

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

STATE OF DELAWARE)
)
 v.) Case No. 0202002306
)
 CHRISTINE L. ARNOLD,)
)
 Defendant.)

Submitted: April 8, 2003
Decided: July 2, 2003

DECISION AFTER TRIAL

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The defendant was arrested on January 26, 2002 and charged with Operating a Motor Vehicle While Under the Influence of Alcohol, in violation of 21 Del. C. § 4177. The facts which lead up to her arrest indicate that on the date charged Officer Leonard Aguilar of the Delaware State Police was sent to Route 896 and Route 13, known as Boyd's Corner, on a complaint of a vehicle stopped in a median with its lights on. When Trooper Aguilar approached the vehicle, he

noticed that the operator of the vehicle was seated in the passenger seat with the vehicle lights on and the engine running. His initial contact, he testified, was between 3:10 a.m. and 3:30 a.m. The driver's side window was down and a female was seated in the driver's seat with her seat belt on. He testified that he thought the operator was asleep or unconscious. He reached into the vehicle, placed the vehicle in park, and was able to arouse the operator on his first attempt. He testified that the person operating the motor vehicle was Christine Arnold. The weather at that time was cold and clear, but he does not recall, nor does his report reflect any adverse weather conditions.

Trooper Aguilar testified he observed vomit on the seat belt and on the lapel of defendant's jacket. While standing next to the driver side door, he spoke with the Defendant and detected a moderate odor of alcohol and an odor of vomit. When asked, the defendant admitted she had consumed alcoholic beverage that evening. The Defendant further stated she was okay but very tired. He further testified the Defendant's eyes were glassy and bloodshot; her complexion was flush; her speech was good; and, her clothing was soiled due to vomit. The vomit did not appear dry, but he could not say whether it was very recent. Additionally, the Defendant was cooperative. He requested insurance, registration, and driver's license. The Defendant was able to produce all of the documents except a valid driver's license, without difficulty.

Based on these observations, Officer Aguilar testified he decided to administer field coordination tests. While exiting the vehicle, he observed her use

the door and the edge of the car for balance. When questioned, the Defendant stated that she had been up since 5:00 a.m., dropped friends off prior to driving to this location, and had consumed three glasses of wine, but had not eaten.

The field tests administered included the Horizontal Gaze Nystagnus test (HGN), the Walk-And-Turn test, the Balance test, the Alphabet test, and Counting test. I excluded the Alphabet test and the Counting test. The Officer testified that he administered the HGN test by having the Defendant place her hands to her sides and follow a stimulus which was slightly above her eyes. During the testimony of the HGN test, the Officer indicated that the Defendant moved her head slightly and the area was not well lit. He further was unable to testify regarding the percentage of reliability or the percentage of error for the test, and he was unable to point to any of the factors that would create a false positive, other than spinning around. The Court granted the Defense's motion to exclude the HGN test on the basis the Officer was unable to meet the minimum requirements to qualify to administer the test.

The second test administered was the Walk-And-Turn test. The Officer testified that this test was administered on a grassy surface, in the median between the north and southbound lanes of Route 13. He testified that when taking the first nine steps of the test, she stepped off the imaginary line, at steps three, five and seven. Additionally, she took ten steps rather than nine steps. Also she was unable to walk heel-to-toe, and when she reached the turn, she lost her balance and fell backwards. After the fall, they discontinued this test. The

Defense objected to this test on the basis it was not conducted on a hard surface, and that the Officer failed to ask the Defendant whether she had any disability, which would prevent her from performing the test. The Officer testified the Defendant was wearing boots but was unable to recall the height of the heel. The Court, after considering arguments of Defense and the State, concluded that since the test was not administered on a hard surface and was in the center of the roadway, this would compromise the test reliability and granted the motion to exclude the test.

The third test administered was the Balance test. The Trooper testified, Defendant was unable to hold her foot up for the count from 2001 to 2030. She put her foot down on the count of ten. Additionally, she bent her knees. The Officer did not administer a portable breath test. However, based on these factors, he believed she was under the influence of alcohol and took her into custody.

The Defense moved to suppress the arrest on the basis the Officer lacked probable cause to take the Defendant into custody. In considering this motion, the Court pointed to the Officer's observation, the fact that the Defendant's eyes were glassy and bloodshot, there was an odor of alcohol, she had vomited recently in the vehicle, and her performance on the balance test. Considering all of these factors with the fact that her vehicle was found in the middle of a busy highway, with the vehicle transmission in drive, the lights on and

the engine running, the Court concluded that the Officer had probable cause to take the Defendant into custody to administer the intoxilizer test.

The Defendant was transported to Troop 9 for the intoxilizer test. The interview began at 4:35 a.m., at which time, the Defendant indicated a second time to the Officer she had consumed three glasses of wine, she started drinking at 7:30 p.m. and stopped at 1:00 a.m. She also indicated the previous day, she had five hours of sleep, and she had not eaten during of the time she was consuming alcoholic beverage.

The Officer testified he was a certified operator of the Intoxilizer 5000 machine, but did not have his certification card since he had misplaced it. Also the State seeks to rely on two documents to indicate that the machine was operating properly at the time the test was administered. The Officer testified the certification documents are kept in the ordinary course of business, and that the machine was certified on January 18, 2002 and February 21, 2002, and found on both occasions to be in good working order. During cross examination regarding the certification documents, the Officer testified that he had never personally observed the test done, was not aware of how the test was done, but was told that the test was done by a certain method by David Sockrider. In addition, he indicated he had never seen Sockrider sign the sheets, nor was he aware of whether the certifications are prepared contemporaneous when the time tests were performed. The defense objected to the admission on the documents on the basis the witness failed to satisfy the requirements of the Delaware Rules of Evidence,

Rule 803(6). The provisions of Rule 803(6) provide that records which are kept in the regular course of business are admissible through the testimony of the records custodian or other qualified witness. To be a qualified witness, the Officer must be able to provide foundational testimony. *Bruce v. State*, Del. Supr., 781 A.2d 544 (2001). Because I conclude that this witness did not come within the requirement of an otherwise qualified witness under the Rules of Evidence, Rule 803(6), the Court excluded the certification test. Because the certification documents were excluded, the results of the intoxilizer are excluded.

The State argues that notwithstanding the exclusion of the intoxilizer test, the evidence is sufficient in the record to prove beyond a reasonable doubt that the Defendant was impaired at the time she was found under the wheel in the middle of the road. The Defense argues that the Information charges driving as the violation, and there is no evidence of driving. Therefore, the defense reasons the only other alternative is that the State must allege that she was in actual physical control of the vehicle.

In a determination of whether an individual has violated 21 Del. C. § 4177, the State is not required to prove that the Defendant was drunk at the time that the incident is charged. All the State need prove is that her ability to operate a motor vehicle is impaired, that she was less likely than an ordinary reasonable person to operate a motor vehicle. In this incident, the Defendant's vehicle was found in the middle of the median on a busy and well-traveled highway. She was found either asleep or unconscious. Additionally, there was recent vomit in the

vehicle; there was an odor of alcohol; there was glassy and bloodshot eyes, and while there is some dispute about her exit of the vehicle, there is ample evidence that when she exited, she had to steady herself. All the other testimony was excluded. Defendant's explanation for being asleep is that she had not gotten very much sleep the night before.

Based on of the evidence in the record, I am not convinced beyond a reasonable doubt, that there is sufficient proof that the Defendant was under the influence at the time she was arrested. Accordingly, a judgment of Not Guilty is hereby entered.

SO ORDERED this 2nd day of July, 2003

Alex J. Smalls
Chief Judge

Arnold-OPApr03