IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE	)	I.D. No. 0110010945
v.	)	
EDWARD L. POWELL, III	)	
Defendant.	)	

Submitted: March 22, 2002
Decided: June 4, 2002

ORDER

Upon Defendant's Motion to Suppress. Denied.

James Kriner, Esquire, Deputy Attorney General, Dover, Delaware, for the State.

Anne E. Hartnett, Esquire, of Parkowski, Noble & Guerke, P.A., Dover, Delaware for the Defendant.

WITHAM, J.

State of Delaware v. Edward L. Powell, III
I.D. No. 0110010945
June 4, 2002

Upon consideration of the Motion to Suppress of Edward L. Powell, III ("defendant"), the arguments of the parties, as well as testimony from the defendant and the arresting officer, it appears to the Court that defendant's motion should be denied. Because no bargain or agreement was reached between Cpl. Hill and the defendant for the entry of a nolle prosequi in this case, the defendant has no remedy for the alleged breach of such an agreement.

Background

1. This case arises from a fourth arrest of the defendant for Driving Under the Influence ("DUI") which is a felony in violation of Title 21, Section 4177(a) of the Delaware Code. (A passenger in defendant's car was arrested on separate drug charges.) This is the defendant's second pre-trial hearing regarding these charges. Originally, the defendant moved this Court to dismiss the DUI charges for the reason that immunity existed under an alleged nolle prosequi agreement between the defendant and the arresting officer. The Court denied the motion to dismiss finding that the alleged agreement provided no basis to dismiss the DUI charges; however, the Court agreed to hear additional argument on the issue of suppression. This is the Court's decision after a hearing on the defendant's Motion to Suppress.

Facts

2. On the morning of September 23, 2001, the defendant was seen by Officer Hutson and Cpl. Hill of the Clayton Police driving his pickup truck erratically from the fog line to the center line of the road, weaving in and out of the lane at least three times. The officers pulled the defendant over. As the officers

approached the truck, Cpl. Hill noticed a strong smell of alcohol coming from the defendant. Upon questioning by Cpl. Hill, Mr. Powell admitted to consuming alcoholic beverages. Several other officers arrived and put defendant's passenger in the back of a police car.

3. Because the police had reason to believe the defendant was operating his vehicle under the influence of alcohol, he was then asked to exit his truck to perform field sobriety tests. The police officers took defendant to the rear of his truck to perform the tests. They observed him having trouble with his balance. He used the bed rail for balance purposes and had to lean up against the back of the truck. The defendant had trouble with the field sobriety tests.

4. After failing the field tests, the defendant was placed under arrest. Cpl. Hill then went to the front of the truck to secure the vehicle (the truck was to be left locked at the arrest site). While securing the truck, Cpl. Hill observed in plain view[1] a pipe used for smoking marijuana or narcotics. The defendant denied the pipe was his, and said it belonged to his passenger, or to an employee that had borrowed the defendant's truck. Cpl. Hill testified that he told defendant, "I need to know where the pipe came from, because if not, I'm going to lock everybody up that's in the vehicle. And at that point that's when [defendant] started talking." Defendant told Cpl. Hill that the drugs were in the headband of the defendant's passenger. The defendant testified that he provided the whereabouts of the drugs only *after* Cpl. Hill

[1] Defendant denied the pipe was in plain view; however, this fact is irrelevant to the current analysis regarding the DUI charges.

told the defendant that Hill could "help him out," or "get this taken care of–make this DUI disappear" if the defendant told Hill where the drugs were. Cpl. Hill denied that he made any promise of help at this time. Rather, it was Cpl. Hill's testimony that the threat of being locked up made the defendant talk.

5. After a search of the passenger's headband the drugs were found. Both individuals were arrested and transported to the Smyrna Police Department. There, the defendant alleges that Cpl. Hill told the defendant to "go on inside and sit next to Mr. Brown [the defendant's passenger] like you didn't tell me nothing, everything is just right."

