

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

John K. Welch
Judge

December 22, 2011

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Re: *State of Delaware v. Jonathan Early*
Case No.: 1105003950

Date Submitted: November 30, 2011

Date Decided: December 22, 2011

MEMORANDUM OPINION

Dear Counsel:

Trial in the above captioned matter took place on Wednesday, November 30, 2011 in the Court of Common Pleas, New Castle County, State of Delaware. Defendant previously filed a Motion to Suppress (the “Motion”) which was docketed and filed with the Criminal Clerk.

Following the hearing on the Motion to Suppress, the Court entered an oral bench ruling and denied defendant’s Motion.¹ The Court proceeded to trial as to merits on all charges, including, *inter alia*, a violation of 21 *Del.C.* §2101(A), unregistered motor vehicle; 21 *Del.C.* §4114(a) driving on the wrong side of the

¹ The Deputy Attorney General then made a motion at trial to move into evidence all non-hearsay evidence and/or testimony presented at the suppression hearing.

roadway; and 21 *Del.C.* §407(b), disregarding a traffic control devise. All charges were filed through Informations filed by the Attorney General with the Clerk of the Court. Since no Forensic Chemist appeared at trial, the Attorney General proceeded on the violation of 21 *Del.C.* §4177 through an impairment theory.

Following the receipt of documentary evidence and sworn testimony at trial, the Court reserved decision. This is the Court's Final Decision and Order.²

I. The Facts

Corporal Joshua S. Walther ("Trooper Walther") testified at trial. He has been employed with the Delaware State Police for thirteen (13) years and has previous law enforcement experience with the New Castle County Police Force from 1999 to 2005. During Trooper Walther's tenure as a uniformed patrol officer with the Delaware State Police he has handled a "few hundred DUI arrests." On Friday, May 6, 2011 at 1:55 a.m. he was travelling in a marked police vehicle at Delaware Route 92 on Faulk Road near the Naaman's Shopping Center. He identified the defendant Jonathan S. Early ("defendant") in Court.

Trooper Walther was operating his police vehicle on Naaman's Road north of Faulk Road eastbound. Another State Trooper was driving next to him on Naaman's Road. As he was approaching Faulk Road eastbound with a co-officer Trooper

² On November 30, 2011 the Court ordered a Brief Schedule to determine what the appropriate remedy would be when defendant filed pursuant to 21 *Del.C.* §4177(h)(4) a written demand of at least fifteen (15) days prior to trial requesting the presence of the Forensic Chemist who then failed to appear at trial.

Walther saw the defendant near the F & N Shopping Center in the lane approaching him, traveling in the wrong direction on Naaman's Road with his headlights traveling directly at both officers at approximately 45 mph. Shortly before the entryway of the F & N Shopping Center, the defendant turned sharply into the shopping center; traveled over a curb; and then ran over an additional curb and suddenly parked his Jeep Cherokee.

Trooper Walther stopped his patrol vehicle and approached the side of the defendant's motor vehicle. He saw the defendant with his hand in his lap "with a blank stare" looking forward. Trooper Walther requested the defendant roll down the window. He then observed a strong odor of alcoholic beverage emanating from the motor vehicle. Trooper Walther asked defendant "Do you know why I stopped you?" The defendant did not respond. Defendant then exited the motor vehicle and could not keep his balance. The defendant kept "falling forward near the front of his motor vehicle" and almost struck the front of his motor vehicle. Defendant refused to cooperate with Trooper Walther during his subsequent investigation. At one point the defendant "balled up his fist". For officer safety reasons and to avoid a physical altercation with the defendant, Trooper Walther took the defendant into custody and handcuffed him. Trooper Walther then placed the defendant in his patrol vehicle.

On cross-examination, Trooper Walther said defendant's fists were "flat to his side" and the defendant did not actually "raise his fists". Trooper Walther also

testified both he and his co-officer were traveling 45 mph while approaching the defendant who was also traveling approximately 45 mph directly at the officers on Naaman's Road when the defendant suddenly made the left turn into the F & N Shopping Center from the wrong side of the highway.

