

I.

Defendant, Kevin Banner, moves to suppress evidence seized from an automobile he was driving after a Town of Elsmere police officer pulled him over for an alleged traffic violation. Mr. Banner argues that the police officer's explanation of the reasons for the vehicle stop is not credible, and he argues that the officer lacked probable cause to initiate a search of the vehicle. In addition, he argues that the "inventory search" of the vehicle conducted by the officers after his arrest was pretextual. Upon careful consideration of the motion, the Court has determined that the motion must be **DENIED**.

II.

Officer John Mitchell of the Elsmere Police Department was conducting stationary patrol in the area of Kirkwood Highway and Seneca Road on the evening of August 23, 2011. While parked at this intersection, he observed a tan Volvo with two occupants - - Mr. Banner (the driver) and Kyrob Smith (the front seat passenger). Officer Mitchell testified that both occupants of the vehicle had their seats reclined so that it was difficult to see them from the outside of the vehicle. The Volvo made a left turn onto Kirkwood Highway from Seneca Road. According to Officer Mitchell, the driver did not activate the left turn signal. Officer Mitchell testified that he began to follow the Volvo as it proceeded east bound on Kirkwood Highway with

the intent to stop the vehicle for failing to use a turn signal. While following the vehicle, Officer Mitchell ran the vehicle registration and determined that the owner of the vehicle had a suspended driver's license. Officer Mitchell pulled the vehicle over as it entered a residential area on what had then become East Lincoln Street.

Upon approaching the vehicle, Officer Mitchell detected a strong odor of burnt marijuana. He noticed that the driver of the vehicle, Mr. Banner, was acting very nervous; his hands were shaking uncontrollably as he presented the officer with the vehicle insurance card. Mr. Banner was unable to provide a vehicle registration card. He also advised Officer Mitchell that his driver's license was suspended. Officer Mitchell returned to his patrol vehicle and ran a driver's license and "wanted" check on both Mr. Banner and Mr. Smith. He learned that Mr. Banner was wanted on two active capiases and that he was on probation. From information received from Mr. Smith, and from his research, Officer Mitchell learned that Mr. Smith was on probation and suspected that he may be in violation of his curfew. As Officer Mitchell was retrieving this information he noticed that Mr. Banner was moving quite a bit within his vehicle, leading Officer Mitchell to conclude that he was nervous and may be trying to hide something. Officer Mitchell then called for back-up so that he could take Mr. Banner into custody and secure Mr. Smith for probation and parole officers to remove him from the scene.

Once another officer arrived, Officer Mitchell approached the vehicle, asked Mr. Banner to exit, secured him in handcuffs, placed him in his patrol vehicle, and searched the passenger compartment of the vehicle. He found no sign of marijuana but he did find several 20 gauge shotgun shells in a cup holder separating the back seats of the vehicle. Officer Mitchell testified he believed he had probable cause to search the vehicle based on the following factors: (1) the odor of burnt marijuana within the vehicle; (2) information he had discovered regarding Mr. Banner's past history for drug arrests and/or convictions; (3) Mr. Banner's nervous behavior when Officer Mitchell first approached the vehicle; and (4) Mr. Banner's movements within the vehicle while Officer Mitchell was observing him from his patrol vehicle.

Mr. Smith's probation officer arrived at the scene and took him into custody. Mr. Banner was also in custody and was to be taken to the Elsmere Police Station for processing on the *capias* and, perhaps, criminal charges relating to the seized shotgun shells. Officer Mitchell testified that the vehicle was to be towed off of the public street since there was no one to drive the vehicle away. Accordingly, he conducted an "inventory search" of the vehicle to document its contents for the protection of the Elsmere Police Department, Mr. Banner, and the owner of the vehicle. Upon searching the trunk of the vehicle, Officer Mitchell located a sawed-off shotgun. Mr. Banner admitted, after *Miranda*, that the shotgun and shotgun shells belonged to him.