6. Cpl. Hill left the room (and was busy securing evidence that was found in the vehicle) while Officer Hutson conducted the intoxilizer test on defendant. Hutson was seated with defendant at the intoxilizer for the twenty-minute observation period. Defendant alleges he was given a form by the police with two sections on it. One was probable cause to take the intoxilizer and the other section was implied consent.[2] Defendant never considered invoking the implied consent provisions because of the repeated assurances of Cpl. Hill. Cpl. Hill testified that when he came back into the room defendant was done his breath test. Defendant's blood alcohol concentration was .141, which is over the statutory limit of .10.

7. Cpl. Hill testified that after the intoxilizer, the defendant then confided that he was trying to get his children back through family court, and couldn't go to

[2] There was no evidence from Officer Hutson that he gave the defendant the implied consent option under 21 *Del. C.* § 2741(a). Cpl. Hill could only speculate on what Hutson did.

jail. Cpl. Hill told the defendant that he would "call the Attorney General when it was time for the case and try to talk to him to see if we can't try to keep you out of jail to see if we can get your children." Cpl. Hill testified that, at that point, defendant had already taken the intoxilizer test and failed; therefore, it probably struck the defendant that he might go to jail, and so he confided in Cpl. Hill about his children.

8. Defendant testified that when Cpl. Hill came back into the room after the intoxilizer, the officer asked the defendant to ride in the police car to show Hill the location defendant had taken his passenger (prior to the arrest). Defendant, believing that Cpl. Hill was going to help with the DUI charges, agreed to show him the house. Apparently, crack use occurred there. The defendant took a ride with Cpl. Hill and pointed out the house. When they got back to the station defendant was given his keys and a ticket, and he left.

9. The next day defendant testified that he called Cpl. Hill to confirm that the DUI was taken care of. Defendant testified that Cpl. Hill said "It's no problem, I call down [to] the AG's office and I get it Nolle processed (sic)." Cpl. Hill testified that when he promised to call the prosecutor he had no knowledge that this was defendant's fourth DUI, so he didn't know that a plea bargain was not possible. Cpl. Hill wanted to help the defendant get a plea.

10. Cpl. Hill testified that he actually did make a call to the prosecutor about the defendant and the charges in this case. Cpl. Hill was advised that since this DUI was a felony charge, whereas the charges with which the defendant

assisted were misdemeanors, the prosecution would not entertain a plea bargain.

Claims of the Parties

11. Defendant maintains that Cpl. Hill made a promise to help, fully knowledgeable that defendant was facing jail time, and truly believing that he could actually help. Defendant states that he relied, to his detriment, upon Cpl. Hill's promise, accepted his offer and reciprocated by providing information regarding the location of drugs on the passenger in his truck. In addition, in reliance on Cpl. Hill's promise, defendant completed field sobriety tests, made statements, took a Breathalyzer test and provided further drug information. Finally, defendant maintains that because of the repeated assurances of Cpl. Hill, the defendant never considered invoking the test refusal provisions of under 21 *Del. C.* § 2741(a).

12. Defendant submits three cases from three other jurisdictions for the following rule. Where: (1) there was a police promise not to prosecute in exchange for assistance to the police; (2) detrimental reliance upon the promise by the defendant, and (3) and unwillingness on the part of the prosecution to be bound by the police promise; then (4) to protect the fundamental fairness and integrity of the criminal justice system, the appropriate remedy is to suppress the evidence obtained as a result of the unauthorized promise.

13. Applying the rule of the case law submitted by the defendant, it is argued that here: (1) Cpl. Hill made a promise to enter a nolle prosequi for the defendant in this case; (2) the defendant relied upon this promise, provided information leading to the drug arrest of his passenger, cooperated in providing a

breath sample, and did not choose to have his license revoked for one year instead of giving the breath sample; therefore, (3) because of this detrimental reliance, even if Cpl Hill did not have the authority to bind the prosecutor to a nolle prosequi, this Court may suppress all evidence obtained after Cpl. Hill's unauthorized promise.

14. The prosecution maintains that the defendant's argument is invalid on its face because Delaware courts have never recognized an unauthorized promise, nor provided a remedy for such a promise. Moreover, even if Delaware courts were to recognize such a remedy, considering the present facts the defendant is not entitled to suppression under the non-jurisdictional cases he has submitted. Those cases hold that the defendant should be placed in the same position that he held prior to the unauthorized promise. Even if an authorized promise could be construed, the police had probable cause to take the defendant's breath sample with or without his cooperation. Consequently, the defendant never really experienced a change in position as a result of any alleged promise.