After his arrest, defendant was then taken back to the Troop and handcuffed to a bench. The defendant then asked several question of Trooper Walther as to why he was being taken into custody. Trooper Walther informed him "You almost killed us; you were going the wrong way in the roadway."³

While traveling back to the troop the defendant kept "slouching down" in the back seat of Trooper Walther's patrol vehicle. The defendant also kept "falling over" in the back seat. Trooper Walther testified it was approximately a five (5) minute drive to the troop. When the defendant exited the patrol vehicle at the troop, the defendant leaned on the open door of the patrol vehicle to keep balance.

When later traveling to Omega Medical Center to draw defendant's blood, the defendant was in the back seat and asked Trooper Walther, "What's this all about?" Defendant also asked Trooper Walther "Where did this happen?" Trooper Walther informed the defendant he almost hit his patrol vehicle "head on" on Naaman's Road. The defendant responded, "I was on Route 202, not Naaman's Road". Defendant was then taken to Omega Medical Center for a blood draw.

³ Defendant did eventually retrieve his driver's license and insurance card out of the console, but Trooper Walther could not find his registration card.

II. The Law

Sec. 4177. Driving a vehicle while under the influence; 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 .10 or more; or
 - (5) When the person's alcohol concentration is, within 4 hours after the time of driving, .10 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 .10 or more and the alcohol concentration is the result of an amount of alcohol present in, or consumed by the person when the person was driving.
- (b) In a prosecution for a violation of subsection (a) of this section:
 - (1) 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 after the person has ceased driving and

only such consumption after driving caused the person to have an alcohol concentration of .10 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 .10 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 .10 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 (1) and the prosecution may seek conviction under any of the subparagraphs of subsection (a).

(a) 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 .10 or more" shall mean:

a. An amount of alcohol in a sample of a person's blood equivalent to .10 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 of .10 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 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(48) of this title, any off-highway vehicle as defined in §101(54) of this title and any moped as defined in §101(53) 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 .20 more” more” shall mean:
 - a. An amount of alcohol in a sample of a person’s blood equivalent to .20 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.

. . .

- (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 of an alcohol concentration of .05 or less in a person's blood, breath or urine sample taken within 4 hours of driving and tested as defined in subsection (c)(2) of this section is prima facie evidence that the person was not under the influence of alcohol within the meaning of this statute. Evidence of an alcohol concentration of more than .05 but less than .10 in a person's blood, breath or urine sample taken within 4 hours of driving and tested as defined in subsection (c)(2) of this section shall not give rise to any presumption that the person was or was not under the influence of alcohol, but such fact may be considered with other competent evidence in determining whether the person was under the influence of alcohol. (emphasis supplied).

21 *Del.C.* §4175 provides:

§4175. Reckless driving:

(a) No person shall drive any vehicle in wilful or wanton disregard for the safety of persons or property, and this offense shall be known as reckless driving.

(b) Whoever violates subsection (a) of this section shall for the first offense be fined not less than \$100 nor more than

\$300, or be imprisoned not less than 10 nor more than 30 days, or both. For each subsequent like offense occurring within 3 years of a former offense, the person shall be fined not less than \$300 nor more than \$1,000, or be imprisoned not less than 30 nor more than 60 days, or both. No person who violates subsection (a) of this section shall receive a suspended sentence. However, for the first offense, the period of imprisonment may be suspended. Whoever is convicted of violating subsection (a) of this section and who has had the charge reduced from the violation of §4177(a) of this title shall, in addition to the above, be ordered to complete a course of instruction or program of rehabilitation established under §4177D of this title and to pay all fees in connection therewith. In such cases, the court disposing of the case shall note in the court's record that the offense was alcohol-related or drug-related and such notation shall be carried on the violator's motor vehicle record.

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 may “be found, beyond a reasonable doubt, to have operated a vehicle while under the influence of alcohol.”

