

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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2006-038

OCTOBER TERM, 2006

State of Vermont	}	APPEALED FROM:
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Chittenden Circuit
Robert K. Andres	}	
	}	DOCKET NO. 6665-12-04 CnCr

Trial Judges: Edward J. Cashman

Michael S. Kupersmith

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

Defendant Robert K. Andres appeals pro se from his conviction, after a jury trial, of driving under the influence, first offense, in violation of 23 V.S.A. ' 1201(a). He argues that: (1) the trial court erred in denying his motion to suppress; (2) the trial court erred in proceeding to trial on combined charges of DUI and resisting arrest before it had completed a hearing on his second motion to dismiss; (3) he was denied due process when the trial court dismissed the first jury panel without providing him notice or an opportunity to be heard; (4) he was denied his right to present evidence in his favor because the State concealed the police officers= cell phone

conversations; and (5) his sentence violates the proportionality clause of the Vermont Constitution and constituted an abuse of discretion. We affirm.

Defendant was charged with driving under the influence in December 2004. He filed a motion to suppress and dismiss, arguing that police lacked a reasonable basis to stop him and they lacked probable cause to arrest him. The court denied the motion in February 2005 after a hearing. The court made the following findings of fact. In November 2004, at approximately 2:40 a.m., Officer Keith O=Gorman of the Burlington Police Department observed that defendant=s vehicle did not appear to have a light for the rear license plate. He then observed defendant swerve over the double yellow centerline on Route 127 twice within a short distance of travel. After being pulled over, defendant immediately exited his truck and began walking toward the officer. The officer ordered defendant to get back in his truck but defendant refused and continued walking toward the officer. After repeated and strongly voiced commands, defendant complied with the officer=s order. The officer then went to the side of the truck and interviewed defendant. He observed a number of signals that pointed toward the abusive use of alcoholic beverages. Defendant spoke with a numb tongue, he had difficulty enunciating his words, and his eyes shone glassily and squinted.

The officer returned to his vehicle, made a brief record check and asked defendant to perform roadside dexterity tests. Defendant refused. The officer returned to his vehicle to seek assistance from his supervisor. Defendant again exited his truck, and was ordered several times to return to the vehicle before he finally complied. A male passenger then exited defendant=s truck. The officer had to order him back into the vehicle several times before the passenger complied. At this point, two passengers, a male and female, exited the truck. The officer repeatedly ordered them to return to the vehicle. They refused. A second officer appeared on the scene. The passengers had to be threatened with pepper spray before they returned to the truck. This behavior did not stop. Defendant left his truck a third time, attempting to leave the scene. He refused to obey the officer=s instructions to remain in his vehicle. The officer attempted to arrest defendant, but defendant resisted arrest. Two officers intervened to assist the first officer in subduing defendant, and defendant finally stopped resisting after police used pepper spray. After being arrested, defendant agreed to take an evidentiary breath test, which showed that his blood alcohol content was over the legal limit.

The court rejected defendant's assertion that the officer lacked an adequate basis to initiate the stop. It explained that the officer observed defendant violate highway safety laws, crossing the yellow centerline twice within a short distance of travel, and he also noticed defendant weaving in his lane for no apparent reason. Considering the time of night, the court concluded that the officer had a reasonable basis to suspect that defendant was impaired to some degree, and he thus had an adequate basis to initiate the roadside stop. After stopping defendant, the officer then observed unusual conduct as well as physical signs of intoxication, which gave the officer sufficient basis to suspect that defendant might be intoxicated. Defendant and his passengers continued to disrupt the officer's attempt to conduct a roadside investigation by repeatedly exiting the truck, and the officer had fair reason to question his safety in this situation. Defendant had also refused the officer's request that he perform roadside dexterity tests, and such conduct provided probative evidence of guilt. The court concluded that at this point, the officer had a fair and reasonable basis to request an evidentiary breath test.

