*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2002-407

MAY TERM, 2003

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| State of Vermont<br><br>v.<br><br>James P. Nolan | } | APPEALED FROM:<br><br>District Court of Vermont, Unit No. 2, Bennington Circuit<br><br>DOCKET NOS. 1300-10-01 Bncr and 70-10-01 Bncs<br><br>Trial Judge: David Howard |

In the above-entitled cause, the Clerk will enter:

The State of Vermont appeals from a district court order granting defendant' s motion to suppress evidence in a civil suspension proceeding. The State contends the court erred in concluding that the investigating officer lacked a reasonable basis to order defendant out of his vehicle. We affirm.

On September 21, 2001, a State Trooper was in the process of completing a motor vehicle stop on Route 7 in the Town of Pownal when he observed another vehicle come around a corner at a high rate of speed, cross the center line, and brake hard. The officer estimated that the vehicle was traveling at approximately seventy to seventy-five miles per hour in a fifty mile-per-hour zone. The officer followed the vehicle in his cruiser, activated his blue lights, and effected a motor vehicle stop.

The officer approached the driver' s side of the vehicle and asked the driver, later identified as defendant, for his license and registration. The officer observed that defendant appeared to be tired and that his eyes were watery. The officer observed children in the back seat. Defendant explained that he had been driving non-stop from Long Island and was heading to his parents' residence in Pownal. Defendant denied that he had consumed any alcohol. The officer observed no alcohol containers in the car. The officer recalled that defendant had maintained eye contact with him and was polite, cooperative, and responsive. Defendant' s speech was normal. The officer detected no odor of alcohol.

Defendant exited his vehicle to retrieve his license and registration from the trunk. The officer followed defendant to the trunk, noting that he appeared to be walking, standing, and speaking normally. The officer observed no alcohol containers in the trunk, and detected no odor of alcohol from defendant.

Defendant then reentered his vehicle, and the officer returned to his cruiser to complete the speeding citation and run a license check. The officer then returned to defendant' s vehicle, handed him a speeding ticket through the driver' s window, and asked defendant " if he minded stepping out so I could speak to him." The officer testified that his purpose was to " try[] to determine whether [defendant] was just actually really tired or if he had been under the influence." After defendant exited the vehicle, the officer noted that his walking " appeared to be fine," but as the officer came very close to defendant he detected a " faint odor" of alcohol. Although defendant again denied that he had been drinking, the officer administered a preliminary breath test, followed by several field sobriety tests. Based on the results, he arrested defendant for DUI. A subsequent blood alcohol test revealed a BAC of .155 %.

Defendant moved to suppress. Following a hearing, the trial court issued a written decision, granting the motion on the ground that the officer lacked a reasonable basis to order defendant from his vehicle after completing the speeding ticket, and also lacked a reasonable basis to administer the preliminary breath test. This appeal followed.

Recently, in State v. Sprague, 2003 VT 20, & 1, 14 Vt. L.W. 39, 39, we held that " a police officer must have a reasonable basis to believe that the officer' s safety, or the safety of others, is at risk or that a crime has been committed before ordering a driver out of a stopped vehicle." The State contends that the circumstances here satisfied the Sprague test based on the officer' s initial observations of defendant' s driving, and his subsequent concerns for the safety of the children based on defendant' s tired appearance. We examine each of these assertions in light of the record evidence.

There is no question that an officer may harbor a reasonable suspicion of DUI based on his or her personal observations of erratic driving, and that a reasonable suspicion of such wrongdoing may support an exit request. See id. at & 14, 14 Vt. L. W. at 40-41. The difficulty here is that the officer plainly did not harbor a reasonable suspicion of DUI based solely on his observations of defendant' s driving. He indicated that he was uncertain, and hoped to ascertain facts to support or dispel such a suspicion through his observations of defendant. The officer acknowledged, however, that all of his observations - from the initial discussion with defendant while he was in his car, to defendant' s voluntary exit to retrieve his license and registration from the trunk, to the second conversation with defendant after the speeding citation was complete - revealed nothing to suspect DUI. Defendant appeared merely to be tired, and his eyes were watery but not bloodshot. The officer smelled no alcohol and observed no alcohol containers. Defendant maintained eye contact while talking with the officer. Defendant' s speech was normal. The officer had an extended opportunity to observe any signs of intoxication while defendant walked to his trunk and back to the car. The officer followed him the entire way, detecting no odor of alcohol and observing that defendant stood, talked, and walked normally.

Thus, when the officer finally completed the speeding citation and asked defendant, once again, to exit his vehicle the officer had, in the trial court' s words, " little more than a ' hunch' that there was any issue of alcohol involved in the situation." This was clearly insufficient to support the vehicle exit under Sprague.

Apart from the DUI issue, however, the State also asserts a " community caretaking" justification for the vehicle exit, arguing that the officer was concerned for the safety of the children. See State v. Marcello, 157 Vt. 657, 658 (1991) (mem.) (in some circumstances, police officers without reasonable suspicion of criminal activity may intrude on person' s privacy to carry out community caretaking functions to protect public safety). The problem with this claim, however, is that there was no basis at the time of the exit to support a reasonable suspicion that the children were in danger from defendant being DUI, and apart from his observation that defendant appeared to be tired, the officer did not testify that he believed defendant was so fatigued that he could not drive safely, and there was no evidence to support such a claim. On the contrary, as noted, the officer indicated that defendant talked and walked perfectly normally throughout the encounter. We thus conclude that the evidence amply supported the court' s finding that there was no reasonable basis for the vehicle exit.

The State also asserts that " defendant was not ordered out of his vehicle," but apart from this single sentence sets forth no argument or authority to support the implicit argument that the exit was consensual. Thus, the issue is not adequately briefed for purposes of review. See Brigham v. State, 166 Vt. 246, 269 (1997) (we will not undertake search for error where issue is not adequately briefed and supported by arguments). We note, however, that as in Sprague the setting was " inherently coercive," defendant having already been seized by virtue of the initial detention. Sprague, & 28, 14 Vt. L.W. at 42. Defendant could not realistically determine which " requests" he was free to ignore and which he was not, and the officer gave no indication that defendant was free to leave or refuse to exit the vehicle. Sprague, & & 28-30, 14 Vt. L.W. at 42-43. Accordingly, we discern no basis to conclude that the exit was voluntary.

Affirmed.

BY THE COURT:

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Frederic W. Allen, Chief Justice (Ret.)

Specially Assigned