COURT OF COMMON PLEAS
FOR THE STATE OF DELAWARE
WILMINGTON, DELAWARE 19801

John K. Welch
Judge

January 25, 2010

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Re: *State of Delaware v. William P. Cathcart*
Case No.: 0905018487

Date Submitted: January 13, 2010
Date Decided: January 25, 2010

MEMORANDUM OPINION

Dear Counsel:

Trial in the above captioned matter took place on Wednesday, January 13, 2010 in the Court of Common Pleas, New Castle County, State of Delaware. A Motion to Suppress was not docketed and filed by the defendant prior to trial.[1]

Following the receipt of documentary evidence and sworn testimony the Court reserved decision. This is the Court's Final Decision and Order.

The defendant, William P. Cathcart ("Cathcart" and/or "defendant") was charged by Information filed by the Attorney General with the Clerk of the Court

[1] Counsel stipulated pre-trial that this criminal action is a straight impairment driving under the influence charge, 21 *Del.C.* §4177(a) and an Intoxilizer 5000 Report or Phlebotomist Blood Drawn Report will not be offered by the Attorney General.

alleging the 22nd day of May, 2009, three (3) separate motor vehicle violations. Prior to trial the Attorney General entered a *nolle prosequi* on the Registration Card violation, 21 *Del.C.* §2108 and Insurance Card Charge, 21 *Del.C.* §2118(p). The remaining Count alleging a violation of 21 *Del.C.* §4177 and provided, *inter alia*, that the defendant "on or about the 22nd day of May, 2009, in the County of New Castle, State of Delaware, did drive a vehicle upon S/B/ Rt1, Newark, Delaware, while under the influence of alcohol or any drug or a combination of drugs and alcohol…".

I. The Facts

The State offered the testimony of Corporal Robin Brown ("Corporal Brown"). Corporal Brown is a New Castle County Public Safety Emergency Medical Services Division Employee, a Paramedic, for the New Castle County for the past sixteen (16) years, eleven (11) years as a Paramedic. Corporal Brown's duties are to provide life saving techniques to the public and the sick and injured during routine calls and investigations.

On May 22, 2009 between 1:30 a.m. and 1:45 a.m. Corporal Brown observed an incident on Route 1 in New Castle County with the defendant. Corporal Brown was co-assisted in her patrol vehicle with a co-paramedic William Conklin ("Conklin"). Corporal Brown was returning from the Christiana Hospital after dropping off a patient and was on Route 1 southbound near Route 72. Corporal Brown observed the defendant in front of her in the right lane on Route 1, she observed the defendant "swerve quickly" onto the shoulder and thereafter across

three (3) lanes of traffic from the left hand lane in front of her and then slowed to approximately 45 miles per hour directly in front of her in the center lane. Corporal Brown promptly applied the brakes and activated her emergency lights. The defendant then pulled into the median of Route 1 at her verbal request.

Corporal Brown activated her emergency lights on her motor vehicle and slowed. At this point and time, Corporal Brown's testified her state of mind was "self preservation" because she was concerned because of the defendant's erratic driving and she "did not know what [defendant] would do next". Corporal Brown was also concerned about the traffic behind her traveling 65 mph and could potentially run into the back of her patrol care. She called for assistance from the Fire School. Corporal Brown was then following six (6) feet behind the defendant, who finally pulled over to the shoulder in the median after she activated her emergency lights.

Corporal Brown then observed the defendant wave his hand outside his motor vehicle as if to say "What's going on?" Corporal Brown activated her PA system and ordered the defendant to remain in his vehicle. Corporal Brown also did not exit her patrol car.

On cross-examination, Corporal Brown testified that she has had two similar experiences with motor vehicle operators and "could not say for certain" whether the incident at hand was a DUI or emergency medical condition. It was 1:30 a.m. when she was returning on the late shift and the three-interstate highway lanes near Route 72 were very well lit. Corporal Brown testified that she travels Route 1 "regularly"

and she believes she was north Route 72 near the bridge where there were three lanes of traffic with a speed limit of approximately 65 mph. Corporal Brown testified the traffic was "scattered and intermittent" and she was on Route 1 southbound.