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 or want of evidence in the case. *State v. Matuschefske*, Del. Super., 215 A.2d 443 (1965).

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).

OPINION AND ORDER

The Court has carefully scrutinized the evidence at trial following the denial of defendant's Motion to Suppress. After reviewing counsel's briefs and considering the fact the State did not produce the State Chemist, but proceeded to trial on the violation of 21 *Del.C.* §4177 as an impairment case, the Court finds the State has proven that the defendant was guilty of the lesser included offense of Reckless Driving, Alcohol Related in violation of 21 *Del.C.* §4175(a), as well as violations of 21 *Del.C.* §2101(A); 21 *Del.C.* §4114(a) and 21 *Del.C.* §4107(b). The Court makes this finding after reviewing counsel's submittals following the briefing schedule. The Court finds the appropriate remedy when the Forensic Chemist fails to appear is to exclude the State Chemist's Report and testimony. The defense has cited no case law or legal authority wherein the Court could proceed otherwise. Simply put, the State is barred from introducing at trial the State Chemist's toxicology report or use it as evidence at trial on the violation of 21 *Del.C.* §4177(a). Dismissal is not an appropriate remedy. As to the *Deberry* issue, the State points out in its filing that the

defense doesn't even argue or assert that the toxicology report is exculpatory so a *DeBerry* analysis is not necessary.⁴

In addition, because the defendant was arrested and taken into custody and not given any Field Coordination Tests and/or Mental Acuity Tests such as the Counting or Alphabet or administered a PBT, there is not sufficient evidence to find beyond a reasonable doubt that the defendant was driving under the influence of §4177(a). 11 *Del.C.* §301. However, given the testimony at trial, and the fact that defendant was driving on the wrong side of the roadway; kept falling over in the police car; was unsteady on his feet on numerous instances and had a strong odor of alcoholic beverage, it is clear he violated 21 *Del.C.* §4175(a). Clearly the defendant drove in a willful and wanton disregard on Naaman's Road directly at the State Trooper in the opposite or wrong lane, and as Trooper Walther testified; could have killed them.

“A conviction of Reckless Driving Alcohol Related under 21 *Del. C.* §4175 lies where a defendant is found to have: a) driven a motor vehicle; b) with a wilful or wanton disregard for the safety of persons or property; and c) such actions were alcohol related. The first element is conceded. Thus, this Court's inquiry is confined to whether sufficient evidence supports a finding that Appellant exhibited wilful or wanton conduct and whether such behavior was alcohol related. For the reasons below, I find that sufficient evidence supports the trial court's decision.

Wilful or wanton disregard for the safety of persons or property exists where one acts with “conscious indifference or an ‘I-don't-care attitude.’” ’ *Eustice v. Rupert*, Del.Supr., 460 A.2d 507 (1983) (quoting *Foster v. Shropshire*, Del.Supr.,

⁴ See, *State v. DeBerry*, 457 A. 2d 744, 749 (Del.Supr. 1982).

375 A.2d 458, 461 (1977)). The question of wilful or wanton conduct in the present case was wholly based on the trial judge's credibility determinations regarding witness testimony.”⁵

See, Wilkerson v. State, 1998 WL 472755 (June 17, 1978).

In addition, the Court finds the defendant GUILTY of operating an unregistered motor vehicle in violation of 21 *Del. C.* §2101(a), driving on the wrong side of a public roadway in violation of 21 *Del.C.* §4114(a); and disregarding a traffic control device in violation of 21 *Del.C.* §4107(b). The Court shall set this matter for sentencing at the earliest convenience of the Court and Counsel.

IT IS SO ORDERED this 22nd day of December, 2011.

John K. Welch

John K. Welch
Judge

/jb

cc: Ms. Diane Healy, Case Manager
CCP, Criminal Division

⁵ Clearly driving on the wrong side of the road at 45 mph directly at two state troopers constitute willful and/or wanton conduct.