IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	INFORMATION BY THE
v.	)	
	]	ATTORNEY GENERAL
JACOB A. ANDREWS	)	
	]	CASE NUMBER: 0208019127
	]	N02-09-0621

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FINAL ORDER AND OPINION

Trial In the above captioned matter took place on May 28, 2003. Following the receipt of evidence in testimony the Court reserved the decision. This is the Court's Final Order and Decision.

The Facts

The defendant was charged by information filed with the Clerk of the Court two traffic counts: One count Driving Under the Influence of Alcohol and/or Drugs allegedly in violation of 21 Del.C. §4177(a) on June 23, 2002, County of New Castle, Route 273; a second count was filed by the Attorney General; No Motorcycle License on June 23, 2003, County of New Castle, Route 273 allegedly in violation of 21 Del.C. §2703(a).[1]

[1] The State's reply brief was filed and reviewed by the Court on August 21, 2003 before the issuance of this final opinion.

At trial the State called as its Chief Investigating Witness, Corporal James J. DiTomasso ("DiTomasso"). DiTomasso presented the following relevant testimony at trial. DiTomasso is in the Traffic Services and Reconstruction Unit of the New Castle County Police and has twenty-one years with the New Castle County Police Department, four years with the Elsmere Police Department and one year with the Delaware River and Bay. His specific training is in accident reconstruction and he is a graduate of the Delaware State Police Academy in Dover, Delaware. For the past three years he has been involved in accident reconstruction cases that total two to three hundred in number.

DiTomasso was dispatched to respond to an accident on Route 273 in New Castle County on June 23, 2002. He was at home "on call" and approximately at 12:40 a.m. he received a call from New Castle County Police Headquarters and traveled to the intersection of Route 273 at 01:12 hours. It was a clear day and the roadway was "dry". The roadway at the location of the accident was slightly curved to the right and there was a slight improvement on the roadway. The roadway was also lit by streetlights and there was a vehicle was in the grass median approximately 20-30 yards to the left of Route 273. The operator was not located on the scene or near the motorcycle.

At this point the State moved into evidence a series of photographs of the area marked "State's Exhibit 1-4."[2]

DiTomasso interviewed Jacob A. Andrews ("Andrews" or "the defendant") on July 11, 2002 at his parent's residence. At the time the defendant was not in custody and no traffic charges were pending. The purpose of the interview, according to DiTomasso, was a fact-finding accident investigation. The defendant was never Mirandized prior to the interview and at the time was employed as a New Castle County Police Officer.

This interview took place two and a half weeks after the accident in question and the defendant, upon voire diue by Mr. Hurley, told

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[2] State's 1 was a scale showing bodily fluids and vomit in the grassy area. State's 2(a-h) was also a series of photographs. State's Exhibit 2(a) was the vehicle line in the roadway with scuff marks; 2(b) was skid marks prior to leaving the roadway allegedly made by the motorcycle; 2(c) showed the vehicle on the right side final pointing of resting; 2(d) are photographs of the bike's speedometer locked in with a speed of 50 miles per hour; 2(e) was the position of the vehicle at the point and resting on the grass median on the right side; 2(f) was a picture facing southwest of Route 273 showing the point the motor vehicle allegedly left the roadway; 2(g) was a picture of the path of the roadway where the vehicle left the roadway; 2(h) was a picture of the motorcycle on the road's surface; 2(i) was picture of Route 273 curve at the location where the accident occurred; 2(j) was a picture northeast where the vehicle motorcycle left the roadway; 2(k) showed the end of the scuff marks on the road; 2(l) was a picture of the scuff marks on the grass; 3(a) was a picture the next day, daylight photos of marks on the grass indicating where the motorcycle traveled; 3(b) was a picture of the roadway where Vehicle 1 at the same location only larger scale; 3(c) was a picture of a curve in the roadway on 273 northeast where the vehicle motorcycle was laying; 3(d) was a clear shot where the motorcycle left the roadway on the side of the road; 3(e) shows the same shot only a larger blown up picture version; 3(f) is the location where the vehicle left the road; 4(a) was a picture of the right side of the vehicle shows what side the vehicle went down when the vehicle left the roadway; 4(b) is the frontal view of the scrape marks in the mud on the grass median; 4(c) was a picture of the side of the motorcycle showing the right front brake handle mirror and right side damage to the motorcycle; 4(d) was a shot of the right side of the motor vehicle and the grass and dirt; 4(e) was a picture showing the damage to the right side of the motor vehicle motorcycle; 4(f) shows damage to the right side of the motor vehicle and turn signal and brake handle damage; 4(g) shows a view of the speedometer where the needle stopped at less than 50 miles per

DiTomasso that he was on medication. DiTomasso did not inquire about whether he could give an accurate, reliable and confident statement.

