IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	CRIMINAL ACTION NUMBER
v.	)	
	)	IN-08-07-2277 thru IN-08-07-2280
KEITH BETTS	)	and IN-08-07-2845
	)	
Defendant	)	ID NO. 0807018808

Submitted: November 14, 2009
Decided: February 3, 2009

MEMORANDUM OPINION

Upon Motion of Defendant to Suppress -
GRANTED, in part, and DENIED, in part

Appearances:

Abigail Layton, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, attorney for State of Delaware

Michael W. Modica, Esquire, Wilmington, Delaware, attorney for the defendant

HERLIHY, Judge

Defendant Keith Betts is indicted for driving under the influence (DUI) of drugs. It is his 3rd or 4th alleged DUI making it a felony.[1] He moves to suppress all evidence relating to a charge of DUI which arose from an incident occurring on July 12, 2008. For reasons stated herein, his motion is **GRANTED** in part and **DENIED** in part.

Factual Background

On July 12, 2008, Betts was stopped by Officer Gregory Bruno of the New Castle County Police in the parking lot of the Wawa convenience store at the intersection of Foulk and Wilson Roads. Betts was driving a black pickup truck. The stop occurred around 5:20 in the morning.

During the suppression hearing, Officer Bruno testified at length concerning the stop of Betts' vehicle. Officer Bruno first recalled noticing Betts' truck on the southbound exit ramp of Interstate 95 for Route 202 northbound. During the turn, Bruno observed the truck come close to striking the curb on the exit ramp. Once the truck pulled onto Route 202, Bruno again observed the truck come close to the edge of the road and then "overcorrect" by moving too far onto the other side of the road. Officer Bruno testified the truck crossed over the street lines three times on Route 202. He followed the truck on Route 202 and continued to the follow vehicle as it took a right hand turn onto Foulk Road. Based on what he observed, Officer Bruno decided to stop the truck on Foulk Road. He had observed the truck for approximately two miles in a time period of three to four minutes.

[1] 11 *Del. C.* § 4177(d)(3), (4).

When Officer Bruno flashed his lights, the truck pulled into the Wawa parking lot. The driver of the truck parked his vehicle in a manner that took up two handicapped parking spaces. The truck was not licensed as a handicapped vehicle.

Upon approaching the vehicle, Officer Bruno observed two people in the truck. The driver was Betts. The other passenger was later determined to be a friend of Betts. Officer Bruno approached the vehicle and asked for identification, insurance registration, and driver's license. He testified he could detect a slight odor of alcohol and noticed that Betts had glassy, watery eyes. He also stated that Betts was initially unresponsive to his questions to the point that Officer Bruno asked Betts if he could hear his questions. Betts also avoided eye contact with him when answering the officer's questions. Officer Bruno stated Betts' speech was "thick tongued" and unclear; his responses were short, one word replies. Officer Bruno asked where Betts had come from and where he was headed. Betts answered that he was coming from "home" and going to "home". When asked if he had been drinking, Betts replied, "Yup". Furthermore, Officer Bruno recalled that Betts exhibited signs of "fumbling fingers," which he explained to be decreased finger dexterity. Betts exhibited "fumbling fingers" while looking for his registration in the glove compartment and exhibited the same behavior while looking for his driver's license in his wallet.

Officer Bruno also testified about the passenger with Betts. During the officer's questioning, Betts often looked over to the passenger multiple times before looking back

at the officer. He asked the passenger why Betts continually looked over at him. The passenger replied, "I think you have him nervous." Officer Bruno also testified of previous instances where he had interacted with the passenger, stating he had been previously called, as backup, to arrest the passenger for an incident involving PCP. He also told the Court that the passenger had been in at least one other PCP related incident.

Officer Bruno opined about his knowledge and experience of PCP and its effects on the human body. He testified that PCP users often feel a sense of "superhuman strength" and often demonstrated a "1,000 yard stare." He explained this phrase was used to describe a PCP user's tendency to look through a person while talking to them. He testified that Betts' general unresponsiveness to his questions led him to suspect Betts may have been on PCP, stating that Betts exhibited signs of the "1,000 yard stare".