Mr. Banner now stands charged by indictment with two counts of possession of a firearm by a person prohibited, one count of possession of ammunition by a person prohibited, one count of possession of a destructive weapon, one count of carrying a concealed deadly weapon, one count of driving a vehicle while license is suspended or revoked, one count of failure to use turn signal, and one count of failure to possess a vehicle registration card.

III.

On a motion to suppress, the State bears the burden of establishing that the challenged search or seizure comported with the rights guaranteed defendant by the United States Constitution, the Delaware Constitution and Delaware statutory law.¹ The burden of proof on a motion to suppress is proof by a preponderance of the evidence.² In this case, the State must establish that Officer Mitchell's initial stop of Mr. Banner's vehicle was supported by a reasonable, articulable suspicion that he had committed a criminal or traffic offense.³ The State must then establish that the

¹ *Hunter v. State*, 783 A.2d 558, 560-61 (Del. 2001).

² *State v. Anderson*, 2010 WL 4056130, at * 3 (Del. Super. Oct. 14, 2010).

³ *Id.*

subsequent search of the vehicle was either supported by probable cause⁴ or justified as a lawful “inventory search.”⁵

Mr. Banner argues that the Court should grant his motion to suppress because Officer Mitchell’s testimony regarding the circumstances of the vehicle stop and the subsequent search of the vehicle was not credible. He points specifically to an alleged contradiction in Officer Mitchell’s suppression hearing testimony and his preliminary hearing testimony -- at the suppression hearing Officer Mitchell testified that Mr. Banner failed to use his turn signal as he turned onto Kirkwood Highway from Seneca Road, but during the preliminary hearing he at one point stated “when the vehicle made its lane change and didn’t use a turn signal I proceeded to catch up to the vehicle.” Officer Mitchell explained at the suppression hearing that he simply misspoke during the preliminary hearing. The Court finds this explanation to be credible, particularly given that Officer Mitchell’s nearly contemporaneous police report indicated that the failure to use a turn signal occurred as Mr. Banner was turning onto Kirkwood Highway. Mr. Banner also points to certain portions of

⁴ *State v. Tatman*, 494 A.2d 1249, 1251 (Del. 1985) (“so long as the police have probable cause to believe that an automobile is carrying contraband or evidence, they may lawfully search the vehicle without a warrant”) (citations omitted); *State v. Manley*, 706 A.2d 535, 539 (Del. Super. 1996) (same).

⁵ *Taylor v. State*, 822 A.2d 1052, 1055 (Del. 2003) (the inventory search is a “well-defined exception to the warrant requirement, and thus does not violate the United States Constitution”).

Officer Mitchell's testimony that are not reflected in his police report. If these omissions related to critical aspects of Officer Mitchell's testimony, the Court might be inclined to question Officer Mitchell's credibility. The omissions were not material, however, and they certainly do not rise to a level where the Court should have concerns that Officer Mitchell was not telling the truth during his testimony. Moreover, Officer Mitchell credibly explained that he remembers the details of this particular vehicle stop (even those not contained in his police report) because this is the only instance where he has seized a sawed-off shotgun after a vehicle search. Mr. Banner's attacks on Officer Mitchell's testimony are not persuasive.

With respect to the probable cause issue, Officer Mitchell credibly testified that he smelled a strong odor of burnt marijuana as he approached the driver side of the vehicle that Mr. Banner was operating. He also credibly testified that Mr. Banner was shaking uncontrollably and appeared very nervous as he produced the vehicle's insurance card. The State argues that these factors, in addition to Mr. Banner's drug history as discovered by Officer Mitchell, were sufficient to give Officer Mitchell probable cause to search the vehicle. The State cites no authority in support of this proposition, however, and the Court has found none directly on point. The closest case the Court has found is *Chisholm v. State*,⁶ where the Supreme Court determined