Corporal Brown further testified on cross-examination that she believed the defendant came "very close to striking a pedestrian" from the rear on the ramp near Route 72 on the shoulder while a pedestrian was changing the tire on his motor vehicle. At that point and time she was traveling approximately 65 mph but "could not say exactly" how far she traveled behind the defendant. Her attention was drawn in multiple directions, including her concern for her own safety, as well as other motor vehicles traveling behind and striking her in the rear of her patrol car. She was then traveling 45 mph in a 65 mph speed limit.

Corporal Brown did not have any conversation with the defendant and did not see him exit the motor vehicle while he waited 20-30 minutes until the officer arrived. Her call for assistance was to New Castle County Fire Station, not 9-1-1, the New Castle County has a direct line to the communications center for officer assistant emergency calls for New Castle County. Corporal Brown testified that she never saw the defendant speak or walk because he remained in his motor vehicle.

The State also offered the testimony of William Conklin ("Conklin") also a New Castle County Paramedic for the past four (4) years. Conklin was a passenger and co-paramedic in Corporal Brown's patrol vehicle. Conklin was returning with her from the Christina hospital. Conklin believed, but was not absolutely sure, that he

made the second call to 9-1-1 Fire School for officer's assistance. He testified he did not prepare a report, but simply offered his testimony from memory.

Trooper Robert L. Downer ("Trooper Downer") was sworn and testified. He is a Trooper First Class from Troop 9 for the past two (2) years. He was previously a Philadelphia Police Officer before joining the Delaware State Police. He averages, while a city police officer for Philadelphia 3-6 arrests per month for DUI violations and averages 2 arrests per month as a Delaware State Police Officer for violations of 21 *Del.C.* §4177.[2]

Trooper Downer provided testimony that he was on Route 1 southbound north of the bridge and approximately 15 – 20 minutes earlier he was present for a call which he heard on RECOM. Trooper Downer observed some traffic lights near the vicinity where the defendant was stopped. Trooper Downer was in New Castle County at the time and went to the scene where the defendant's motor vehicle was stopped on Route 1. He observed a dark colored Chrysler Aspen with a Medic Unit behind him stationed with the lights activated. Trooper Downer performed a U-Turn and turned into the median, parked his motor vehicle and then spoke with the Medic Unit, including Corporal Brown and Conklin.

[2] Trooper Downer has received training from the Delaware State Police Academy for HGN, Walk and Turn, One Legged Stand, as well as the Counting Test and is certified to administer the Intoxilizer 5000. Trooper Downer received his training two (2) years ago at the Academy in December 2007 and on May 22, 2009 was working at approximately 1:30 a.m. -1:45 a.m. His duties involve law enforcement, criminal summons and traffic violations.

Trooper Downer's understanding, at the time, of his initial RECOM call was that the defendant "driving erratic." After speaking with the medics, he walked to the defendant's motor vehicle. Trooper Downer observed the defendant "with his head on his hands asleep in his motor vehicle". Trooper Downer then walked around the defendant's motor vehicle for officer's safety. While the defendant was asleep he looked for weapons. He then approached the defendant's motor vehicle. The defendant's elbow was on the door with his seat back at 45 degrees and was asleep with his head placed near the window. Trooper Downer called to the defendant who then woke and asked the defendant, "Are you okay?"

The defendant responded and told Trooper Downer, "I was on 273 behind my brother and was following him."[3]

Trooper Downer requested the defendant provide him his driver's license, registration and insurance card. The defendant's eyes, according to the officer, "were glassy", "bloodshot" and the defendant "was staring like he had difficulty focusing." The defendant's speech "was slurred" and the defendant's demeanor was that he appeared "very relaxed." The defendant handed Trooper Downer a Shoprite Card instead of his driver's license. When asked for the defendant's registration card, the defendant gave Trooper Downer a package of lugnuts from his glove box. Trooper

[3] Trooper Downer testified at trial that this statement was peculiar because the defendant was stationed on the median on Route 1 in New Castle County and Rt. 273 was two exits down I-95 on Route 1.