Standard

15. In the case *sub judice* defendant's rights must be analyzed under Fourth Amendment search and seizure law, because when the police have probable cause to arrest a defendant and a bodily sample is appropriated, "[s]ection 2750(a) [of Title 21] eliminates any defense to admissibility not implicating the Fourth Amendment."[3] On a Motion to Suppress, the State bears the burden, by a

[3] *Seth v. State*, 592 A.2d 436, 445 (Del. 1991).

preponderance of the evidence,[4] to establish "that the challenged police conduct comported with the rights guaranteed [defendant] by the United States Constitution, the Delaware Constitution and Delaware statutory law."[5]

Fourth Amendment Analysis

16. Here, the Fourth Amendment is not implicated for use as a defense against admissibility because the defendant had no reasonable expectation of privacy in the Breathalyzer sample taken.[6] The breath sample was *required* to be turned over to the police under 21 *Del. C.* § 2740(a), which states that "[a]ny person who drives . . . within this State shall be deemed to have given consent . . . 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 drugs."[7]

17. Delaware's implied consent law, which removes the expectation of privacy, is subject to the requirement that the police have probable cause that a DUI

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[4] "Despite some arguable earlier confusion in the Delaware case law over which party bears the burden of proof on a motion to suppress evidence seized during a *warrantless* search, the rule in Delaware should now be clear. The State bears the burden of proof." *Hunter v. State*, —A.2d—, 2001 WL 965062 at *2 (Del.) (emphasis in original).

[5] *State v. Kang*, 2001 WL 1729126 at *3 (Del. Super Ct.) (citing *Hunter,* 2001 WL 965062).

[6] "[T]he test to determine whether a person has a protected Fourth Amendment privacy right is whether that person has a reasonable expectation of privacy in the area invaded by government action." *State v. Onumonu*, 2001 WL 695539 at *3 (Del. Super. Ct.) (citing *Katz v. United States,* 389 U.S. 347, 349 (1967)).

[7] *See State v. Baker*, 720 A.2d 1139 (Del. 1998) (discussing constitutionality of statute).

offense has been committed.[8] Probable cause is a "practical, nontechnical" concept that must be measured by the totality of the circumstances.[9] Probable cause "lies between suspicion and sufficient evidence to convict."[10] Here, no one challenges that the police had probable cause to arrest the defendant. The defendant was swerving across lanes, he smelled strongly of alcohol, he had trouble balancing, and failed field sobriety tests. Because the police had probable cause and their conduct did not involve excessive force, the defendant was required to consent to the intoxilizer test.

18. Defendant argues that it was his option to invoke the refusal provisions of 21 *Del. C.* § 2741(a).[11] Defendant maintains that he did not even consider using that section because he relied on Cpl. Hill's promises and assurances of help. After hearing the testimony, the Court believes that there was no in-depth discussion or offer of help on the part of Cpl. Hill until *after* the Breathalyzer test was taken by the defendant; therefore, it was not reasonable for defendant to rely on the mere hope of help from Cpl. Hill as a reason to take the intoxilizer. Moreover, there is no evidence that the defendant's will was overborne in his decision to take the

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[8] *State v. Brown*, 1995 WL 339052 (Del. Super. Ct.); *aff'd* 1995 WL 788607 (Del.).

[9] *Gardner v. State*, 567 A.2d 404, 409 (Del. 1989).

[10] *Thompson v. State*, 539 A.2d 1052, 1055 (Del. 1988).

[11] 21 *Del. C.* § 2741(a) states in pertinent part that"[a]t the time a chemical test specimen is required, the person *may* be informed that if testing is refused, the person's driver's license and/or driving privilege shall be . . . revoked . . . ." (Emphasis added.)

intoxilizer. For these reasons, the Court cannot find that defendant had a reasonable expectation of privacy in the breath sample even if the defendant had been given the option to invoke the refusal provisions of 21 *Del. C.* § 2741(a).[12]

19. Furthermore, even if this Court found that the Fourth Amendment was implicated here because there was government action *and* a reasonable expectation of privacy in the breath sample, the search was still proper for two reasons. The most obvious reason is the consent statute cited above.[13] Secondly, the search was constitutionally permissible as a search for evanescent evidence under exigent