The court rejected defendant's assertion that the officer lacked probable cause to proceed any further after interviewing defendant while defendant sat in his truck. The court explained that the implied consent law envisioned an initial investigation at the roadside that included the officer's observations of the operator's appearance, speech patterns, balance and coordination skills, performance of roadside dexterity tests, and a preliminary breath test with the roadside alcohol sensor. The court found that defendant essentially argued that he had a right to walk away despite the officer's demands that he remain until the officer finished the roadside investigation. The court found that Vermont law held to the contrary, and it noted that the implied consent law presumed that a defendant would remain in the presence of police long enough for them to carry out the provisions of the testing procedure.

The court explained that V.R.Cr.P. 3(b) and 3(c)(2) provided guidance for arrest in this case, and all of the circumstances demonstrated that defendant probably committed the offense of operating under the influence in violation of 23 V.S.A. ' 1201(a)(2). It found that the facts also supported a second basis for arresting defendant, explaining that defendant had provided little information to the officer and he and his passengers

made repeated attempts to distract and frustrate the officer=s orderly investigation. If the officer allowed defendant to walk away from the scene, the officer would be unable to offer defendant the evidentiary breath test as required by the implied consent statute. The court therefore denied defendant=s motion to suppress and dismiss.

After the jury draw and shortly before the scheduled trial date, the State filed a motion to continue. The State explained that it had just learned that Officer O=Gorman=s mother was gravely ill, he was out of the state, and he would be unavailable to testify at trial. The court granted the State=s request to continue. Shortly thereafter, the State charged defendant with resisting arrest in connection with the DUI charge. A second jury draw occurred in July 2005. Defendant then filed a motion to dismiss the second charge, asserting that the officer lacked probable cause to arrest him, and therefore the State could not prove that he had been subject to a lawful arrest or that he resisted arrest. Defendant also asked the court to reconsider its first ruling, arguing that the court=s findings were not supported by the evidence. The court denied the motion to reconsider at a hearing on defendant=s motion to dismiss the resisting arrest charge. Defendant renewed the motion to reconsider, and the court agreed to review the record underlying its first decision. After reviewing the record, the court again denied the motion to reconsider in August 2005 at a continued hearing on defendant=s motion to dismiss the resisting arrest charge. The court concluded the hearing without formally ruling on defendant=s motion to dismiss, however. The State advised the court of this in a September 2005 letter. The court then issued a written decision denying both defendant=s motion to reconsider its first ruling as well as his motion to dismiss the resisting arrest charge.

In its decision, the court noted that the issues raised by defendant had been considered on four separate hearing dates. It reviewed the record at defendant=s request, and set forth additional findings to address defendant=s concerns as to the first motion. The court explained that it had based its findings regarding the investigatory stop on the officer=s credible testimony. The officer=s testimony also formed the basis for its finding that defendant slurred his speech, as well as the court=s other findings about defendant=s physical condition. The court rejected defendant=s challenge to its finding that the officer smelled alcohol at the time of the initial stop. It acknowledged that the evidence was somewhat confused on this point. The officer had noted

at the time, however, that he smelled a strong odor of alcohol. The court found that, considering the dangerousness of the encounter, the provocative conduct of defendant and his passengers, and the difficulty of the human mind to record and remember events in temporal sequence when under high stress, the totality of the evidence showed that the officer did smell the strong odor of intoxicants during his contact with defendant, and he certainly smelled it prior to the arrest.

The court also rejected defendant's challenge to its finding of probable cause. Defendant pointed to Officer O'Gorman's statement during the motion hearing that he did not think he had probable cause for the arrest. The court explained that in evaluating probable cause, the law did not rely on the subjective opinion of the arresting officer but rather looked to see what a reasonable person, objectively viewing the circumstances, would conclude. The court found that taking the officer's testimony of the evening's events into consideration, the officer had probable cause for an arrest. It explained that it had relied on defendant's conduct subsequent to the initial contact to justify a finding of probable cause, and it stood by its finding. The court therefore denied defendant's motions.