During the interview defendant informed DiTomasso that he, along with Mr. John Molitor ("Molitor") decided to go motorcycle riding and met up at 1:30 p.m. on the day of the accident. Molitor and the defendant went on a scenic ride through Beaver Valley and then drove through Maryland. They both stopped in Maryland at the Union Hotel, which is a restaurant/bar and an "outside cabaret" where motorcycle riders frequently gather. They listened to a band for "awhile" and had "a couple of beers" and were at the hotel approximately 3½ hours. They then traveled to the Wesley House Restaurant for dinner. While at the dinner they drank a few more alcoholic drinks. They arrived at Wesley at 6:00 p.m. and left at 8:30 p.m.

Molitor and the defendant then rode up to the "Newark area" to the Deer Park at 9:30 p.m. They left the Deer Park at 11:00 p.m. They did not drink alcoholic beverages at the Deer Park, but ate nachos and left at 11:00 p.m. They were traveling to the New Castle area and took Route 273.

At Route 273, Molitor was ahead of the defendant and a pick up truck pulled alongside of the defendant. The defendant informed DiTomasso during the interview that he tried to swerve over to the left of the roadway on 273 to avoid the truck and caught dirt on the roadway

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hour; 4(h) shows the gas tank to the motor vehicle with scuff marks on the gas tank

with his bike causing him to leave the roadway. Defendant was wearing his helmet and safety glasses and the scene validated the same.

DiTomasso indicated during his testimony that following his investigation that he could not verify whether a pick up truck was involved.

When DiTomasso arrived at the accident scene the defendant was "no longer there" as he had already been transported to the hospital.

DiTomasso obtained the defendant's clothing and helmet from the accident scene. When DiTomasso arrived at the hospital he tried to obtain the nature and extent of the defendant's injuries. DiTomasso also obtained the medical records of the defendant from the Christiana Medical Center.

State's identification No. 5 was marked as the Hospital Records from Christiana Hospital. DiTomasso indicated the records were sent to Deputy Attorney General William George. He testified that he doesn't understand what's in the records and he did not personally acquire them from the hospital.

DiTomasso indicated the Trauma Flow Sheet of the Records indicate the types of medication the defendant "was on" but he could not identify exactly those medications.

DiTomasso also indicated that he is not familiar how Christiana Hospital keeps its medical records.

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and indicates marks on the tank where it hit the grass.

State's "Exhibit 5" was moved into evidence conditionally as stipulated by counsel, subject to the Court's final ruling. They are hospital records kept by the Christiana Medical Hospital for the defendant. The records indicate that medical treatment was received by the defendant at Christiana Hospital. DiTomasso indicates they are prepared by nurses and doctors.

The State offered as authority for the admission of the hospital records D.R.E 902(11). The hospital records were previously sent to Deputy Attorney General Bill George and subpoenaed through the medical records custodian of Christiana Medical Hospital. These records indicate the therapeutic level Toxicology Report taken of the defendant on June 24, 2002 at 01:00 hours.

At this point defendant's counsel questioned DiTomasso whether the BAC reading of ethyl alcohol in the records was reliable given the pathology and laboratory medicines given to the defendant. Upon voire dire, DiTomasso indicated it appeared the records had two separate blood samples taken on June 24, 01:00 hours and June 24, 01:13 hours. DiTomasso was not present when the blood was taken and conceded that a standard blood kit test was not used. DiTomasso further conceded that he did not know if the blood collection site on the defendant was "swabbed."

State's "Exhibit 5" was moved into evidence without objection and was a Trauma Flow Sheet.

