IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
v.	)	Cr. A. No: 0905014485
	)	
MATTHEW J. MEALY,	)	
Defendant	)	

Submitted: December 21, 2009
Decided: January 20, 2010

DECISION AFTER TRIAL

Michael Hendee, Esquire, Department of Justice, Wilmington, Delaware, Attorney for the State

Thomas A. Foley, Esquire, Wilmington, Delaware, Attorney for Defendant

ROCANELLI, J.

Defendant Matthew J. Mealy was charged by information with Driving Under the Influence of Alcohol in violation of 21 *Del. C.* §4177(a). Trial was held on December 21, 2009. The Court reserved decision. This is the Court's decision after trial. The Court concludes that the Defendant had actual physical control of a vehicle while he was under the influence of alcohol.

THE FACTS

On May 15, 2009, at around 05:00 a.m., Corporal Rhoades of Delaware State Police Troop Six was on routine patrol in a fully marked patrol car on Kirkwood Highway in New Castle County. During the course of his patrol,

Corporal Rhoades entered the Astro Shopping Center to conduct business property checks. All businesses in the shopping center were closed. There was a grey Honda Accord in the parking lot with its engine running and its headlights on. Defendant was in the driver's seat slumped over the steering wheel.

Corporal Rhoades exited his police cruiser and approached the vehicle. Corporal Rhoades noticed vomit on the pavement next to the vehicle. Corporal Rhoades knocked on the window of the vehicle. Defendant did not awaken as a result of the knocking.

Corporal Rhodes opened the unlocked driver's door of the vehicle to check on Defendant's welfare. Defendant's seatbelt was not buckled; it was tangled over Defendant's left arm. The seatbelt retracted when Corporal Rhoades opened the door.

Defendant was awakened when Corporal Rhoades opened the door. Corporal Rhodes inquired whether Defendant needed medical attention. Defendant stated, "No, I'm fine" and explained that he did not feel well the previous night.

Corporal Rhoades noticed a strong smell of alcohol when he opened the door. Corporal Rhoades testified that the odor of alcohol was coming from Defendant's mouth and not from the vomit nearby. In addition, Corporal Rhoades stated the odor of alcohol got stronger when Defendant was speaking. Corporal

Rhoades observed that the Defendant's speech was "slurred," his eyes were "blood shot," and his face was "flushed red."

Defendant admitted he had been drinking at Hooter's Restaurant in the Astro Shopping Center the previous evening. Defendant claimed he ate chicken wings that did not agree with him. He said he had had "a few drinks" and stopped drinking at last call.[1] Defendant told Corporal Rhoades that "a few drinks" meant "three or four or something like that."

Corporal Rhoades requested to see Defendants driver's license and vehicle registration. Defendant initially responded to the officer's request by producing a credit card instead of his license. Defendant noticed his mistake and placed his credit card back in his wallet. Defendant produced his driver's license and registration as requested.

After receiving Defendant's license and registration, Corporal Rhoades asked Defendant to step out of the vehicle. At this point, the vehicle's engine was shut off and the keys were placed on the front passenger seat. While Defendant was exiting the vehicle, he lost his balance. Defendant used the open door and the roof of the vehicle to steady himself. Corporal Rhoades asked Defendant if he was OK to drive. Defendant responded that he felt "OK" and stated he could drive.

[1] Last call is at 1:00 a.m. when service of alcoholic beverages must cease. 4 *Del. C.* §709(c).

Defendant consented to performing field sobriety tests. Corporal Rhoades administered three tests: the HGN test, the Walk-and-Turn test, and the Counting test. The Horizontal Gaze Nystagmus ("HGN") and Walk-and-Turn tests were administered to Defendant in compliance with National Highway Traffic Safety Administration ("NHSTA") standards. Corporal Rhoades is certified by the Delaware State Police in NHTSA-DUI Detection and HGN.[2] The Counting test is not NHTSA approved.

The first field sobriety test performed by Defendant was the HGN test. Defendant failed six of the six possible clues. The second field sobriety test conducted was the Walk-and-Turn test. The Walk-and-Turn test contains eight clues indicating intoxication. NHTSA considers observation of two or more clues a failure. Defendant failed seven out of eight clues by losing his balance, starting too soon, stopping at step nine, missing heel to toe contact, stepping offline, raising his arms and failing to pivot as instructed. Defendant took the correct number of steps as instructed, passing one clue out of eight. Corporal Rhoades stated that Defendant lost his balance and almost fell down while attempting to pivot during the Walk-and-Turn test. Therefore, Corporal Rhoades did not administer the One-Leg Stand test due to concern for Defendant's safety.

