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ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-514

NOVEMBER TERM, 2005

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Franklin Circuit
Randy Pudvah	}	
	}	DOCKET NO. 1004-8-01 FrCr

Trial Judge: Mark S. Keller

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

Defendant Randy Pudvah appeals from a judgment of conviction, based on a jury verdict, of driving under the influence of intoxicating liquor, in violation of 23 V.S.A. ' 1201(a)(2). Defendant contends the court erred in rejecting his claim that the Americans with Disabilities Act required the exclusion of a videotape showing defendant=s performance of certain field sobriety tests. We affirm.

Early on the morning of July 28, 2001, a police officer in the City of St. Albans observed a vehicle traveling at a speed of approximately 60 miles-per-hour in a 40 mile-per-hour zone. The officer also observed the vehicle swinging from side to side across both the center and fog lines of the travel lane. The officer activated his blue lights and video camera, and stopped the vehicle. Upon approaching the driver (later identified as defendant), the officer detected the odor of alcohol. In response to questioning, defendant stated that he had consumed about four beers that evening. Defendant assented to the officer=s request to perform field sobriety exercises, but when asked whether he could walk a straight line, informed the officer that he had a problem with his back and limped on the left side. In the course of performing a Horizontal Gaze Nystagmus test, defendant further informed the officer that he was legally blind in his left eye. When asked to perform a one-leg stand, defendant stated that he had a partial disability affecting his back and legs. The officer concluded that defendant had failed the gaze test and had not successfully completed the heel-to-toe walking exercise. A videotape of the field tests and the colloquy between the officer and defendant was admitted over defendant=s objection that the administration of the tests violated Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. " 12131-12134.[1]

After administering an Alco-Sensor test, the officer arrested defendant for driving under the influence and transported him to the station, where he was processed for DUI. Although a breath test was administered, the results were not admitted at trial because the state chemist was unavailable. Defendant=s expert chemist acknowledged that an individual who had consumed four beers over the period in question might have been slightly under the influence. The jury returned a verdict of guilty. This appeal followed.

Defendant contends that the evidence of defendant=s performance of the field sobriety tests should have been excluded because their administration to a disabled individual such as defendant violated the ADA. The contention is unpersuasive. Title II of the ADA provides that Ano qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity . . . .@ 42 U.S.C. ' 12132. For purposes of this appeal we will assume that defendant was denied a Abenefit@ of

a Aservice, program or activity@ within the ambit of Title II. Apart from his statements to the officer during the investigative stop claiming to be disabled, however, defendant here has not offered any evidence to show that he fits within the ADA definition of a Aqualified individual with a disability.@ See Id. '12102[2] (defining disability as Aa physical or mental impairment that substantially limits one or more of the major life activities of such individual@).

Further, there is no support for defendant=s assertion that the evidence should have been suppressed. The Alaska Court of Appeals considered a similar claim in Nathan v. Municipality of Anchorage, 955 P.2d 526 (Alaska Ct. App. 1998). In Nathan, the defendant, having been arrested and processed for DUI, claimed the court should suppress the results of a breath test because the police failed to provide him with an American Sign Language Interpreter to facilitate communication and ensure a knowing and intelligent waiver of his right to an independent test. Even assuming, without deciding, that the processing of arrestees qualified as a service, program, or activity under the ADA, the court held that other measures were Aavailable to deter and redress violations of the Americans with Disabilities Act,@ and Athat exclusion of evidence would not be the remedy even if [defendant] could show that the police violated the Act in his case.@ Id. at 533; see also State v. Piddington, 623 N.W.2d 528, 547 (Wis. 2001) (assuming arguendo that Title II applied to arrest, defendant=s Aremedy would not be suppression of evidence, but rather an action under the Act or 42 U.S.C. ' 1983@). These holdings are consistent with our decision in In re. B.S., 166 Vt. 345 (1997), where we concluded in a different context that the remedy for alleged violations of the ADA in the provision of family services was not denial of a petition to terminate parental rights, but a complaint or civil action for Title II violations. Id. at 353-54.

Defendant was afforded ample opportunity at trial to present evidence, and to argue that his performance on the field sobriety tests resulted not from his intoxication, but from his alleged disabilities. He was not entitled, however, to exclude the evidence on the basis of alleged ADA violations. Accordingly, we find no error.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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[1] Defendant had raised this claim, among others, in an earlier filed motion to suppress, but the court (Judge Crucitti) rejected the claim, finding Athat the ADA does not create rights that require the court to exclude evidence or dismiss a case if violations were found.@

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