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[12] It is also not clear under the case law, or the facts of this case, whether the defendant ever had the option to invoke the refusal statute. Here, there was no sure testimony that the defendant was ever given notice of the penalty for refusal to take the Breathalyzer under § 2741. Defendant's lawyer said defendant was given a written form with an "implied consent" section on it. Cpl. Hill did not know if the defendant received such a writing or if the § 2741(a) provisions were presented to the defendant. Cpl. Hill didn't explain them to the defendant himself because Officer Hutson administrated the breath test. (See "Facts" P. 4 *infra.*) Cpl. Hutson did not testify, and the defendant never testified that he was given a choice to take the test. Nor did the defendant state he was informed of the penalty of revocation for failure to take the test. The police officers were not required to give the defendant a choice to take this test, and the facts do not show that they gave him the choice. Moreover, "*even if the officer had violated the implied consent law*, any argument to exclude the evidence is irrelevant [unless it] implicat[es] the Fourth Amendment." *Seth*, 592 A.2d at 445 (emphasis added) (citations omitted) (holding "that the Delaware statute allows an officer to require submission to testing without consent, and that the statute affords no choice"); *see State v. Brown*, 1995 WL 339052 (finding that informed consent was not necessary to admit breath test results); *Brank v. State*, 528 A.2d 1185, 1189 (Del.) (distinguishing Delaware law from Maryland law, in that Delaware does not give a DUI suspect (where there is probable cause) the "option under the statute–to take or refuse to take the sobriety test"). *McCann v. State*, 588 A.2d 1100, 1102 (Del. 1991).

[13] 21 *Del. C.* § 2740(a).

circumstances.[14]

Fundamental Fairness

20. Nevertheless, the defendant has argued that the results of the intoxilizer test should still be suppressed for reasons of fundamental fairness and to protect the integrity of the criminal justice system. To achieve that end, defendant submits case law from three other jurisdictions. The defendant submits that in those cases, where there was: (1) a police promise not to prosecute in exchange for assistance to the police; (2) detrimental reliance upon the promise by the defendant, and (3) and an unwillingness on the part of the prosecution to be bound by the police promise; then (4) to protect the fundamental fairness and integrity of the criminal justice system, the appropriate remedy is to suppress the evidence obtained as a result of the unauthorized promise.

21. The Court does not need to decide whether the persuasive authority submitted by the defendant is protective of fundamental fairness, or whether those cases are in accord with Delaware law. The instant facts do not satisfy the rule of those cases. First, on these facts, the Court cannot find the existence of a non-prosecution agreement. Cpl. Hill's language, at best, was an offer to "help-out" the defendant. By making the call to the prosecution he fulfilled that promise. Second, under Delaware law there was no detrimental reliance by the defendant because defendant gave nothing that he was not required to give. Thus, he suffered no

[14] *Schmerber v. State of California*, 384 U.S. 757, 771 (1966); *State v. Coverdale*, 1999 WL 517410 (Del. Super. Ct.).

detriment.[15] Although the defendant may be able to establish the third element (that the prosecutor would not uphold any alleged agreement), the remedy of those cases cannot help him. All cases submitted by the defendant state that only *inculpatory* evidence may be suppressed as a result of unauthorized agreements by the police. The only evidence defendant gave up (that he was not required to give up) was *not* self-incriminating. It was drug evidence irrelevant to his case.

22. For these reasons, the non-jurisdictional cases submitted are inapposite. There was no agreement to enter a nolle prosequi, nor was there detrimental reliance on the same. Lastly, because production of the inculpatory evidence here was statutorily mandated, the intoxilizer results were obtained as a result of defendant's implied consent, and did not arise as a consequence of a bargained-for exchange. The Court finds that the intoxilizer results are, therefore, admissible.

Inculpatory Statements

23. The only inculpatory statements made by Defendant were the admissions of drinking given in response to questioning after a lawful stop.[16] These

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[15] There also could not have been an agreement for this same reason. Under 21 *Del. C.* § 2740(a), the defendant had already consented to chemical testing by driving on Delaware roads; therefore, all he could offer Cpl. Hill was past consideration. The only new consideration the defendant had to give was the non-inculpatory drug information on his passenger, and the cases submitted by the defendant stand for the proposition that only self-incriminating evidence should be suppressed.