[2] Performance of sobriety field tests was part of Corporal Rhoades' training at the Delaware State Police Academy. State's Exhibit One is the October 13, 2000 certificate Corporal Rhoades received from the Delaware State Police Academy upon his successful completion of NHTSA DUI Detection and HGN course.

Corporal Rhoades also administered a Counting Test to Defendant. Defendant confirmed that he understood the instructions and would be able to perform the test. The test required Defendant to count down from number seventy-two to number fifty-two. According to Corporal Rhoades, Defendant failed the test because he failed to stop at number fifty-two as directed. Defendant counted to number fifty-one. After counting, Defendant realized his mistake and said "I think I should have stopped at fifty-two."

Corporal Rhoades concluded that Defendant was impaired. Because Defendant was in actual physical control of an operable vehicle, Corporal Rhoades arrested Defendant for Driving Under the Influence of Alcohol ("DUI") in violation of 21 *Del. C.* §4177(a). Defendant was read his Miranda rights and transported to Delaware State Police Troop Six. Defendant was cooperative but refused to take the intoxilyzer test.

ANALYSIS

"No person shall drive a vehicle … [w]hen the person is under the influence of alcohol."[3] The State must prove each element of the charge beyond a reasonable doubt.[4] Before a Defendant may be found guilty of DUI, the State must prove that Defendant drove a motor vehicle at or about the time and place charged;

[3] 21 *Del. C.* §4177(a) (1).
[4] 11 *Del. C.* §301.

and that Defendant was under the influence of alcohol while he drove the motor vehicle.[5]

"Driving" is specifically defined as "driving, operating, or having *actual physical control* of a vehicle."[6] "[A]n accused may be convicted [of DUI] under this statute based on admissible evidence '*other than the results of a chemical test of a person's blood, breath or urine* to determine the concentration or presence of alcohol or drugs.'"[7] In other words, if the State proves beyond a reasonable doubt that Defendant was impaired when he had actual physical control of a vehicle, then it is not necessary for the State to provide evidence of the results of a chemical test, such as an intoxilyzer or blood test.

No evidence of any chemical tests were admitted as evidence at trial. Prior to trial, the parties stipulated that the results of the HGN and Walk-and-Turn tests were admissible to establish evidence of impairment but not as scientific evidence to quantify blood alcohol level.[8] Therefore, no evidence was presented to quantify the concentration of alcohol in Defendant's blood.

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[5] *Lewis v. State*, 626 A.2d 1350, 1355 (Del. 1993).
[6] 21 *Del. C.* §4177(c) (3) (*emphasis added*).
[7] *Bennefield v. State*, 2006 WL 258306 (Del. Super. 2006) (citing 21 *Del. C.* § 4177(g) (2) (*emphasis added*)).
[8] *See State v. Ruthardt*, 680 A.2d 349, 362 (Del. Super. Ct. 1996).

A. ACTUAL PHYSICAL CONTROL

A person may be convicted of DUI even if the motor vehicle at issue was not actually in motion and even if the engine was not running. The statutory prohibition against DUI is not limited to those actually operating or driving a vehicle. The legislature expressly expanded the scope of the DUI statute to include more than just driving by adding the language of "actual physical control."[9] A person can have actual physical control of a motor vehicle without either operating or driving the vehicle.[10] "[P]hysical control is meant to cover situations where an inebriated person is found in a parked vehicle under circumstances where the car, without too much difficulty, might again be started and become a source of danger to the operator, to others, or to property."[11]

> In considering whether or not the defendant was in physical control of the motor vehicle while under the influence of alcohol, you may consider the defendant's location in or by the vehicle, the location of the ignition keys, whether the defendant had been a passenger in the vehicle before it came to rest, who owned the vehicle, the extent to which the vehicle was operable, and if inoperable, whether the vehicle might have been rendered operable without too much difficulty so as to be a danger to persons or property. You may consider these facts as well as any other facts or circumstances bearing on whether or not the defendant was then in physical control of a motor vehicle which was or reasonably could

[9] *Bodner v. State*, 752 A.2d 1169, 1172 (Del. 2000).
[10] *Id*. at 1173.
[11] *Id.* (citing *State v. Starfield*, 481 N.W.2d 834, 837 (Minn. 1992)).

