

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND
FOR NEW CASTLE COUNTY

STATE OF DELAWARE)
)
 v.)
)
GARY J. BOBB,) Case No. 0702002217
)
)
 Defendant.)
)

Date Submitted: June 11, 2007
Date Decided: June 13, 2007

MEMORANDUM OPINION

Upon Consideration of Defendant's Motion to Suppress
GRANTED in part.

Joseph S. Grubb, Deputy Attorney General, Department of Justice,
Wilmington, Delaware, Attorney for the State.

Brian J. Chapman, Esquire, Wilmington, Delaware, Attorney for the
Defendant.

SCOTT, J.

FACTS

Police accused Defendant Gary J. Bobb (“Defendant”) of leaving the scene of a three car accident on northbound North DuPont Highway, US Route 13, north of the intersection with School Lane in New Castle, Delaware. The accident occurred on February 2, 2007 at approximately 10 p.m.

Shortly after this accident, Trooper Malkin (“Malkin”) of the Delaware State Police arrived at the scene and conducted an investigation. Malkin first spoke with drivers of the other two vehicles, hereinafter referred to as “Driver 1” and “Driver 2”. Both drivers provided the same description of the accident. According to Malkin, Driver 1 informed him that:

He was traveling northbound on US Route 13 in the middle lane of traffic. A white pick-up truck was in the right lane next to Driver 1. The white pick-up truck attempted to merge into Driver 1’s lane, causing the white pick-up truck’s front left area to strike the right side of Driver 1’s vehicle. This collision forced Driver 1 into the far left lane, where Driver 2 was. Driver 1 then struck Driver 2’s vehicle as a result. The white pick-up truck continued northbound on Us 13 without stopping and fled the scene.¹

Trooper Malkin also spoke to a witness who was driving northbound on US Route 13, immediately behind the white pick-up truck. (hereinafter referred to as “Witness 1”). Witness 1 gave the same account of the accident

¹ State Resp. to Def. Mot. Supp., ¶4.

as Driver 1 and 2. Also, Witness 1 noted that she continued to follow the truck after it failed to stop at the scene and managed to obtain its license plate number. When Trooper Malkin conducted a computer inquiry of this license plate number, he found that the white pick-up truck was registered to Defendant Gary Bob at 201 Western Avenue in Wilmington, Delaware.

At the June 11, 2007 Suppression Hearing, it was established that Defendant lived roughly five miles from the scene of the accident. Trooper Malkin testified that approximately an hour and a half after the accident he continued his investigation by going to the residence. At the residence, he observed the white pick-up truck with the same license plate number. Malkin also noticed that the white pick-up truck did not have snow on it, while the other cars parked outside the residence did have snow on them. In addition, he noticed that there was snow underneath the pick-up truck as though the truck had not been there for some time. Finally, Malkin observed left front-end damage to the white pick-up truck that corresponded with the accounts of Driver 1, Driver 2 and Witness 1.

Shortly after 11:17 p.m., Trooper Malkin knocked at the front door and when there was no answer he went to the back door and knocked again. Trooper Malkin testified that when Defendant answered the door, he told Defendant that he would like to speak with him about an accident he was

investigating. Malkin then asked Defendant if anyone else was in the home. Defendant responded “No.” Malkin then asked if he could come inside to check for safety purposes. Defendant did not answer but instead pushed open the door and stepped backward to allow the Trooper to enter. At the Hearing, the State conceded that at no time did Defendant verbally agree, nor did he agree in writing, to the Trooper’s entry.

After entering the house, Trooper Malkin stated that he smelled a pungent odor of alcohol on Defendant and then noticed his “glassy and bloodshot” eyes.² Malkin also observed Defendant’s inability to stand upright without swaying. Defendant told Trooper Malkin that no one, including himself, drove the white pick-up truck that day. Trooper Malkin subsequently placed Defendant in handcuffs and put him in his police car. Trooper Malkin testified that at that point Defendant was not free to leave.

A search of Defendant’s person revealed keys to the white pick-up truck. According to Malkin, he did not conduct a field test at the Defendant’s residence because of the snowy and wet conditions. Later at the police station, Cpl. Slover of the Delaware State Police informed Defendant of his Miranda Rights. Defendant then agreed to perform the field tests, but stumbled twice. Defendant then stated: “Mark me off, I couldn’t do that if I

² State Resp. to Def. Mot. Supp., ¶11.

was straight.”³ Cpl. Slover asked Defendant why he could not complete the test, and Defendant answered, “Cause I’m drunk.”⁴ Defendant refused to perform another sobriety test.

Defendant was subsequently charged on February 3, 2007 with Driving Under the Influence of Alcohol, Improper Lane Change, Leaving the Scene of a Property Damage Accident, Removing a Vehicle from the Scene of an Accident, Failure to Report an Accident to a Police Agency and Failure to Provide Information at an Accident Scene.