Downer testified the defendant thought his lugnuts were actually his registration card and defendant continued to be "staring ahead" as if like he had difficulty focusing.

Trooper Downer testified he told the defendant to "sit tight" and walked back to his patrol vehicle.

Next, Trooper Downer observed the defendant leaning out his motor vehicle and "vomit" out the defendants' side window. Trooper Downer observed the vomit run down the side door. He also observed the vomit when he returned to the motor vehicle on the defendant's leg and inside of his motor vehicle on the left door.

Next, Trooper Downer asked the defendant to exit the motor vehicle. The defendant "swayed" to the right near the outside of his motor vehicle and then walked in a "zigzag pattern" back to the rear of Trooper Downer's patrol car.

Trooper Downer then administered several NHTSA Approved Field Coordination Tests and several Mental Acuity Tests. First, the defendant was asked to recite the alphabet A-Z which the defendant performed correctly, according to Trooper Downer the defendant's speech was "slurred".

Second, the defendant was asked if he could count 1 – 100. The defendant responded in the affirmative and he was requested to count from 100 – 80 backwards. The defendant actually counted 80 – 60 before he stopped and did not follow Trooper Downer's instructions.

Third, the defendant was administered the Horizontal Gaze Nystagnus ("HGN") Test.[4] During the administration of the HGN Test the defendant "swayed from front to back" with his full body, had "difficulty keeping balance" and notwithstanding Trooper Downer properly instructed defendant as to performing the tests, the defendant exhibited all six (6) clues.

Fourth, Trooper Downer properly instructed and administered the NHTSA Walk and Turn Test and carefully explained the test to the defendant.[5]

Fifth, the defendant was administered the One-Legged Stand Test. The defendant was properly instructed under the NHTSA Standards in how to perform the test. The defendant counted to six (6); put his foot down; swayed; and then put his foot down "two more times" and "raised his arms." The defendant could not perform remainder of the field coordination tests. Trooper Downer observed three (3) of the four (4) clues under NHTSA standards which he testified indicated there was a 60% probability that the defendant was driving while impaired on the night in question.

Trooper Downer testified there was no PBT in his patrol car and therefore placed the defendant in handcuffs and transported him back to Troop 6. During the

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[4] The Court finds the proper foundation for the HGN Test was set forth in the trial record under *Zimmerman v. State*, 693 A.2d 311 (Del.Super. 1997).

[5] The defendant was instructed to take nine (9) heel-to-toe steps; count out loud 1-9; and perform a pivot turn; and then count 1-9 and walk 9 test steps back along a designated imaginary line. According to Trooper Downer, the defendant missed heel-to-toe on every step; he did not walk on a straight line; and took 12 steps up and 12 steps back and failed the test. Trooper Downer testified the defendant exhibited three (3) clues which is a 77% likelihood that defendant was impaired while driving his motor vehicle.

ride, defendant "hiccupped all the way to the Troop." When Trooper Downer returned to Troop 6, he believed the Intoxilizer 5000 test would be flawed and therefore transported defendant to Omega. He waited 20 minutes Intoxilizer 5000 test as the defendant had stopped hiccupping, but no employee of Omega appeared. Trooper Downer then returned with the defendant to Troop 6 to administer the tests.

Much of what was elicited during cross-examination of Trooper Downer was a restatement of the Trooper's testimony on direct testimony. Trooper Downer did testify on cross-examination that the defendant "could have been awoken abruptly" and was startled after he was asleep when the officer approached his car. He re-testified the defendant's eyes were "bloodshot," "watery" and the defendant was "staring straight forward" as if he had difficult focusing. He testified the eyes could have been partially bloodshot when he woke up because he was sleeping,

Trooper Downer also testified when the defendant exited his motor vehicle the ground was "not completely level". However, he testified the defendant was a "little unsteady" during the exit of his motor vehicle. Trooper Downer testified the defendant's motor vehicle was "somewhat raised up", like a Dodge Durango and the defendant possibly could have had some difficulty exiting his motor vehicle. Trooper Downer also testified the defendant properly performed the Alphabet Test, but his speech was "slurred". The trooper also testified the defendant properly counted from 80 - 60, but didn't follow the trooper's instructions, which were to count from 100 - 80.