> become a danger to person or property while the defendant was under the influence of alcohol.[12]

Defendant reasonably could have become a danger to persons and property. He was behind the wheel of the car, the engine was running, and the headlights were on. In addition, the seatbelt was tangled over Defendant's left arm, indicating that he intended to drive at some point. Actual physical control requires fewer factors than are present in this case.[13]

Moreover, in response to questioning, Defendant told Corporal Rhoades that he felt "OK" and could drive. Because the vehicle was not secured (at least one door was unlocked), the Court rejects Defendant's contention that he was using the vehicle for shelter. In addition, because the seat belt was tangled over Defendant's left arm and he was slumped over the wheel, the facts do not support Defendant's contention that he was merely resting.

The Court concludes Defendant was in actual physical control of the vehicle.

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[12] *Id*. at 1174.

[13] *See Baker v. State*, 2002 WL 1288728 (Del. Super. 2002) (where the Court found the defendant was in actual physical control while sleeping in the driver's seat of a vehicle where the headlights were not on, the driver's side window was partially open, the ignition keys were on the passenger's seat, and alcohol was found in the vehicle).

B. IMPAIRMENT

The State is required to prove that Defendant was under the influence of alcohol.[14] Chemical testing is not required to prove impairment.[15]

> The evidence must show that the person has consumed a sufficient amount of alcohol to cause the driver to be less able to exercise the judgment and control that a reasonably careful person in full possession of his or her faculties would exercise under like circumstances.
>
> It is not necessary that the driver be "drunk" or "intoxicated." Nor is it required that impaired ability to drive be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to drive safely was impaired by alcohol.[16]

Impairment was established beyond a reasonable doubt. Defendant was slumped over the wheel of car with his arm tangled in the seat belt. The car's engine was running and its door was unlocked. The car was in a deserted parking lot at 5:00 in the morning. Defendant did not awaken when Corporal Rhoades knocked on the window. Defendant admitted he had been drinking. There was a strong odor of alcohol on Defendant's breath, his speech was slurred and his face was flushed. Upon exiting the vehicle, Defendant lost his balance and steadied

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[14] *Lewis*, 626 at 1355.
[15] 21 *Del. C.* §4177(g)(2) ("Nothing in this section shall preclude conviction of an offense defined in this Code based solely on admissible evidence other than the results of a chemical test of a person's blood, breath or urine to determine the concentration or presence of alcohol or drugs.")
[16] *Lewis*, 626 A.2d at 1355.

himself by holding onto the vehicle. Defendant failed two NHSTA-certified field sobriety tests.

After being arrested by Corporal Rhoades for DUI, Defendant refused to take a breath test to measure the concentration of alcohol in his blood. Evidence of the accused's refusal to take sobriety tests, including a breathalyzer, is admissible and may be considered by the trier of fact as evidence of consciousness of guilt.[17] The Court also may consider legitimate reasons that a suspect may refuse to perform sobriety tests but none were presented by Defendant[18]

The Court does not rely on the results of the Counting test, evidence of Defendant's "blood shot" eyes, or the presence of vomit outside of the vehicle to conclude that Defendant was impaired. The Counting test is not NHTSA approved. Defendant also noticed his mistake on the test and pointed it out to Corporal Rhoades. Defendant's "blood shot" eyes can be attributed to the fact that Defendant had been recently awakened. The vomit outside of the vehicle was not necessarily the result of consumption of alcohol. Defendant told Corporal Rhoades that the wings did not agree with him. Since there are other reasonable explanations for Defendant's blood shot eyes and the vomit out side the vehicle, and because Defendant corrected his own mistake on the Counting test, the Court

[17] *See State v. Durrant*, 188 A.2d 526 (Del. 1963).
[18] *See State v. Laphen*, Del. CCP Cr. A. No. 96-05-007101, DiSabatino, C.J. (December 23, 1996).

does not rely upon these potential indicators of impairment to reach its conclusion that Defendant was impaired.

CONCLUSION

As a result of the Court's findings of fact, which are based upon the entire record, including all direct and circumstantial evidence and the references therefrom, the Court finds that the State has met its burden of proving each and every element of Driving Under the Influence of Alcohol beyond a reasonable doubt. Defendant was under the influence of alcohol while in actual physical control of a vehicle as prohibited by 21 *Del. C.* §4177(a). Therefore, Defendant is GUILTY of Driving Under the Influence of Alcohol.

The matter shall be set for sentencing.

IT IS SO ORDERED.

Andrea L. Rocanelli

The Honorable Andrea L. Rocanelli