Because of Betts' general demeanor throughout the stop and his own knowledge of the passenger as someone who had used PCP in his past, Officer Bruno stated that it was his belief he was potentially dealing with a drug impaired driver. Although he had originally planned on issuing field sobriety tests once his backup arrived, he decided against them when he suspected PCP use of the driver and the passenger.

Officer Bruno waited for backup and a police canine before asking Betts to get out of his truck. He testified that Betts made a movement in with his arms, away from him. This caused Officer Bruno to reach into the vehicle with his arms and restrain Betts. He reminded Betts of his backup and the canine. Eventually, Betts complied and got out of the

vehicle. The officers handcuffed Betts and escorted him to the back of police squad car. Betts walked to the car under his own power and did not resist being placed into custody. The passenger was also taken into custody by other police officers.

Betts was initially arrested for DUI of alcohol. After Betts was placed in the police car, the officers conducted a search of the truck. One of the officers discovered PCP in a cigarette box on the driver's side door. The officer who discovered the drug stated it was PCP because of the drug's unique smell was similar to cat urine.[2]

Following Betts' arrest, Officer Bruno transported him to the police station where he, Bruno, administered a preliminary breath test ("PBT"). This was the first substance abuse test conducted on Betts. A PBT can detect the presence of alcohol; however, it cannot detect PCP use. Betts "passed" the PBT.

Following the PBT, Officer Bruno told Betts that he had probable cause to suspect that Betts was under the influence of PCP (and/or alcohol). He requested Betts submit to a blood sample. Betts expressed his reluctance to submit. Officer Bruno testified at length to his recollection of the conversation between him and Betts concerning the blood testing:

> Q: So you read the implied consent form?
>
> A: Yes, and he refused to sign it.
> Q: And he told you that he didn't want to take the test, and then that's when you told him that you can take it anyhow; is that right?
>
> A: I told him that we can't forcibly take it. I said I won't do that. I told him I wouldn't.

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[2] Later, chemical tests confirmed the drugs were PCP.

Q: I'm just reading your report. You tell me if this is accurate. Prior to submitting to the blood draw, Mr. Betts advised he did not want to voluntarily submit to the test, but when he was informed that the blood could be drawn without his consent, he submitted to the test.

A: Right.

* * * * *

Q: So he told you he didn't want to give it?

A: Right.

Q: And then you told him that you wouldn't, but that you could forcibly draw it by having other officers assist you?

A: I would never – I told him we can forcibly take it. I said, I won't do that, because I know I won't do that. I never would, I never did and never will. I'm not playing with a needle and blood for a DUI, for anything.

* * * * *

Q: So after he told you he didn't want to give it and then you explained that you could forcibly take it, but you wouldn't, then he said, "Okay, go ahead?"

A: He did. He said, Yeah, go ahead. But he said, I want you to know, I don't want you to take it. I said, "Mr. Betts, I'll write it in my report, I promise you."[3]

Officer Bruno was also questioned about the implied consent form that he filled out in Betts' presence:

Q: Now, Defense Exhibit 1 (the form), I want you to look at the back page. Are you with me?

A: Yes.

Q: That's the implied consent. And you have checked in there "blood"?

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[3] Suppression Hr'g Tr. 39-40.

A: Right.

Q: You checked that?

A: Yes.

Q: Then down below you've written "Mr. Betts refused to sign"?

A: I wrote that, yes.

Q: And that's after you read these three paragraphs; is that right?

A: Right.

Q: So you read those three paragraphs to him and you said, "Now will you submit to blood, and he refused?

A: Right.

Q: And then you put that he refused to sign?

A: Right.[4]

The "Implied Consent and Probable Cause" Form was moved into evidence as Defendant's Exhibit #1. On the front of the page, Officer Bruno had the option of checking either (1) the implied consent box or (2) the probable cause box. He checked off the probable cause box and signed on the signature line below it. However, on the back of the page, there are three paragraphs (the three paragraphs alluded to above) which Officer Bruno testified he also read to Betts. These paragraphs contain the information about the one year revocation of driving privileges that Betts would incur should he continue to

[4] *Id.* at 44-45.

refuse to submit to a chemical test.[5] Officer Bruno checked off the boxes indicating the test would be a blood test and signed the bottom. He also wrote under the driver's signature line, "REFUSED TO SIGN". He testified that "[i]f I put on there 'refused to sign,' I know I would have read refusal consequences as part of the form."[6]

A phlebotomist withdrew a blood sample from Betts around 7:45 AM at the police station. Betts did not physically resist the taking of the blood sample. At some point in this process, Officer Bruno arrested Betts for driving while under the influence of a drug (PCP).

