rule 201(b).*

II. Analysis under 21 *Del.C.* § 4177 (a) (1)

The State does contend, however, that the whole blood alcohol concentration of "approximately .08 weight\volume" is permissible under any part of section (a), when considering whether Ms. White was driving "while under the influence of alcohol".[13]

21 *Del. C.* § 4177 (g) states:

> (5) "While under the influence" shall mean that the person is, because of alcohol or drugs or a combination of both, less able than 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.[14]

Subsection (a) (1) of the Driving Under the Influence statute is generally referred to as the "impairment" subsection. Unlike subsection (a) (5) of the statute there is no particular set of circumstances that, when proven as facts and admitted in evidence, results in a "per se" finding of guilt. An analysis under this subsection requires an examination of all admissible evidence by the trier of fact and the weight to be given to each fact.

As previously stated, the testimony of Steven Johnson provided admissible evidence converting the serum blood result in toxicology tests performed on the Defendant into a whole blood result. The whole blood result concluded that the Defendant had a blood alcohol concentration of "approximately 0.18 weight per volume".

[13] 21 *Del.C.* § 4177 (g).
[14] 21 *Del.C.* § 4177 (c) (5).

The difficulty for the trier of fact is the degree of weight to be given to this fact. There was no testimony by the State as to how that level of weight per volume affects the ability of the human body to perform normal functions like driving.

Defendant points out that the conversion results in an "approximate" weight per volume result. The State offered no evidence as to the parameters, i.e. the "plus or minus" deviations that naturally attach to an "approximate" calculation. Further, the State points out that the blood sample was not taken with the "blood kit" normally used in DUI investigations. The kit normally utilized in DUI investigations contains a non-alcoholic swab, so as not to affect the alcohol level of the sample taken. The State's witness was not able to state whether the swabs used in Christiana Care's taking of Defendant's blood were non-alcoholic.

While the existence of alcohol in Defendant's system is established by the testimony of Steven Johnson, the unexplained issues discussed here regarding the approximate level of the whole blood result, the lack of "plus or minus" parameters and the type of swab used when taking the sample lead the Court, as trier of fact, to conclude that no evidentiary weight can be given to the weight per volume whole blood result.

The State points out that, on page 4 of 85, of Christiana Care's medical reports for Defendant Amber White indicate that the Defendant was involved in a "rollover motor vehicle collision with an ethanol intoxication". This is not helpful to the trier of fact due to the lack of an explanation of the relation of "ethanol" to alcohol and the fact that this information was contained under a heading entitled "Impression".

It is uncontroverted that Amber White lost control of her vehicle along DE Rt. 9 on the night in question, resulting in a horrible crash. This raises the issue of whether her

inability to control her vehicle was the result of being under the influence of alcohol. She told Cpl. Einbrod that she hydroplaned after driving through a "puddle". There was no testimony as to which direction she was traveling when she lost control. She first struck a tree on the easterly side of Rt. 9 but it is undetermined whether the tree was adjacent to her lane of travel and the location of the puddle. When asked about the road being flooded at the time in question Cpl. Einbrod stated, "I went through it that night". He did not comment on the existence or nonexistence of a "puddle" in the vicinity large enough to cause a vehicle to hydroplane. However, he testified that earlier there had been "pretty violent weather", that the road surface was "wet" and that the section of Rt. 9 in question "floods a lot".

Amber White admitted that she had consumed five (5) rum and cokes at a bar in Delaware City. However there was no testimony regarding over what period of time they were consumed or when she had the first or last drink. At the time of her interview in the ambulance she had "blood shot eyes" and her fact was "flushed". Cpl. Einbrod noticed a "moderate odor of an alcoholic beverage in the ambulance".

Amber White's performance on the alphabet test requires examination. When asked if she knew the alphabet by Cpl. Einbrod she immediately began to recite, "A,B,C,D". She was stopped and was asked to begin with "E" and end with "R". She then gave a blank stare and did not answer. The totality of the circumstance must be considered in evaluating her performance. She is in an ambulance, with serious injuries including a hematoma[15] to the head. This situation requires that the alphabet test not be considered in determining guilt beyond a reasonable doubt.

[15] A hematoma is defined as "a mass of usu. clotted blood that forms in a tissue, organ, or body space as a result of a broken blood vessel." Merriam Webster's Collegiate Dictionary 540 (10th ed. 1997).

The defendant also refused to submit to a Portable Breathalyzer Test as well as a blood draw, when asked by Cpl. Einbrod. A Defendant's refusal to submit to testing may be used for any relevant purpose, including showing consciousness of guilt.[16] However, the Defendant declines the blood draw by saying, "No sir, I don't understand what's going on, I'm in pain". Again, the circumstances here require that the refusal to blow into a portable breathalyzer or submit to a blood draw requested by a police officer not be considered as consciousness of guilt.

Summarizing the evidence against the Defendant when considering whether she was driving a vehicle while under the influence of alcohol,[17] then Court, as trier of fact considers:

- admission to driving
- admission to losing control of the vehicle by hydroplaning
- admission to drinking five (5) rum and cokes at a bar, with no additional information as to the period of time of consumption
- moderate odor of an alcoholic beverage
- bloodshot eyes, flushed face
- wet roadway that floods a lot and is not well lit
- violent weather earlier

As previously stated, the Court finds that the whole blood alcohol measurement of weight to volume and the statement: "Impression: rollover motor vehicle collision with an ethanol intoxication", while admitted, are given no weight for reasons previously stated.

[16] *Church v. State*, 11 A.3d 326 (Table) at *2 (Del. Dec. 22, 2010) (citations omitted).
[17] 21 *Del.C.* § 4177 (a).

The totality of the evidence, when considered as a whole, gives rise to reasonable doubt as to whether Defendant Amber White was, 1) driving a vehicle and, within four (4) hours of driving, having a blood alcohol concentration of .08 or more grams of alcohol per hundred milliliters of blood; or, 2) driving a vehicle while under the influence of alcohol.

Based on the above, the Court enters a finding of **NOT GUILTY**.

IT IS SO ORDERED.

Date: **03/22/11**

/S/ Joseph F. Flickinger III
Joseph F. Flickinger III
Judge