The State rested its case-in-chief.

Defendant presented his case-in-chief, which, in part, was an 18 ½ minute video of the Intoxilizer room after the defendant was taken to Troop 6 for administration of the Intoxilizer test during a second 20 minute waiting period. The video was the second attempt by Trooper Downer for a 20 minute observation period after returning from Omega.[6] Trooper Downer testified, at that time, approximate one and a half hours after the traffic stop that the defendant's voice was "clear and concise". The defendant properly told Trooper Downer he understood his Miranda Rights and actually texted two – three times to his wife for a ride home with no difficulty. Defendant also properly blew into the Intoxilizer 5000 machine for six (6) seconds.

On re-direct of Trooper Downer on cross-examination, Trooper Downer testified the defendant actually fell asleep again on his way back from Omega to Troop 6 and was asleep for approximately twenty (20) minutes. Trooper Downer testified there was actually two different observation periods and the first one ended because of defendant hiccupping. [7,8]

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[6] The Court notes that the Intoxilizer 5000 Test, although properly calibrated, there was not a sufficient 20 minute period, but the Court still, at the defendant's request, observed the 18 ½ minutes in the Intoxilizer room.

[7] What the Court observed according for Trooper Downer in the DVD video for the 18 ½ minutes was the second 20 minute waiting period, which according to Trooper Downer, the second observation period began at 0141 hours or 1:41 a.m.

[8] Next, before resting, the defendant made a request for a *DeBerry/Lolly* instruction which this Court will address in its final opinion and order after argument on the Motion was heard from both the State and defense.

Finally, the defense called William Cathcart ("defendant") to testify who was duly sworn and testified. The defendant is 33 years old and employed by Shoprite as a Manager on Route 202 in Wilmington, Delaware. His Title is Assistant Store Manager. He works 12 hours per day from 6:00 a.m. to 7:00 p.m. He has two children. He recalls the incident in question. On the day in question he testified he went bowling on Thursday with his normal bowling league after playing and coaching baseball. The defendant testified he never ate breakfast, but he did eat lunch at approximately 11:30 a.m., which he believed was a cheesesteak. The defendant testified he did not eat any dinner and went to the softball league and coached. He played the league for several hours and then went to bowl. Baseball practice was from 5:00 p.m. – 7:00 p.m. with no food and no alcoholic beverages. The defendant arrived at the bowling alley at approximately 7:00 p.m. and testified he consumed a total of three pitchers of beer with two (2) other individuals following baseball practice. He believed he bowled from 7:00 p.m. – 10:00 p.m. and the played touch football in the parking lot.

The defendant testified that there were three (3) people drinking from the beer pitchers and that he believed that he consumed 1/3 of the beer or approximate three (3) drafts of approximately 12 ounces each. His last beer was at approximately 10:00 p.m. and he then played football for approximately one (1) hour in the parking lot. The defendant testified he last drank an alcoholic beverage at 9:50 p.m. and had to work the next day.

The defendant followed his brother in his truck and an individual named Jamie and "got lost on Route 1". He last remembers being near construction, near Toys R Us by Route 7 and then attempted to contact his brother several times, but he could not locate him on his cell phone. The defendant admitted that he did have a "couple of drinks" on the date of the Information while bowling but he believes he "fell asleep" on occasions because he "worked too hard", "didn't eat dinner" and was "very tired". He attributes his erratic driving to being tired and working long hours and the fact that he didn't eat enough food. He also testified that he vomited because he was "hungry".

II. The Law

> Sec. 4177. Driving a vehicle while under the influence or with a prohibited alcohol content; evidence; arrests; and penalties
>
> (a) No person shall drive a vehicle:
>
> (1) When the person is under the influence of alcohol;
>
> (2) When the person is under the influence of any drug;
>
> (3) When the person is under the influence of a combination of alcohol and any drug;
>
> (4) When the person's alcohol concentration is .08 or more; or
>
> (5) When the person's alcohol concentration is, within 4 hours after the time of driving .08 or more. Notwithstanding any other provision of the law to the contrary, a person is guilty under this subsection, without regard to the person's alcohol concentration at the time of driving, if the person's alcohol concentration is, within 4 hours after the

time of driving .08 or more and that alcohol concentration is the result of an amount of alcohol present in, or consumed by the person when that person was driving.