[16] A *stop* or seizure has occurred under Article I, § 6 of the Delaware Constitution, and under 11 *Del. C. § 1902,* "when a reasonable person would have believed he or she was not free to ignore the police presence." *Jones v. State*, 745 A.2d 856, 863 (Del. 1999) (interpreting United States and Delaware constitutions so as to construe search and seizure rights under each)

admissions occurred before the allegations of an offer of help by Cpl. Hill and are admissible. The Delaware constitutional standards for lawful detentions and stops have been codified by 11 *Del. C.* § 1902.[17] This provision provides, in pertinent part:

> (a) A peace officer may stop any person abroad, or in a public place who the officer has *reasonable ground* to suspect is committing, has committed or is about to commit a crime, and may demand the person's name, address, business abroad and destination.
>
> (b) Any person so questioned who fails to give identification or explain the person's actions to the satisfaction of the officer may be detained and further questioned and investigated.[18]

24. A "stop must be justified *at its inception* by reasonable suspicion of criminal activity as defined in *Terry v. Ohio*."[19] If a stop is based upon reasonable and articulable suspicion, the defendant's admissions recovered as a result are admissible at trial.[20] The Delaware Supreme Court has stated that an officer has

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[17] *Jones* 745 A.2d at 861.

[18] 11 *Del. C.* § 1902 (emphasis added).

[19] *Caldwell v. State*, ----A.2d ----, 2001 WL 1078869 at *3 (Del.) (emphasis added) (citing *Terry v. Ohio*, 392 U.S. 1 (1968)).

[20] *Dorsey v. State*, 761 A.2d 807, 821 (Del. 2000).

reasonable and articulable suspicion to support a detention when he or she can "'point to specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant[s] th[e] intrusion.'"[21] The Court must analyze a police officer's determination of reasonable and articulable suspicion under the "totality of the circumstances"[22] evaluated "through the eyes of a reasonable, trained police officer in the same or similar circumstances, combining objective facts with such an officer's subjective interpretation of those facts."[23]

25. In the present case, the defendant was seen swerving across traffic lanes at least three times. As the officers approached the vehicle there was a strong smell of alcohol. The officers had reasonable articulable suspicion that the defendant was driving under the influence; therefore, they were justified in asking the defendant if he had been drinking. The admissions of defendant in response to Cpl. Hill's questions are admissible.[24]

Field Tests

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[21] *Jones v. State*, 745 A.2d 856, 861 (Del. 1999).

[22] *Id.*

[23] *Id.*

[24] The Court does not find that the defendant was under arrest at this time; thus, he was not entitled to have his rights explained under *Miranda v. Arizona*, 384 U.S. 436 (1966). The Court considered the amount of force and the need for force; the extent to which the defendant's freedom of movement was restrained; the physical treatment of the defendant; the number of agents involved at that time; the duration and likelihood of the defendant being armed, the Court does not find that the defendant was under arrest when asked about his drinking. *See e.g. Kang* 2001 WL 1729126 at *6 (setting forth elements of arrest).

26. The results of the field sobriety tests should also be admitted. Field sobriety tests are used primarily to determine probable cause necessary for arrest.[25] "In order to detain someone to administer field sobriety tests, an officer need only possess a reasonable articulable suspicion of criminal activity."[26] As previously explained, the police had reasonable articulable suspicion to stop the defendant and question him about his drinking. Moreover, the results of the field sobriety tests were obtained before the drug pipe was found, and before the defendant alleges any offer of help was made. Accordingly, the Court finds that the field test results cannot be tainted by any allegation defendant has presented, and are certainly admissible.

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[25] *Kang,* 2001 WL 1729126 at *7; *Casey v. State*, 2000 WL 33179684 at *6 (Del. Super. Ct.).

[26] *Kang,* 2001 WL 1729126 at *8.

Wherefore, for the reasons expressed above, the defendant's motion to suppress is ***DENIED***.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
J.

WLW/dmh
oc: Prothonotary
xc: Order Distribution