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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-249

FEBRUARY TERM, 2007

State of Vermont	}	APPEALED FROM:
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Orleans Circuit
Craig Silloway	}	
	}	DOCKET NO. 7-1-06 Oscs

Trial Judge: Howard E. Van Benthuysen

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

Defendant Craig Silloway appeals from the civil suspension of his driver=s license. He argues that he was entitled to an affirmative defense set forth in 23 V.S.A. ' 1201(f) because no one observed him put his vehicle in motion. We affirm.

On January 22, 2006, at approximately 2:50 a.m., a Vermont State Trooper noticed defendant=s truck in a pull-off area on Route 111. Continuing along Route 111, the officer saw a set of tire tracks in the freshly fallen snow veering from one side of the road to the other approximately fifteen times within a mile. The officer turned around and followed the tracks, which led directly back to defendant=s vehicle. The officer found defendant seated behind the wheel of his truck with the lights on and the engine running. Defendant told the

officer that he had been parked there for about an hour. The officer observed signs that defendant was intoxicated, and defendant was processed for DWI. His blood alcohol content was .229 % at 4:29 a.m.

Civil suspension proceedings were instituted, and the parties submitted the case to the trial court on stipulated facts. They agreed that the sole issue for determination was the applicability of 23 V.S.A. ' 1201(f), which provides an affirmative defense to operators if they (1) had no intention of placing the vehicle in motion, and (2) had not placed the vehicle in motion while under the influence. The court found the defense inapplicable. It found that defendant had plainly driven to the pull-out area shortly before the officer approached him because his tire tracks were still visible in the freshly fallen snow, and the tire tracks led directly to his vehicle and no other. Defendant admitted consuming four or five beers earlier that evening, and given his BAC level, he had clearly driven to the pull-off area in a highly intoxicated state. The court also found that defendant was in actual physical control of his truck as he sat in the pull-out area behind the wheel with the engine running, and he was intoxicated at this time. Thus, based on its conclusion that defendant was legally impaired when he drove on Route 111 and also when he pulled off of the highway, the court entered judgment for the State. This appeal followed.

On appeal, defendant argues that he was entitled to the benefit of the affirmative defense even though he was behind the wheel with the vehicle=s engine running because no one observed him put the vehicle in motion.

We find no error in the court=s decision. As noted above, ' 1201(f) provides that in a civil suspension proceeding, a defendant who is charged with operating, attempting to operate, or in actual physical control of a vehicle on a highway with a BAC of greater than .08 may assert as an affirmative defense that he was not operating, attempting to operate, or in actual physical control of the vehicle because he: (1) had no intention of placing the vehicle in motion; and (2) had not placed the vehicle in motion while under the influence. The evidence in this case overwhelmingly shows, as the trial court found, that defendant did place his vehicle in motion while under the influence. See State v. Giard, 2005 VT 43, & 7, 178 Vt. 544 (mem.) (Supreme Court reviews trial court=s findings of fact for clear error, and court=s conclusions will be upheld if supported by

findings). As the court explained, the officer observed tire tracks in the fresh snow swerving across the highway that led directly to defendant=s vehicle. Defendant admitted that he had been drinking, and given his extremely high BAC level fewer than two hours later, the court justifiably concluded that defendant had driven to the pull-out area while intoxicated. The statute does not require that someone directly observe defendant put his vehicle in motion to establish that he operated his truck under the influence or that he intended to do so. See In re Bennington Sch., Inc., 2004 VT 6, & 12, 176 Vt. 584 (mem.) (AThe definitive source of legislative intent is the statutory language, by which we are bound unless it is uncertain or unclear.@).

Given the evidence in this case, we need not decide if defendant also Aintended to drive@ while he was sitting behind the wheel of his truck with the engine running in the pull-off area. The court did not err in granting judgment for the State.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Brian L. Burgess, Associate Justice