(b) In a prosecution for a violation of subsection (a) of this section:

(1) Except as provided in paragraph (b)(3)b. of this section, the fact that any person charged with violating this section is, or has been, legally entitled to use alcohol or a drug shall not constitute a defense.

(2) a. No person shall be guilty under subsection (a)(5) of this section when the person has not consumed alcohol prior to or during driving but has only consumed alcohol after the person has ceased driving and only such consumption after driving caused the person to have an alcohol concentration of .08 or more within 4 hours after the time of driving.

b. No person shall be guilty under subsection (a)(5) of this section when the person's alcohol concentration was .08 or more at the time of testing only as a result of the consumption of a sufficient quantity of alcohol that occurred after the person ceased driving and before any sampling which raised the person's alcohol concentration to .08 or more within 4 hours after the time of driving.

(3) The charging document may allege a violation of subsection (a) without specifying any particular subparagraph of subsection (a) and the prosecution may seek conviction under any of the subparagraphs of subsection (a).

(c) For purposes of subchapter III of Chapter 27 of this title, this section and §4177B of this title, the following definitions shall apply:

(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; or

b. An amount of alcohol in a sample of a person's breath equivalent to .08 or more grams per two hundred ten liters of breath.

(2) "Chemical test" or "test" shall include any form or method of analysis of a person's blood, breath or urine for the purposes of determining alcohol concentration or the presence of drugs which is approved for use by the Forensic Sciences Laboratory, Office of the Chief Medical Examiner, the Delaware State Police Crime Laboratory, any state or federal law enforcement agency, or any hospital or medical laboratory. It shall not, however, include a preliminary screening test of breath performed in order to estimate the alcohol concentration of a person at the scene of a stop or other initial encounter between an officer and the person.

(3) "Drive" shall include driving, operating, or having actual physical control of a vehicle.

(4) "Vehicle" shall include any vehicle as defined in §101(80) of this title, any off-highway vehicle as defined in §101(39) of this title and any moped as defined in §101(31) of this title.

(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.

(6) "Alcohol concentration of .16 or more" shall mean:

a. An amount of alcohol in a sample of a person's blood equivalent to .16 or more grams of alcohol per hundred milliliters of blood; or

b. An amount of alcohol in a sample of a person's breath equivalent to 20 or more grams per two hundred ten liters of breath.

(7) "Drug" shall include any substance or preparation defined as such by Title 11 or Title 16 or which has been placed in the schedules of controlled substances pursuant to Chapter 47 of Title 16. "Drug" shall also include any substance or preparation having the property of releasing vapors or fumes which may be used for the purpose of producing a condition of intoxication, inebriation, exhilaration, stupefaction or lethargy or for the purpose of dulling the brain or nervous system.

* * *

(g) For purposes of a conviction premised upon subsection (a) of this section, or any proceeding pursuant to this Code in which an issue is whether a person was driving a vehicle while under the influence, evidence establishing the presence and concentration of alcohol or drugs in the person's blood, breath or urine shall be relevant and admissible. Such evidence may include the results from tests of samples of the person's blood, breath or urine taken within 4 hours after the time of driving or at some later time. In any proceeding, the resulting alcohol or drug concentration reported when a test, as defined in subsection (c)(2) of this section, is performed shall be deemed to be the actual alcohol or drug concentration in the person's blood, breath or urine without regard to any margin of error or tolerance factor inherent in such tests.

(1) Evidence obtained through a preliminary screening test of a person's breath in order to estimate the alcohol concentration of the person at the scene of a stop or other initial encounter between a law enforcement officer and the person shall be admissible in any proceeding to determine whether probable cause existed to believe that a violation of this Code has occurred. However,

> such evidence may only be admissible in proceedings for the determination of guilt when evidence or argument by the defendant is admitted or made relating to the alcohol concentration of the person at the time of driving.