⁶ 2010 WL 424241(Del. Feb. 4, 2010).

that a police officer had probable cause to search an individual after smelling a strong odor of marijuana while approaching the passenger side of a vehicle where the individual was sitting, and observing the individual “clutching” his jacket where the marijuana was eventually located.⁷ *Chisholm* would suggest that Officer Mitchell did have probable cause to search the vehicle based on the circumstances he articulated at the suppression hearing. The Court need not decide this issue, however, because the Court finds that Officer Mitchell conducted a valid “inventory search” during which he inevitably would have discovered the shotgun cartridges located within the passenger compartment of the vehicle and did discover the shotgun in the trunk.

Mr. Banner had active capiases upon which he was properly arrested. The passenger, Mr. Smith, was properly taken into custody by his probation officer for a suspected violation of curfew. Officer Mitchell’s investigation revealed that the owner of the vehicle had a suspended license. Officer Mitchell testified that, under circumstances where no one was available to drive a vehicle away after the vehicle’s occupants were taken into custody, and the vehicle would otherwise sit unattended on a public roadway, Elsmere Police Department policy requires the officer to impound the vehicle, i.e. to have it towed from the scene. As part of this process, Officer Mitchell described Elsmere Police Department policy that a full inventory

⁷ *Id.* at *2.

search take place in order to document the contents of the vehicle for the protection of the Elsmere Police Department, the vehicle's occupants, and the vehicle's owners. Although the policy itself was not present in the courtroom and available for inspection, Officer Mitchell testified that he was very familiar with the policy, described its details, and affirmed that he acted in accordance with it.⁸ In this instance, Officer Mitchell was left with no choice but to impound the vehicle Mr. Banner had been operating; no one else was available to take custody of the vehicle. There was no evidence presented that Officer Mitchell exceeded the scope of the inventory search in order to locate the shotgun (or the shotgun shells).⁹ Nor is there evidence to suggest that Officer Mitchell deviated from department policy or "acted in bad faith for the sole purpose of investigation."¹⁰ The inventory search was proper.

The inevitable discovery doctrine is a viable exception to the exclusionary rule and provides that evidence obtained in the course of illegal police conduct will not be suppressed if the prosecution can establish that the incriminating evidence "would have been discovered through legitimate means in the absence of official

⁸ See *State v. Deputy*, 2000 WL 1729120 at * 2 (Del. Super. Dec. 20, 2001) ("the purpose of an inventory search is to (a) protect an owner's property while it is in the custody of the police, (b) insurance against claims of lost, stolen, or vandalized property, and (c) protect the police from danger").

⁹ *Id.*

¹⁰ *Id.*

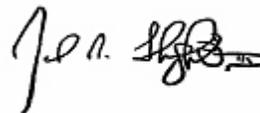
misconduct.”¹¹ In *Cook*, police found money during a frisk for weapons. The defendant moved to suppress the evidence on the ground that the search was not supported by reasonable suspicion or probable cause. After addressing the probable cause issue, the court held that even if the seizure of the currency was beyond the scope of a reasonable search for weapons, the money would have been discovered during the course of an inventory search of the defendant subsequent to arrest.¹² The Court determined, therefore, that the seizure of the currency was lawful.

As in *Cook*, Officer Mitchell’s seizure of the shotgun and shotgun shells, whether or not supported by probable cause, would have occurred in any event during the course of Officer Mitchell’s lawful inventory search of the vehicle. Thus, the Court is satisfied that the State has properly invoked the “inevitable discovery doctrine” to justify Officer Mitchell’s search and seizure of both the shotgun shells and the sawed-off shotgun.

IV.

Based on the foregoing, the defendant’s motion to suppress must be **DENIED**.

IT IS SO ORDERED.



Judge Joseph R. Slights, III

¹¹ *Cook v. State*, 374 A.2d 264, 267-68 (Del. 1977) (citations omitted).

¹² *Id.*