A trial was held in December 2005, and the jury found defendant guilty of driving under the influence. The jury was unable to reach a unanimous verdict on the resisting arrest charge, however, and this charge was dismissed. The court ordered a pre-sentence investigation report and in January 2006, it sentenced defendant to one to two years to serve and imposed a \$750 fine. The court stayed the sentence during appeal, and advised defendant that if his conviction was affirmed, and if defendant was able to successfully complete a residential alcohol treatment program, the court would reduce the minimum sentence. This appeal followed.

Defendant first challenges the trial court's denial of his motion to suppress. In doing so, he sets forth his version of the facts, which differ from the findings made by the court. Defendant asserts that the court's findings are not supported by the record. He argues that the officer lacked probable cause to arrest him, pointing to the officer's testimony at the motion hearing. He also asserts that the court should not have considered his refusal to perform dexterity tests as support for its probable cause determination.

On review of the trial court's decision on motion to suppress, we accept the trial court's findings of fact unless clearly erroneous, and we review de novo the question of whether the facts as found meet the relevant legal standard. State v. Simoneau, 2003 VT 83, & 14, 176 Vt. 15. We find no error in the court's decision here.

As reflected above, the trial court set forth numerous findings of fact to support its conclusion that the officer had a reasonable basis to stop defendant and probable cause to arrest him, and its findings are supported by the record. The officer testified that he observed defendant driving erratically. After initiating a traffic stop, he observed defendant acting in an unusual manner. Defendant repeatedly exited his vehicle despite the officer's repeated commands to stay inside the truck. The officer also observed physical signs of intoxication, and he smelled alcohol. Defendant and his passengers repeatedly disrupted the officer's attempts to conduct a roadside investigation. Defendant refused to perform field sobriety exercises, and he started to walk away from the officer up Route 127. These findings support the court's conclusion that the officer had probable cause to believe that defendant had been driving under the influence. See V.R.Cr.P. 3(b) (law enforcement officer may arrest without a warrant where he has probable cause to believe that individual has committed or is committing a misdemeanor in officer's presence). The officer also had probable cause to believe that arrest was necessary to obtain nontestimonial evidence . . . including an evidentiary test for purposes of determining blood alcohol content. @ V.R.Cr.P. 3(c)(2).

None of defendant's arguments undermine this conclusion. First, as the trial court noted, the standard used to evaluate probable cause is an objective, rather than subjective, one. See State v. Caron, 155 Vt. 492, 499 (1990) (recognizing that probable cause to arrest exists where facts and circumstances are sufficient to warrant a prudent person to believe that defendant committed an offense) (citing Beck v. Ohio, 379 U.S. 89, 91 (1964)). Thus, the officer's statement about lack of probable cause at the motion hearing is not determinative. We note, moreover, that defendant mischaracterizes the officer's testimony. At the hearing, defendant asked the officer why he had not responded, apparently at the time of the initial stop, to defendant's repeated questions of whether he was under arrest. Defendant inquired if the officer had declined to respond because he did not believe that he had probable cause at that time to make an arrest. The officer responded,

AMaybe not.@ The officer later testified that he believed he had grounds to take defendant into custody when defendant began walking away from him up the highway, even if he only had a reasonable suspicion that defendant was driving under the influence at the time of the initial stop. Finally, we find no reason why the court should not have considered defendant=s refusal to perform field sobriety exercises as part of the totality of the circumstances in evaluating probable cause. Cf. State v. Curavoo, 156 Vt. 72, 75 (1991) (motorist=s refusal to perform field sobriety exercises is probative of guilt, and therefore relevant and admissible at trial).