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[5] If the defendant has refused all other requests, the arresting officer WILL read the following to the defendant when a chemical test is sought under Title 21 § 2740:

> I have probable cause to believe that you have driven, operated or had actual physical control of a motor vehicle (including an off-highway vehicle, a moped or bicycle) while under the influence of intoxicating beverages and/or drugs in violation of Title 21 § 4177 of the Motor Vehicle Laws of the State of Delaware and/or a local ordinance substantially conforming thereto.
>
> I request that you submit to the taking of samples of you ☐ Breath ☐ Blood ☐ Urine, for the purpose of making chemical tests to determine the content of alcohol and/or drugs in your blood.
>
> If you refuse to submit to te test, on behalf of the Secretary of Public Safety, I will serve you with notice of revocation that fifteen days from this date, your license and/or driving privileges to drive a motor vehicle within this State will be revoked for one year for the first offense, 18 months for a second offense, or two years for the third or subsequent offense.
> Defendant's Exhibit #1.

[6] *Id.* at 38:21-23.

Parties' Contentions

Betts has argued that the initial stop of his truck was illegal. He also complains that his subsequent arrest for DUI was not based on probable cause and, therefore, the arrest was illegally conducted. Since his arrest was without probable cause, there was no legal basis to take his blood. Also, he asserts, he did not consent to its taking which makes it illegal. In addition, by taking his blood sample after informing him of the consequences of refusal, the officer acted contrary to statute and could not lawfully obtain a blood sample. Finally, Betts contends the blood drawn at the police station was unreasonably conducted because a police station is an unsanitary site to take blood. Such testing, argues Betts, should be conducted at a medical facility.

The State contends the arresting officer had reasonable suspicion to execute a stop of the vehicle. After the officer questioned Betts, the State argues the officer had probable cause to arrest Betts for DUI. When Betts passed the PBT, Officer Bruno, based on his other observations, then had sufficient probable cause to suspect Betts had operated his vehicle under the influence of PCP. Therefore, the officer also had probable cause to take a blood sample. The State offers the blood sample was legally retrieved by pointing out the probable cause box was checked by the officer, not the implied consent box. Further, Betts' actions by holding out his arm for the phlebotomist acted as a waiver by Betts, a consent to blood testing.

Applicable Standard

On a motion to suppress, the States holds the burden of showing that the alleged search or seizure was within the bounds of the United States Constitution, Delaware Constitution, and other state statutory laws.[7] Accordingly, the State must prove its case by a preponderance of the evidence.[8]

Discussion

This opinion will first consider the arguments Betts makes concerning the traffic stop, his subsequent arrest for DUI of alcohol, and his later arrest for driving under the influence of PCP. Betts argues the stop and arrests were unconstitutional because the officers did not have either reasonable suspicion to stop his vehicle or probable cause to arrest him for either the alcohol or PCP related offenses. The later half of the opinion will focus specifically on the legal issues involving the blood sample that was seized by the arresting officer.

This Court holds the officer had the requisite reasonable suspicion and probable cause to stop and arrest Betts under the requirements of the Fourth Amendment of the United States Constitution and Article I, § 6 of the Delaware Constitution. The Court also holds that the phlebotomist's blood sample taken was reasonable even though it was taken at a police station and, therefore, conforms to constitutional standards. However, because

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[7] *Hunter v. State*, 783 A.2d 558, 560-61 (Del. 2001).

[8] *State v. Bien-Aime*, 1993 WL 138719 at (Del. Super.)

the arresting officer unambiguously informed Betts of the one year driving penalty after Betts verbally stated his refusal to submit to blood testing, the blood sample that was taken did not conform to statutory standards under Delaware law. Therefore, Betts' motion to suppress is GRANTED in part and DENIED in part.

The Stop

A traffic stop is considered a seizure for Fourth Amendment and § 6 purposes.[9] Consequently, the State bears the burden of showing the Court that "the stop and any subsequent police investigation were reasonable in the circumstances."[10] Furthermore, the reason for the stop must be justified at the inception based on a reasonable articulable suspicion of criminal activity.[11]

Applying these rules the Court finds that, the stop of Betts' vehicle was based on sufficient reasonable suspicion. The arresting officer testified of a traffic violation that occurred on the exit off of Interstate 95 and the additional traffic violations and/or repeated erratic driving that occurred on Route 202. After witnessing these violations and/or driving problems, the officer possessed a reasonable suspicion of driver's ability to operate the vehicle and the possibility that the driver was under the influence of or impaired by drugs

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[9] *Caldwell v. State*, 780 A.2d 1037, 1045-46 (Del. 2001), (citing *United States v. Brignoni-Ponce*, 442 U.S. 873, 880-81, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975)).

[10] *Id.* at 1046.

[11] *Dunlap v. State*, 812 A.2d 899, 2002 WL 31796193, at *2 (Del Dec. 13, 2002)(TABLE) (citing *Caldwell v. State*, at 1046).

or alcohol. Accordingly, the officer was also allowed to stop, approach, and question the driver to ascertain the status of the driver.

The Arrest

Betts was initially arrested in the Wawa parking lot for DUI of alcohol. He argues that the police lacked probable cause for his arrest. Betts argues the police failed to administer any field sobriety tests or preliminary breathalyzer tests before they arrested him; therefore, they lacked probable cause. The Court is convinced that Officer Bruno had sufficient probable cause to arrest Betts for DUI when the arrest was conducted.

A Court will find an arresting officer had probable cause "when the officer possesses information which would warrant a reasonable man in believing that a crime has been committed."[12] For arresting officers to establish probable cause, they "are only required to present facts which suggest, when *those facts* are viewed under the totality of the circumstances, that there is a fair probability that the defendant has committed a crime."[13] Further that there may be other, even innocent, explanations for one or more facts does not prevent determining probable cause existed.[14]

This Court is not aware of any law that necessitates an arresting officer to conduct a field sobriety test or breathalyzer test before arresting someone for DUI. While these

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[12] *State v. Maxwell*, 624 A.2d 926, 929-30 (Del. 1993).

[13] *Id.* at 930 (citing *Jarvis v. State*, 600 A.2d 38, 42-43 (Del. 1991)).

[14] *Id.*

tests are helpful in probable cause determinations, they are not a required element of a probable cause analysis of a DUI arrest. Nor has Betts offered any case law advancing this novel argument. Instead, the State must simply show the facts and circumstances, in their totality, would lead a reasonable person to suspect a person committed a crime. Although the officer did not conduct any field sobriety test with Betts, this is but one factor to consider during the probable cause analysis. The Court is satisfied there were multiple facts before Officer Bruno to enable him to believe that Betts had driven while under the influence or some intoxicating substance.

Bruno's observations of Betts' driving, crossing the fog lines, twice nearly striking a curb, and overcorrecting raised legitimate suspicions of an impaired driver. When Betts' pulled over his vehicle into the Wawa parking lot, it was parked in a manner that occupied two handicapped spots even though Betts truck was not registered to park in handicapped zones. When Officer Bruno approached the truck, he smelled a slight odor of alcohol. Betts' eyes were somewhat watery and glassy. His speech was "thick tongued". Finally, Betts admitted he had been drinking. He had trouble producing the documents Officer Bruno requested, fumbling past his registration several times. Betts was unresponsive to Officer Bruno's questions to a degree that Officer Bruno was compelled to ask him if he had heard those questions. Also, his answer that he was coming and going to and from home was illogical. The Court finds officer Bruno had a sufficient factual basis to reasonably suspect that Betts was driving under the influence of alcohol during the morning of July 12, 2008.

Probable Cause for Driving Under the Influence of PCP

Because Betts' was initially arrested for DUI of alcohol and not PCP, the State has to show sufficient probable cause existed before the arresting officer to believe that Betts' was driving under the influence of PCP. Again, an arresting officer has probable cause "when the officer possesses information which would warrant a reasonable man in believing that a crime has been committed."[15]

In the instant case, Officer Bruno had probable cause to believe Betts was driving while under the influence of PCP. Officer Bruno's testimony concerning Betts' driving offenses, glassy eyes, general unresponsiveness to questions, and odd staring which factored into his probable cause analysis for alcohol consumption are equally applicable in contributing to a reasonable officer's belief that the person being arrested is under the influence of a drug. More importantly, after the search incident the legal DUI (of alcohol) arrest, PCP was discovered in Betts' vehicle on the driver's side portion of the truck. Finally, when Betts "passed" the PBT back at the police station, there was sufficient basis to suspect another intoxicating substance was causing the impairment. Consequently, there were adequate facts before Officer Bruno to arrest Betts' for driving under the influence of PCP.

The Blood Sample

In Delaware, an officer seeking to take a blood sample from a motorist who is suspected of driving under the influence of a prohibited substance pursuant to 21 *Del. C.*

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[15] *Id*, at 929-30.

§4177 must clear two legal hurdles. First, the state must show that the blood draw meets all constitutional standards. Second, if the State can show that the blood sample was procured in a manner upholding these standards, then the State must also show the officer followed the statutorily mandated procedures commonly referred to as the implied consent statutes.[16]

This Court has already determined the stop and arrests were constitutionally permissible. However, because a blood sample is a bodily search, the United States Supreme Court and the Supreme Court of Delaware have set down heightened constitutional standards. The U.S. Supreme Court in *Winston v. Lee* has stated that bodily intrusions require Courts to apply "a discerning inquiry into the facts and circumstances to determine whether the intrusion was justifiable."[17] Therefore, because a blood sample is a seizure that involves bodily intrusion, the State must also show that the blood sample was taken reasonably.[18] The Delaware Supreme Court has stated that a trial court, when considering the seizure and admissibility of a blood sample, must apply a three part test focusing on "(1) the extent to which the procedure may threaten the safety or health of the individual; (2) the extent of intrusion upon the individual's dignitary interests in personal

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[16] 21 *Del. C.* §§2740-50.

[17] *Winston v. Lee*, 470 U.S. 753, 760, 105 S.Ct. 1611, 1616, 84 L.Ed.2d 662, 669 (1985).

[18] *McCann v. State*, 588 A.2d 1100, 1101-02 (Del. 1991) (*citing Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966)).

privacy and bodily integrity; and (3) the community's interest in fairly and accurately determining guilt or innocence."[19] The United States Supreme Court has held blood testing done by a trained medical professional to be a routine, safe procedure that constitutes only slight bodily intrusion.[20]

Here, the facts demonstrate that Betts did not physically resist the blood test. The blood test was conducted in a routine fashion. A licensed phlebotomist took the blood sample. There is nothing to suggest that Betts' health was at risk. Furthermore, Delaware courts have documented the significant public interest in DUI enforcement which is strengthened by the State's ability to procure evidence that is both fair and accurate.[21] Therefore, under the test laid down in *Winston v. Lee*, the Court finds the blood sample was reasonably procured.

Betts, however, has advanced a fairly unique argument. In his brief and at oral argument, he has contended that the blood drawn from him constitutes an illegal seizure because the sample was obtained at the police station. He argues the blood sample should

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[19] *Id.* at 1102 (*citing Winston v. Lee*, 470 U.S. 753, 761-62, 105 S.Ct. 1611, 1617, 84 L.Ed.2d 662, 669-70).

[20] *Breithaupt v. Abram*, 352 U.S. 432, 77 S.Ct. 408, 1 L.Ed.2d 448 (1957) (holding that the seizure of blood from an unconscious person by someone with medical training was constitutional). *See also*, *State v. Cardona* 2008 WL 5206771 (Del. Super. Dec. 3, 2008) (highlighting the constitutionality of taking blood by a medically trained professional in Delaware when there is requisite probable cause to do so).

[21] *See generally*, *State v. Cardona* 2008 WL 5206771 at *5 (Del. Super. Ct. Dec. 3, 2008).

have been taken in an environment more sterile than a police station. By taking his blood in the police station, he argues the State put his health in greater jeopardy and, therefore, the blood sample was taken unreasonably. To support his argument he cites a recent case from the Delaware Court of Common Pleas, *State v. Crespo*.[22]

In *Crespo*, the defendant moved to suppress her blood sample which was obtained by force at a state police troop. The arresting officer had probable cause to believe that Crespo had committed a DUI. Crespo had repeatedly refused to submit to a PBT. A male and female officer eventually forced Crespo to submit to a blood test by holding her down while a phlebotomist took her blood. Crespo, a female, weighed 125 pounds and was 5 feet, 3 inches tall. This was her first arrest for DUI.