DiTomasso indicated that the hospital records indicate the defendant received Etinide at the hospital. DiTomasso has "no idea" how this medicine would have affected the defendant's "BAC" level. DiTomasso also couldn't identify a number of the drugs given to the defendant at that hospital as detailed in the report before the blood was actually drawn. DiTomasso also couldn't tell how the medication would affect the defendant as far as the "BAC" level.

On cross-examination DiTomasso testified the defendant told him he had a "couple of beers" at the Hotel during the 3-3½ hour period he stayed there.

Officer First-Class Charles Dulin ("Dulin") testified at trial. He is employed as a New Castle County Police officer and was at the accident scene, Route 273. He also provided testimony that the defendant was not at the scene but that Dulin obtained the defendant's clothing. Dulin turned the helmet over to New Castle County Police taken from the defendant at the accident scene. He observed dirt and grass in the helmet and a "quantity of blood inside the helmet." There was no other helmet at the scene and Dulin believed that was the helmet the defendant was using when he was involved in the accident. The clothing he observed had "blood and dirt on it" and there was also some vomit on some of the clothes and inside the helmet. Dulin testified that he observed a strong odor of alcoholic beverage about the helmet. He also

testified he detected a "moderate odor of alcoholic beverage" on the defendant's clothing.

Discussion

I. Was the Court required to issue a criminal bench warrant when the State provides a fact witness-list and requested a summons to issue by the Criminal Clerk after mailing John Molitor the same through the United States Postal Service?

At trial, the Court reserved decision following oral argument and post-trial briefing as to whether it should issue a bench warrant as requested by the State for John Molitor, who was the State's indispensable, hostile fact witness.

The applicable rules that govern this decision as well as statutes are 11 Del.C. §5304 and Court of Common Pleas Criminal Rule 17. Court of Common Pleas Criminal Rule 17 provides as follows:

> (a) For Attendance of Witness.
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> (1) Form; Issuance. A subpoena shall be issued by the Clerk under the seal of the Court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served.
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> (2) Bail in Lieu of Subpoena. If it appears by affidavit that the testimony of a person is material in any criminal proceeding and that it may be impracticable to secure the presence of the witness by subpoena, the Court may direct that the witness to give bail as security for appearance as a witness and shall commit a witness who fails to give bail. The Court may direct that the witness' deposition be taken in accordance with Rule 15 (a) and may order the release of a witness who has been detained for an unreasonable length of time.

(b) Defendants Unable to Pay. The Court shall order at any time that a subpoena be issued for service on a named witness upon an ex parte application of a defendant upon a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense. If the Court orders the subpoena to be issued the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the State.

(c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The Court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The Court may direct that books, papers, documents or other objects designated in the subpoena be produced before the Court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, documents or object, or portions thereof, to be inspected by the parties and their attorneys.

(d) Service. A subpoena may be served by the sheriff, by a deputy sheriff or by any other person who is not a party and who is not less than 18 years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named.

(e) Place of Service. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the State of Delaware.

(f) For Taking Deposition; Place of Examination.

(1) Issuance. And order to take a deposition authorizes the issuance by the clerk, of the appropriate court in the state in which the deposition is to be taken, of subpoenas for the persons named or described therein.

(2) Place. The witness whose deposition is to be taken may be required by subpoena to attend to any place designated by the trial court, taking into account the convenience of the witness and the parties.

(g) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued.

(h) Information Not Subject to Subpoena. Statements made by witnesses or prospective witnesses may not be subpoenaed from the State or the defendant under this rule, but shall be subject to production only in accordance with the provisions of Rule 26.2.

(i) Witness from Without a State. The attendance of a witness from without the geographical boundaries of the State may be secured pursuant to 11 Del.C., Chapter 35, Subchapter II.

(Emphasis Supplied).

In addition, 11 Del.C. §5304 entitled "Contempt: Issuance of Process and Aid of Jurisdiction" provides as follows:

(a) The may punish contempt and may issue all process necessary for the exercise of its criminal jurisdiction, which process may be executed any part of the State.

(b) The Court in the exercise of it's criminal jurisdiction, may issue subpoenas and other warrants into any county in the State for summoning or bringing any person to give evidence in any matter tryable before it and may enforce obedience by fine or imprisonment. Such subpoenas and warrants should be in the such form as may be prescribed by the Rules of the Court.

(Emphasis supplied).