Case law provides that the element of driving may be proven beyond a reasonable doubt by circumstantial evidence. *Coxe v. State,* Del. Supr., 281 A.2d 606 (1971); *Lewis v. State,* Del. Supr., 626 A.2d 1350 (1993) Subsections (a) and (b) [of Sec. 4177] must be read together and defendant must "be found, beyond a reasonable doubt, to have operated a vehicle while under the influence of alcohol." 21 *Del. C.* §4177(a); 11 *Del. C.* §301.

By established case law and by statute, the State is required to prove each element of the instant charges beyond a reasonable doubt. 11 Del. C. §301. *United States ex rel. Crosby v. Delaware,* 346 F. Supp. 213 (D. Del. 1972). A reasonable doubt is "not meant to be a vague, whimsical or merely possible doubt, but such a doubt as intelligent, reasonable, and impartial persons honestly entertain after a careful examination and conscientious consideration of the evidence." *State v. Matushefske,* 215 A.2d 443 (Del.1965). 11 *Del. C.* §301.

The State also has the burden of proof beyond a reasonable doubt that jurisdiction and venue has been proven as elements of the offense. 11 Del. C. §232. *James v. State,* Del. Supr., 377 A.2d 15 (1977). *Thornton v. State,* Del. Supr., 405 A.2d 126 (1979).

The Court as trier of fact is the sole judge of the credibility of each fact witness.

If the Court finds the evidence presented to be in conflict, it is the Court's duty to reconcile these conflicts, if reasonably possible, so as to make one harmonious story of it all.

If the Court cannot do this, the Court must give credit to that portion of the testimony which, in the Court's judgment, is most worthy of credit and disregard any portion of the testimony which in the Court's judgment is unworthy of credit.

In doing so, the Court takes into consideration the demeanor of the witness, their apparent fairness in giving their testimony, their opportunities in hearing and knowing the facts about which they testified, and any bias or interest that they may have concerning the nature of the case.

III. Opinion and Order

The Court must note that defendant has requested a *DeBerry-Lolly* Instruction on the issue of the lack of the Intoxilizer 5000 results because of the required waiting period of twenty (20) minutes was not followed by Trooper Downer. The Attorney General opposed such an Instruction. However, the Court has decided after a review of the facts and legal argument presented by counsel at trial that it shall instruct *sua sponte* itself pursuant to *DeBerry v. State*, 457 A.2d 744 (Del. Supr. 1983). The form instruction under *DeBerry* is as follows:

> In this case the court has determined that the State failed to collect/preserve certain evidence which is material to the defense. The failure of the State to collect/preserve such evidence entitles the defendant to an inference that if such evidence were available at trial it would be

> exculpatory. This means that, for purposes of deciding this case, you are to assume that the missing evidence, had it been collected/preserved, would not have incriminated the defendant and would have tended to prove the defendant not guilty. The inference does not necessarily establish the defendant's innocence, however. If there is other evidence presented which establishes the fact or resolves the issue to which the missing evidence was material, you must weigh that evidence along with the inference. Nevertheless, despite the inference concerning missing evidence, if you conclude after examining all the evidence that the State has proven beyond a reasonable doubt all elements of the offenses(s) charged, you would be justified in returning a verdict of guilty. (Emphasis added).

There is no doubt that the alleged instant violation of 21 *Del.C.* §4177(a) as charged is an impairment case with no blood or Intoxilizer 5000 test. Hence this Court must review the record to determine if there is "other evidence which establishes the fact or resolve the issue to which the missing evidence was material and weigh the evidence along with this inference". *Id.* In this particular case, as this Court has issued several direct impairment written decisions for alleged violations of 21 *Del.C.* §4177(a), the Court finds in this trial record that there is independent evidence for this Court to conclude beyond a reasonable doubt, 11 *Del.C.* §301, that the defendant was driving under the influence of alcoholic beverage in violation of 21 *Del. C.* §4177(a). The Superior Court has ruled that a chemical Phlebotomist blood test Intoxilizer 5000 result is not necessary in order to find the defendant violated the driving under the influence statute, 21 *Del.C.* §4177, beyond a reasonable doubt. *See e.g. Marvin J. Bennefield v. State*, 2006 WL 258306 (Del. Super.) Jan. 4, 2006. *See State v.*