The court below determined the blood draw to be unreasonable and suppressed the blood results. The court based its decision on multiple factors: (1) Crespo had not previously been arrested for a DUI; (2) first time DUI offenders faced only a misdemeanor charge; (3) Crespo had refused to submit to testing; (4) force was used; (5) there was no uniform system under police procedure in determining when to use force to extract blood; (6) and the sample was taken at the police station.[23]

Although the *Crespo* case is on appeal to this Court, the opinion from the Court of

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[22] Court of Common Pleas: *State v. Crespo*, C.A. No. 0506005562 (Del. Com. Pl. Dec. 20, 2007). This case is currently on appeal to this Court.

[23] *Id*.

Common Pleas has already been discussed in this Court in *State v. Cardona*.[24] In that case, the defendant also argued that the blood drawn at the police station was unreasonable *per se* because of health concerns by relying on the *Crespo* decision. The *Cardona* Court found *Crespo* could be distinguished on its facts and rejected the defendant's argument that the police station blood draw was *per se* unreasonable.[25]

In the instant case, this Court holds that the arresting officer's decision to not apply force in obtaining a blood sample from Betts is sufficient, standing alone, to distinguish this case from *Crespo*.[26] In *Crespo*, the court was concerned with primarily with the police officer's use of force and the amount of discretion an officer has when deciding to use that force. Those concerns are not present in this case and, therefore, the holdings from that decision do not appear applicable to this case.

However, a portion of the decision of *Cardona* is applicable to this case. Betts' fundamental argument relies on the decision in *Crespo* to support the argument that a blood draw at a police station is *per se* unreasonable. The *Cardona* Court, however, has already rejected this argument. In that decision, the Court noted that the defendant had simply

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[24] *Cardona*, 2008 WL 5206771.

[25] *Id.* at *7.

[26] One factor leading to Common Pleas' suppression was that it was taken with some force, it was the defendant's first DUI arrest, and for a misdemeanor DUI. Betts' DUI charge here is a felony. Since *Crespo* has not been decided, this Court will not comment on whether felony vs. misdemeanor is a viable "bright line."

"singled out" the police station factor that was relied upon in *Crespo* to challenge the constitutionality of the seizure.[27] This Court also determined that the defendant in *Cardona* had failed to present any scientific evidence to support the proposition that blood drawn in a police station is more dangerous than one conducted in a hospital.[28] Instead, the Court noted that blood has been traditionally taken outside of hospital settings and that this tradition has not been found to endanger a person's well being.[29] Here, as in *Cardona*, Betts has failed to provide any reason for the Court to find the environment of the police station was unsanitary and, therefore, unreasonable. His argument on this point fails.

Delaware Implied Consent Statutes

The State has shown that at the taking of Betts' blood sample meets all constitutional standards. It has shown that the act of a phlebotomist taking the blood at a police station was reasonable. The focus of the Court's admissibility analysis shifts to the question of whether Officer Bruno complied with the *statutory* provisions regarding taking or not taking blood samples from suspected impaired drivers.

The Court's analysis begins with 21 *Del. C.* § 2740 which is the basic provision stating those who drive on Delaware's public highways are deemed to have, by that act, consented to have submitted to chemical testing.

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[27] *Id.* at *8.

[28] *Id.*

[29] *Id.* (citing *People v. Esayian*, 112 Cal.App.4th 1031, 1041 (Cal. Ct. App. 2003); *People v. Ford*, 4 Cal. App. 4th 32, 37 (Cal. Ct. App. 1992); *State v. Daggett*, 640 N.W.2d 546, 551 (Wis. Ct. App. 2001)).