There is no question that the State provided John Molitor's name and address on the witness list provided to the Criminal Court Clerk. A summons, not a subpoena was issued by the Court at the request of State Attorney General for trial as referenced in Celestine H. Norman's June 18, 2003 letter to the state prosecutor in question. The clerk wrote the prosecutor as follows:

"According to Court's records a summons was generated for Mr. John Mollatar on March 21, 2003. This summons was sent by regular U.S. Mail"…Mr. John Molitor is the State witness.

There is also no question that the State did not request a personal subpoena for Mr. Molitor as envisioned in C.C.P.Crim. R.17. This means the State did not request personal service by the Sheriff and have a Sheriff's return received and filed with the Clerk of the Court prior to trial.

Court of Common Pleas Criminal Rule 17(d) provides in relevant part, "service of subpoena shall be made by delivering a copy thereof to the person named." Clearly the code writers of the Criminal Rule for this rule Court contemplated actually delivering a copy of the subpoena to invoke a Contempt of Court citation. As defendant pointed out in his answering brief Criminal Rule 17(g), entitled "Contempt of Court" under sub-paragraph (g) provides, inter alia, that a warrant may be issued when a person who has been served fails to respond without good cause and service has occurred by delivery. Sub-paragraph provides as follows:

> "Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from the subpoena issued."

The Attorney General argues that the Court should exercise the discretionary form language contained in the summons, which allows a capias or bench warrant for a fact witness' arrest.

However, unlike a party defendant who has been subjected to jurisdiction of this Court following an information filed by the Attorney General; formal arraignment and personal appearance through public defender, private counsel or a "pro se" by plea, the only information the Criminal Clerk has in its' possession is the name and address of a fact witness provided by the State. Nor is there a Sheriff's return or personal delivery or certification of actual notice of pending court proceedings to the witness. No back-up records, notarized statement, or other evidence of a correct address is provided by the State. If the Attorney General doesn't check whether a fact witness has moved or if the address provided by the State is erroneous, the Judge could issue a criminal bench warrant for cash bail erroneously.

In this case the Attorney General clearly requested that a summons, not a formal subpoena for a fact witness who is indispensable to the State's case. The State clearly picked its form of service. The Court clearly addressed this issue at Oral Argument on the date of trial. The State cites case law, State v. Camper, 347 A.2d 137, 139 (Del.Supr.1975) for the proposition of presumption of service. However, that legal presumption is based upon the Attorney General filing the correct address and assuming, perhaps erroneously, that the fact witnesses hasn't moved

The Court finds that C.C.P.Crim. R.17 as well as the applicable statute 11 Del.C. §5304 clearly contemplates delivery of a subpoena and

personal service before a criminal bench warrant may be issued for a fact witness.

Therefore, the Court was clearly within its discretion to deny a criminal bench warrant following oral argument at trial. The State could have clearly avoided the issue by requesting a personal subpoena for Molitor. In short, the State chose its method of service for what appeared to the Court to be a hostile, albeit, indispensable fact witness. Therefore, there was no abuse of discretion by the Court.

II. Did the State satisfy the necessary foundation to enter the hospital records of the defendant into evidence pursuant to Delaware Rule of Evidence 803(6) and/or Delaware Rule of Evidence 902(11)?

A. Did the State meet it's burden to satisfy Delaware Rule of Evidence 803(6) as a basis for the introduction of the hospital records as an exception to the here-say rule?

Defendant in its answering brief correctly sets forth a colloquy between defendant's counsel and the DiTomasso to aid the Court as to whether DiTomasso was a proper fact witness to satisfy the fourth element of D.R.E. 803(6). That colloquy was as follows as set forth in Defendant's answering brief at page 13.

"Q: Okay. And all you know is what you see written there?

A: Yes sir.

Q: And you don't understand everything that is in those records do you?

A: No sir."

"Q: And you're not personally familiar with those procedures as to how their records are prepared, are you?

A: No sir."

Clearly the State as the proponent of evidence has the necessary burden of establishing the admissibility of disputed documents. Hammond v. State, Del. Supr. 569 A. 2d, 81(Del. 1989). There is also no question that the fourth prong of Delaware Rule of Evidence 803(6) as well as the case law provides that a "custodian or other qualified witness" is necessary to meet the requirement of admissibility as an exception to the here say rule. See, e.g. Best v. State, Del.Supr., 381 A2d 141 (1974). Clearly DiTomasso was not a custodian or qualified witness for the admission of the hospital records in question under D.R.E. 803(6).

The Attorney General relies heavily on the clean McLean v. State, 482 A.2d 101 (Del.1984) in asserting that the four prong requirements of Delaware Rule 803(6) has been satisfied.

However, as defendant points out, no proper testimony through DiTomasso or any other state fact witness was presented at trial that the Blood Alcohol Analysis used on defendant was consistent with normal hospital procedure or for treatment of emergency room patients. Defendant correctly points out at page 14 of his answering brief, "not a single syllable was directed in explaining the recorded records of blood analysis procedures." There is also no testimony as to which employee of the hospital entered the record, or what the qualifications of that hospital employee was, or even their actual identity as to who actually conducted the relevant blood alcohol testing on the defendant.

The Court finds that the testimony of a New Castle County police officer who made the admissions listed outlined above had no personal knowledge as to how the medical records were prepared and clearly does not satisfy the fourth prong of D.R.E. 803(6).

The State also requested the Court to take judicial of these records. However, as set forth in Cooper v. State, 1992 WL 53408 (Del.1992) and Hammond v. State, Suprd., the State has failed to meet its evidentiary burden under D.R.E. 803(6). As defendant also points out, judicial notice only appears to cover the first prong of 803. It is clearly the State's burden to prove the necessary established foundation before moving the hospital records into evidence in as an exception to the hearsay rule. The State must establish a foundation to allow evidence to be admitted under the Business Records Exception. Brown v. Liberty Mutual Insurance Company, 774 A.2d (Del.2001).

B. Has the State met its' burden to satisfy the requirements of Delaware Rule of Evidence 902(11) as a basis to introduce the hospital records of the defendant?

The Court conditionally accepted by stipulation of counsel subject to the final ruling of the Court the entry into evidence of the Christiana Care Health Service hospital records of the defendant. The "**Certification of Medical Record Copy**" states "This is to certify the enclosed medical records are an exact copy for Andrews, Jacobs, 903-95-6977, who was treated at Christiana Care Health Systems on 6/28/02." The record was signed by Dean Dodd, Custodian for Health Information

Management Services and was "subscribed and sworn to before me, a Notary Public, on the 8th day of August, 2002" and notarized by Clare Clark. In order to meet the requirements of D.R.E. 902(11) certain requirements must be met. The rule is set forth at page 8 of the State's opening brief and provides as follows:

> Certified domestic records of regularly conducted activity. The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any law of the United States or of this State, certifying that the record
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> (A) was made at or near the time of the occurrence of matters set forth by, or from information transmitted by, a person with knowledge of those matters;
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> (B) was kept in the course of regularly conducted activity; and
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> (C) was made by the regularly conducted activity as a regular practice. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

The concise legal issue before the Court is whether the reported certification set forth in the affidavit offered by the State for the hospital records complies with the exact perimeters of D.R.E. 902(11). Defendant at page 18 of his brief sets forth the D.R.E. 902(11) certification requirements and what actually existed in the instant trial record.

"902 Certification Requirements	State's Purported Certification
Written declaration of a custodian or other qualified person.	Notwithstanding the illegibility of the signature, the printed format does properly certify

	that the signatory is a proper custodian of the records.
Certification that the record was made at or near the time of the matter set forth from information transmitted by a person with knowledge of the matter.	Certification that the records were an exact copy for Jacob Andrews who was treated at Christiana Care. Completely Absent from the certification is any assertion that the record (1) was made at or near the time of the matter set forth or (2) prepared from information transmitted by a person with knowledge.
Records were kept in the course of regularly conducted activities.	There is no reference whatsoever alleging that the records were kept in the course of regularly conducted activities.
The record was made by the regularly-conducted activity as a regular practice.	There is no reference whatsoever that the record was made by the regularly-conducted activity as a regular practice."

The State argues that, in essence, that if it fails to meet the stringent requirements of D.R.E. 902(11) that the Court should take judicial notice and assist the State in meeting its evidentiary burden of laying the required foundation under D.R.E. 902(11). The defendant argues that there would be no necessity or relevance to bring in a qualified witness to discuss the perimeters of the stringent requirements of D.R.E. 902(11) if the Court is simply going to take judicial notice. The Court agrees.