Blood, 2000 WL 2859047 (Del.Com.Pl.); *State v. Singleton*, 2008 WL 5160110 (Del.Com.Pl.); and *State v. Celestine Dorsey-Dixon*, Cr.A. No.: 0805030864, Del.CCP. July 27, 2009 (Welch, J.). Clearly the trial record in the instant case shows that "…the [defendant] had consumed a sufficient alcohol to cause [this] driver to be less able to exercise the judgment and control that a reasonable careful person in full possession of his/her facilities would exercise under light circumstances." *See* 21 *Del.C.* §4177(c)(5); *Louis v. State*, 622 A.2d 1350, 1355 (Del.1993); and *State v. Baker,* 720 A.2d 1139, 1142 (Del.1998).

First, this Court finds after a review of all the evidence at trial that the State has also proven both of the following two elements beyond a reasonable doubt pursuant to 21 *Del.C.* §4177(a). First, the defendant drove a motor vehicle at or about the time and place charged in the Information; [and] second, the defendant was under the influence of alcohol while he drove the motor vehicle. *See,* 21 *Del.C.* §4177(c).

Second, the trial record contained overwhelming abundant evidence beyond a reasonable doubt pursuant to 11 *Del.C.* §301 that the defendant was driving under the influence. 21 *Del.C.* §4177(a). A review of the decision listed above in *Bennefield, Blood, Singleton, Dorsey-Dixon*, indicates the facts of this instant case are somewhat more egregious. In the instant case, the defendant clearly drove erratically and almost struck a pedestrian on the shoulder while driving 65 mph. The trial testimony is that he was "very close" to striking the pedestrian on the shoulder. The defendant

then changed three (3) lanes erratically and slowed to 45 mph placing the paramedic's safety and her co-paramedic in jeopardy by being potentially struck behind by cars traveling the 65 mph posted speed limit. The Court finds that this type of conduct is what the General Assembly in this State has tried to eradicate in enacting 21 *Del.C.* §4177(a). The defendant also did not know where he was physically located at the time of the stop. The defendant incorrectly told the investigating officer he was on Route 273 when interviewed by Trooper Downer not Route 1 in New Castle County. Defendant's eyes were "glassy;" "bloodshot" and he was "staring as if he had difficulty focusing".

The defendant's speech was "slurred;" he could not produce his driver's license and registration card and actually gave the officer a Shoprite card and a package of lugnuts for his registration card. The defendant vomited out the left side of his car while waiting for the officer to return at the time of the motor vehicle stop. The defendant, when exiting the motor vehicle, "swayed" and "walked in a zig-zag" pattern in between the police officer's motor vehicle and his motor vehicle. Although the defendant properly recited the alphabet, his speech was "slurred" and could not perform the Counting Test as he recited 80 – 60 instead of 100 – 80. Defendant also failed the Horizontal Gaze Nystagnus Test and exhibited all six (6) clues.

The defendant also failed the Walk and Turn Test and One Leg Test. While at the Troop during his second 20 minute waiting period, while joking with the officer,

the defendant made at least an implied admission when he jokingly referred to being in trouble with his wife for the traffic stop in question and having in car ear-muffs or headphones. The defendant inquired to the officer as to what penalties he would be facing for the events of the night in question.

As this Court has ruled in *State of Delaware v. Robert R. Powers*, 1999 WL 1847353 (Del.Com.Pl.), "... it is clear to the Court based upon this record that the defendant was "... [b]ecause 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 driving of a [motor] vehicle."

Based upon this trial record, this Court must conclude that beyond a reasonable doubt, 11 *Del.C.* §301 that defendant drove his motor vehicle while under the influence of alcoholic beverages or drugs in violation of 21 *Del.C.* §4177(a).

The Criminal Clerk shall set this matter for sentencing at the earliest convenience of the parties and the Court.

IT IS SO ORDERED this 25th day of January, 2010.

John K. Welch
Judge

/jb
cc: Ms. Juanette West, Case Manager
CCP, Criminal Division