> (a) Any person who drives, operates or has in actual physical control a vehicle…within this State shall be deemed to have given consent, subject to this section and §§ 4177 and 4177L of this title to a chemical test or tests of that person's blood, breath and/or urine for the purpose of determining the presence of alcohol or a drug or drugs. The testing may be required of a person when an officer has probable cause to believe the person was driving, operating or in physical control of a vehicle in violation of §§ 4177 and 4177L or § 2742 of this title, or a local ordinance substantially conforming thereto.[30]

Therefore, an officer need not ask or inform the suspected impaired driver of the officer's intent to conduct a chemical test so long as the officer has probable cause to suspect impaired driving. In fact, the legislative intent behind § 2740 was to provide a mechanism for the police to obtain chemical tests from unconscious suspects, who at the time of their suspected intoxication, would be incapable of refusing the test.[31]

Of course, a majority of the time when an officer interacts with a potentially intoxicated driver that suspect is conscious and can be informed of the officer's intent to obtain a chemical test. Sections 2741 and 2742 of the implied consent statutes lay out the options available to an officer interacting with a DUI suspect. The pertinent sections from those statutes read as follows:

> (a) At the time a chemical test specimen is required, the person <u>may be informed</u> that if testing is refused, the person's driver's license and/or driving privilege shall be (1) revoked for a period of at least 1 year if a violation of § 4177 is alleged; or (2) revoked for a period of at least 2

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[30] 21 *Del. C.* § 2740(a).

[31] *Morrow v. State*, 303 A.2d 633, 635 (Del. 1973).

months if a violation of § 4177L is alleged.[32]

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> (a) If a person refuses to permit chemical testing, after being informed of the penalty of revocation for such refusal, the test shall not be given but the police officer shall report the refusal to the Department. The police officer may, however, take reasonable steps to conduct such chemical testing even without the consent of the person if the officer seeks to conduct such test or tests without informing the person of the penalty of revocation for such refusal and thereby invoking the implied consent law.[33]

In reading those statutes together and distilling them down to their practical effect, the police have two routes they can choose when a driver refuses to submit to a chemical test. One route is for the officer to take the test and not discuss any penalties or consequences for refusal found in § 2741(a). In the event the driver has refused the officer's request, the officer may still go ahead and take the test by invoking the statute set out in the second sentence of § 2742(a) and laid out in full by § 2740(a). The officer is empowered to do this so long as he or she has probable cause to suspect a DUI and has not mentioned the penalties. In this scenario, the driver's refusal is inconsequential to the ability of the police to conduct chemical testing.

However, in the alternative, an officer can also choose to inform a driver who refuses to submit to chemical testing of the penalty of refusal. If, upon learning of the penalties, the driver allows chemical testing, the test may be taken. However, if the driver

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[32] 21 *Del. C.* § 2741(a). (emphasis added)

[33] 21 *Del. C.* § 2742(a). (emphasis added).

still refuses to take the test after the officer recites the penalties, that officer *must not* take the test and can no longer use probable cause as a reason to do so. In sum, when penalties are discussed by the police with the suspected impaired driver, the driver is then empowered to refuse and that refusal becomes binding upon the officer.

Whichever option the officer employs, taking the test upon probable cause and no mention of the revocation consequences, or not taking the test because the driver still refuses testing after being informed of the revocation consequences, the officer, must certify certain information to the Secretary of Transportation. The information certified reflects the statutory dichotomy between the two options available to the police. That certification process also further demonstrates there is a bright line separating the two options the police have when confronted with a refusal to submit to a chemical test.

If there is a refusal to undergo a chemical test after the officer has advised the suspect driver of the penalty consequences, the officer certifies to the Secretary of Transportation that: (1) there was probable cause for arrest, (2) the driver refused testing, and (3) he or she still did so after being advised of the consequences of refusal.[34] Where an officer did not advise the driver of the refusal consequences , and the test was taken the officer's certification is different. He or she has to certify he or she had probable cause for arrest. But in this instance, the officer does not certify the driver was advised of the

[34] 21 *Del. C.* § 2742 (b)(1).

consequences of refusal.[35]

With these statutory guidelines in mind, the Court's analysis turns on what Officer Bruno actually did. And that needs to be examined in light of the "Implied Consent and Probable Cause Form"[36] which he used during his interactions with Betts. The form clearly shows that the officer checked off the "Probable Cause" section. This option would have allowed him to simply proceed to take Betts' blood sample based the officer's probable cause. It and the applicable statutes did not require informing Betts of the penalties of refusal. Although the "Probable Cause" section is what was marked on the form, the officer's testimony clearly indicates he *also* informed Betts of the penalty for not submitting to the blood test. Therefore, even though the officer checked off "Probable Cause", in practice, he also followed the instructions of the "Implied Consent" option.[37]

Because the Court finds that Betts was informed of the loss of driving privileges consequences, the second factual issue is whether Betts sufficiently stated his refusal to blood testing. Betts did not testify and, therefore, the Court must base its decision on the testimony of Officer Bruno. The testimony, while at times a little unclear, shows by more

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[35] 21 *Del. C.* § 2742 (c)(1).

[36] Def's Hr'g Ex. #1.

[37] The terminology is potentially confusing. The basic law is the act of driving acts as implied consent. But the form has an "Implied Consent" section which only covers what happens when the officer has probable cause to arrest and the driver refuses testing after being advised of the penalty consequences.

than a preponderance of the evidence that Betts continued to refuse to undertake the chemical testing. Betts' counsel questioned the officer on whether he asked Betts if he did not wish to take the test. Officer Bruno stated this was correct. The record shows that Betts made a comment stating that he did not want to submit to the test but then, apparently after being informed the police could take his blood without his consent, submitted to the test or, at least did not physically resist. It is clear, however, that Betts, even after being appraised of the police officer's ability to take the test anyway, submitted but maintained his general unwillingness and refusal to submit to the chemical testing.

More importantly, the record shows a clear chronological order as the conversation between Betts and Officer Bruno transpired. First, Betts was read or given the opportunity to read the implied consent form. He refused to sign it. Furthermore, Officer Bruno stated he would not have written down "REFUSED TO SIGN" on the driver's signature line if he had not also read the three paragraphs containing the revocation of license/privilege to drive information. According to the record, Betts continued to refuse testing after he was made aware of the penalty. Under 21 *Del.C.* §2742(a), the officer is explicitly bound by that person's refusal after they have been informed of penalty. The record shows that after Betts read the penalty language he still refused testing. Only after this refusal did Officer Bruno begin to tell Betts the police could take the sample regardless of his wishes. However, when Officer Bruno made these comments, they were incorrect. Because he had already told Betts of the licensure penalty, he could no longer invoke the implied consent statues to take the blood sample, even by force.

It is unclear why Officer Bruno, whom the Court found to be intelligent and refreshingly candid, mixed the two incompatible procedures available to him. Perhaps the layout of the Implied Consent and Probable Cause Form begets the confusion. The "Implied Consent" (licensure revocation) section is separated from the section which the officer must read to a driver when that option is taken. Might this problem and issue have been avoided and not repeated in the future by revising the form to place the section laying out the consequences of refusal immediately after the "Implied Consent" section and before the "Probable Cause" section?

Whether the form is confusingly laid out, Officer Bruno was barred from getting Betts' blood sample once the implied consent provisions were invoked. If he had not invoked them, under the circumstances of this case, he could have legally obtained a sample of Betts' blood.[38] He had probable cause and the means used to obtain the blood sample was reasonable. By invoking the implied consent provisions, however, the taking of the blood sample was illegal under the statute and the result of any test must be suppressed.

The State at oral argument contended that Betts' lack of resistance to the blood draw was a waiver or some form of consent through conduct. This argument, however, overlooks the clear wording of 21 *Del.C.* §2742(a) which states the test "shall not be given" once the person refuses after hearing of the penalty. Furthermore, this argument

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[38] *McCann, supra*.

does not seem to make any practical sense because, essentially, the State is arguing that Betts, who had already verbally refused, would also have to physically resist the blood draw. Such conduct would, presumably, place Betts in the position of having to commit a form of assault or resisting arrest.

Therefore, the test results are inadmissible. However, there is still other competent evidence available to the State if it wishes to prosecute Betts for DUI.

Conclusion

For the reasons set out in this opinion, Betts' motion to suppress the results with regard to the blood test that was taken on the morning of July 12, 2008 is **GRANTED**. However, because the Court finds no infirmities in the police conduct leading up to the blood test, Betts' additional requests for suppression are **DENIED**.

IT IS SO ORDERED.

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J.