In Schaps v Bally's Park Place, 58 B.R., 581, 583 (E.D.Pa.1986) a proffered certification was rejected by the Court when the certification

did not indicate "where or how the records were made nor did it indicate whether it was a regular practice of the business to create records of the kind offered" (defendant's opening brief at 20). Clearly the authors of the D.R.E. both Federal and State, contemplated under both D.R.E. in 803 and D.R.E. 902 that, "[h]owever to be admissible, proper foundation must be laid by either custodian, another qualified witness, or a certification that complies with Fed.R. of Evid. 902(11)." See Travelers Cas. & Sur. Co. of America v. Telestar Constr., 252 F.Supp. 2d 917, 927-28 (D.Ariz.203).

Clearly, the affidavit and foundation by the State offered for D.R.E. 902(11) for the hospital records is lacking for a number of reasons. No reference was in the affidavit indicating the records were kept in the course of regularly conducted activities. There is no reference in the affidavit that the records were made consistent with a regular practice. Under prong 2 of D.R.E. 902(11), there was no certification in the affidavit that the hospital records were made at or near the time of the event or that they were prepared from information transmitted by a person with knowledge. A clear reading of the affidavit prepared on the cover of the hospital records does not meet the requirements of D.R.E. 902(11) and the State has failed to satisfy the foundational requirements to have this document admitted into evidence.

III. Was the police officer in question permitted to testify he conducted a DELJIS computer check to determine whether the defendant had a valid motorcycle endorsement on his driver's license?

It is clear that the Attorney General did not move into evidence the actual DMV certified copy of the defendant's driver's license. Instead, the defendant, through the testimony of a police officer by stipulation with counsel subject to the final ruling of this Court moved, in pursuant to D.R.E. 803(8) a DELJIS check. This check by the police officer purportedly verified that the defendant did not have a valid motorcycle endorsement for his driver's license as reflected in the motor vehicle records. The Attorney General argues and relies on Hickson v. State, 820 A.2d 372, (Del.Supr.2003) for the proposition that this oral check of the DELJIS Criminal Justice Records "provides a hearsay exception for 'records, reports, statements, or data compilation in any form' of a public agency recording activities or matters observed pursuant to duty imposed by law." However the State failed to satisfy the necessary foundation by simply referencing that Officer DiTomasso had access to DELJIS system within the State of Delaware. No further explanation was offered by the Attorney General for the request for the Court to take judicial notice.

The defendant argued correctly that there was only a "passing reference" to DELJIS which the Court finds is not sufficient as a matter of law. In addition, no certified copy of the defendant's DMV driving record was proffered by the State. Nor did the State call any DMV employee who could present evidence or testify as to whether the defendant had a motorcycle endorsement. The testimony was clearly

hearsay offered for the truth of the matter asserted without the necessary foundation as an exception to the hearsay rule.

Final Opinion and Order

It is clear to the Court that the State must meet its burden of proof beyond a reasonable doubt for each and every element of the two subject traffic charges which the defendant is charged by information. 11 Del. C. §301: State v. Matuschefske, Del., 215 A.2d 443 (Del.Supr.1965). To warrant a conviction, all the evidence, direct and circumstantial inference and must lead the Court to conclude beyond a reasonable doubt that the defendant has committed both offenses. The defendant is charged with one count Driving Under the Influence in violation of 21 Del.C. §4177(a) and a second count, a violation of 21 Del.C. §2703(a), No Motorcycle License Endorsement, both June 23, 2002, New Castle County, Delaware, Route 273.

Clearly, the hospital records were not properly moved into evidence and the motorcycle endorsement offered through a DELJIS reference without the necessary foundation creates reasonable doubt as to the defendant's guilt, 11 Del.C. §301 as to both traffic offenses. For the reasons set forth in this opinion and order, the Court shall not admit those records into evidence. Based upon this trial record, including all testimony, documentary evidence and inferences at trial, the State has not satisfied this necessary burden, 11 Del.C. §301.

The Court therefore must enter a finding of not guilty on both charges.

IT IS SO ORDERED this _____ day of August 2003.

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John K. Welch
Associate Judge