PARTIES’ CONTENTIONS

At the Suppression Hearing, the parties agreed that the warrantless entry into Defendant’s residence was legal. The only issue remaining is whether the warrantless arrest of Defendant was legal. Defendant avers that his “warrantless arrest does not comport with the provisions regarding warrantless arrests for motor vehicle violations.”⁵ Defendant specifically refers to statutory violations of §701(a) and (b).

In response, the State contends that Trooper Malkin had probable cause to arrest Defendant for Driving Under the Influence. The State also asserts that Defendant’s Motion must fail under 21 *Del. C.* §701(b).

³ State Resp. to Def. Mot. Supp., ¶15.

⁴ *Id.*

⁵ Def. Mot. Supp., ¶6.

DISCUSSION

The Court will address whether Trooper Malkin's arrest of the Defendant complied with statutory law.

I. Delaware Statutory Law

In order to address the application of 21 *Del. C.* 701 here, the Court notes the relevant sections as follow:

(a) The Secretary of Public Safety, the Secretary of Safety and Homeland Security's deputies, Division of Motor Vehicles investigators, State Police, state detectives and other police officers authorized by law to make arrests for violation of the motor vehicle and traffic laws of this State, provided such officers are in uniform or displaying a badge of office or an official police identification folder, may arrest a person without a warrant:

(1) For violations of this title committed in their presence; or

(2) For violations of 4169 of this title, relating to speed violations, when the speed is determined by radar, electronic devices, electromechanical devices, audio sensor devices, visual sensor devices or aerial spotting...

(3) For violations of §4108(a)(3) of this title relating to red traffic lights, when the violation is determined by personal observation by another law enforcement officer who communicates the observation to the arresting officer.....

(b) Any police authorized to arrest without warrant under subsection (a) of this section is further authorized at the

scene of a motor vehicle accident, upon reasonable and probable cause to believe, based upon personal investigation which may include information obtained from eyewitnesses, that a violation has been committed by any person then and there present, to arrest such person without a warrant of arrest.

Hence, 21 *Del. C.* §701(a) requires that the arresting officer personally witness the violation or that a fellow police officer personally observe the violation. Trooper Malkin's warrantless arrest clearly does not qualify under these requirements because neither he nor other police personally observed the accident.

Likewise, the Court finds that Malkin's arrest does not comport with the requirements of 21 *Del. C.* §701(b). This section only permits a police officer to make a warrantless arrest at the scene of an accident upon probable cause founded through investigation. Delaware law defines "at the scene of an accident" to include a location only several minutes away.⁶ This holding arises from Fourth Amendment concerns regarding the sanctity of one's home.⁷ As such, the Court finds that 21 *Del. C.* §701(b) does not validate Trooper Malkin's arrest because he made the arrest at Defendant's residence, which was approximately five miles from the accident scene.

⁶ *Singleton v. Voshell*, 1993 Del. Super. LEXIS, at *18.

⁷ *Id.* (citing *United States v. Reed*, 572 F.2d 412, 423 (1978) *cert. denied sub nom. Goldsmith v. United States*, 439 U.S. 913, 99 S. Ct. 283, 58 L. Ed. 2d 259)).

Thus, the Court finds that the warrantless arrest of Defendant in his home was illegal.

II. Suppression of the Evidence

The Court finds that it must grant the Motion to Suppress because police violated Delaware statutory law. The Court, therefore, looks to Delaware law for guidance.

In *Fitzcharles v. State*⁸, the Delaware Superior Court addressed this same issue. The defendant in *Fitzcharles*, like in the case at hand, left the scene of an accident. The police traced the license plate number to the defendant's residence where he was arrested. The *Fitzcharles* Court found that police obtained valid consent to enter the residence, but found that the warrantless arrest was illegal. The Court explained that the remedy for an illegal arrest is to suppress the evidence seized as a result of the arrest, however, the Court found that all of the evidence had been recovered or obtained before the arrest.

In the present case, as in *Fitzcharles*, most of the evidence was established prior to Defendant's arrest. Thus, the fact that Defendant may have been impaired is admissible. Trooper Malkin was lawfully at the Defendant's house and his entry was legal. Malkin's observations that

⁸ *Fitzcharles v. State*, 1994 Del. Super. LEXIS 328.

Defendant smelled strongly of alcohol and had bloodshot and glassy eyes were made prior to Defendant's arrest. Defendant's statement and test results obtained after his arrest should be suppressed, however, evidence gathered and observations made prior to arrest will not be suppressed.

The Court, therefore, finds that any evidence obtained after Defendant's arrest in his home should be suppressed.

CONCLUSION

For all the foregoing reasons, Defendant's Motion to Suppress is **GRANTED.**

IT IS SO ORDERED.

Judge Calvin L. Scott, Jr.,