Defendant next argues that the court erred in denying his motion to dismiss the resisting arrest charge before it had completed the hearing on the motion. He asserts that this error was compounded by the court=s refusal to allow him to ask the officer about probable cause during trial. Both arguments are without merit. First, we note that defendant was not convicted of resisting arrest and thus, any alleged error in the court=s consideration of this motion is harmless. Moreover, the record shows that at the continued hearing on defendant=s motion to dismiss the resisting arrest charge, the court informed defendant that he was attempting to relitigate issues that had already been decided by the court in its first ruling on defendant=s motion to suppress and dismiss. The court stated that it was not going to conduct the first hearing all over again. In light of this, the court asked defendant if he had anything else to add, and defendant responded by asking the court to review the record underlying its first decision. The court complied with defendant=s request. We find no error in its decision to terminate the hearing on defendant=s second motion to dismiss.

We similarly find no error in the court=s denial of defendant=s request to cross-examine the officer about probable cause during trial. The record shows that the State moved before trial to preclude defendant from discussing this issue with the officer, arguing that the question of probable cause was one of law for the court. The court granted its request, noting at trial that a discussion of this issue would likely mislead and confuse the jury. The court acted reasonably in excluding this evidence. See V.R.E. 403; State v. Ives, 162 Vt. 131, 135 (1994) (ARulings regarding the admissibility of evidence are subject to review only for an abuse of discretion.@).

Defendant next asserts that the trial court erred in dismissing the first jury panel without providing him

notice or an opportunity to be heard. This claim of error is wholly without merit. The record indicates that the State asked the court to continue the case because the arresting officer had been unexpectedly called out of state. The court acted within its discretion in granting the State's request, and defendant fails to show that his right to a jury trial was in any way meaningfully impaired by the continuance of the case and the empaneling of a different jury.

Defendant next argues that his constitutional rights were violated because the State concealed evidence of cell phone conversations between the officers on the evening in question. This claim of error is without merit. As the State points out, defendant did not request this information in his motion to compel. It is not even clear that such evidence exists. Defendant asserts, without support, that the evidence was lost or forgotten by the time the matter went to trial. He states, again without any evidentiary basis, that the officers communicated by cell phones that evening to conceal their conversations, and that their intent was to prevent him from accessing this information. He asserts that this alleged evidence was exculpatory because it would show the officers' attempts to find an excuse to arrest him without probable cause and it would show the cause of the delay at the roadside. We find these arguments immaterial in light of our conclusion above that police had probable cause to arrest defendant. Additionally, the cause of the roadside delay—namely, defendant's uncooperative and disruptive behavior—is amply set forth in the trial court's findings of fact, which are supported by the record. Defendant fails to show a reasonable possibility that the alleged lost evidence would have been favorable, and his claim of error is without merit. See State v. Gibney, 2003 VT 26, & 38, 175 Vt. 180 (prosecution has obligation to disclose exculpatory evidence, and where possible exculpatory evidence is lost or destroyed, a defendant must first show a reasonable possibility that the lost evidence would have been favorable; if the defendant makes the requisite showing, the court must perform a pragmatic balancing of three factors: (1) the degree of negligence or bad faith on the part of the government; (2) the importance of the evidence lost; and (3) other evidence of guilt adduced at trial).

Finally, we reject defendant's assertion that the court abused its discretion in sentencing him, as well as his claim that the sentence violates the Proportionality Clause of the Vermont Constitution. Contrary to defendant's assertion, the court did not rely on the charge of resisting arrest in sentencing defendant. Instead,



it merely noted that defendant engaged in disruptive behavior on the evening in question. This observation is amply supported by the evidence presented at trial, regardless of whether defendant was ultimately convicted of resisting arrest. Most importantly, the sentence imposed by the court was within the statutory limits for the crime of which he was convicted. See State v. Cyr, 141 Vt. 355, 358 (1982) (Aln sentencing we defer to the lower court and will not review sentences within the statutory limits absent exceptional circumstances.); 23 V.S.A. ' 1210(b) (person who is convicted of DUI, first offense, may be fined not more than \$750.00 or imprisoned for not more than two years, or both). The record does not show the presence of extraordinary circumstances in this case, and we find the sentences imposed in unrelated DUI cases irrelevant here. We find no error.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice