

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

**ENTRY ORDER**

SUPREME COURT DOCKET NOS. 2006-429 & 2006-432

MARCH TERM, 2007

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 1, Windsor Circuit
Randy Howe	}	
	}	DOCKET NOS. 394-3-06 WrCr &
	}	68-3-06 Wrcs

Trial Judge: Theresa DiMauro

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

Defendant appeals his civil and criminal convictions for DUI, arguing that the trial court erred in denying his motion to suppress. Defendant claims that the arresting officer lacked probable cause to order him to exit his vehicle and that the evidentiary breath test results should be excluded because they did not comport with Department of Health Regulations. We affirm.

On February 28, 2006 at approximately 12:30 a.m., a Hartford police officer stopped defendant's vehicle after the officer observed him fail to signal a left turn, weave within his lane, and fail to signal a right lane change. When the officer approached defendant's vehicle, he saw that defendant had bloodshot, watery eyes and that his speech was slurred and confused. Defendant was smoking a cigarette, and the officer could not smell alcohol. The officer asked defendant to exit his vehicle and perform field sobriety exercises.

Once defendant had exited his vehicle, the officer detected an odor of alcohol. Upon questioning, defendant admitted that he consumed some alcohol at 5 p.m. Defendant's performance of field sobriety tests exhibited several signs of impairment. Defendant agreed to provide a preliminary breath sample, and based on the results the officer arrested him on suspicion of DUI. Defendant provided two evidentiary breath samples. The first sample, at 1:52 a.m., indicated a BAC of .157 and the second, at 1:54 a.m., produced a BAC of .178.

Defendant filed a motion to suppress all evidence, claiming that the officer lacked probable cause to order him to exit his car. Defendant also filed a motion to exclude his breath test results in both the criminal and civil suspension cases. Defendant argued that the test results failed to conform to performance standards adopted by the Vermont Department of Health and therefore the State could not establish the necessary foundation for admission. Defendant attached a statement from

his expert to support his assertion that two breath samples taken within five minutes must be within ten percent of one another to be admissible. The State opposed the motion, arguing that defendant misinterpreted the relevant performance standard, and that the accuracy of the DataMaster was not gauged by comparing two successive breath samples, but by assessing the quality of the breath analysis against two known values—an internal and external standard. The State attached to its motion an affidavit from its chemist who averred, among other things, that the DataMaster met and exceeded the minimum accuracy requirement of plus or minus ten percent, and that the external and internal standards in this case indicated that the machine was working properly.

The court held an evidentiary hearing on August 3, 2006, at which the officer testified for the State. Defendant presented expert testimony on the requirements of the Department of Health regulations and the accuracy of his evidentiary breath results. In a written order, the court denied defendant's motion to exclude and entered judgment for the State in the civil suspension proceedings.

Defendant filed a motion to reconsider, arguing that the State failed to present any evidence to rebut the testimony of its expert as to the validity of the test results. Defendant claimed that the court's findings lacked evidentiary support. Defendant also moved to set aside the judgment in the civil suspension proceeding, arguing that the State failed to establish the reliability and accuracy of the breath test results and therefore failed to sustain its burden of proof.

Our review of a motion to suppress involves a mixed question of law and fact. We will affirm the trial court's findings of fact unless they are clearly erroneous. State v. Simoneau, 2003 VT 83, ¶ 14, 176 Vt. 15. "If the trial court's findings are not clearly erroneous, we will then review the legal issues, such as the reasonableness of a seizure, de novo." State v. Freeman, 2004 VT 56, ¶ 7, 177 Vt. 478 (mem.).

On appeal, defendant's first argument is that the trial court erred in denying his motion to suppress all evidence seized after his initial detention. Defendant claims that the officer lacked probable cause to expand the scope of the initial detention and order him from the car. Under Chapter I, Article Eleven of the Vermont Constitution, an order to exit one's vehicle is a seizure. Id. ¶ 9. A law enforcement officer may order a motorist to exit his vehicle if "the objective facts and circumstances would support a reasonable suspicion that the safety of the officer, or of others, was at risk or that a crime has been committed." State v. Sprague, 2003 VT 20, ¶ 16, 175 Vt. 123.

Defendant argues that because the officer did not detect an odor of alcohol, the officer lacked grounds for the exit order and there was no reasonable basis to suspect defendant of DUI. We disagree that an odor of alcohol is a prerequisite factual circumstance to suspicion of DUI. The trial court found that defendant was confused, and his movements were slow and deliberate. Further, defendant's eyes were bloodshot and watery, and his speech was slurred. These facts are supported by the officer's testimony and not clearly erroneous. In addition, these observations constituted objective facts and circumstances to support the officer's reasonable suspicion that defendant was driving under the influence. See Freeman, 2004 VT 56, ¶ 9 (concluding that officer's observations that the defendant's speech was slurred, her eyes were watery and bloodshot and there was an odor of intoxicants constituted reasonable suspicion of DUI).

Defendant next argues that the trial court erred in denying his motion to exclude the results of his evidentiary breath test. Defendant opines that because the results of his two breath samples, .157 and .178, differed by more than ten percent they did not comport with Department of Health regulations and should be excluded. The trial court denied the motion, concluding that Department rules do not require agreement between two successive tests, and, in any event, both results were within ten percent of the mean. We agree that the Department rules do not require agreement between two successive samples and affirm.

In general, infrared breath test results are admissible if the State demonstrates that the analysis was performed by an instrument that meets Department of Health performance standards, and the instrument met those standards while employed to analyze the sample. State v. Rolfe, 166 Vt. 1, 13 (1996). The rules on breath and blood analysis provide that “Analytical instrumentation shall be capable of determining the blood or breath alcohol concentration of the person sampled with an accuracy of plus or minus 10%.” Vermont Department of Health, Breath and Blood Alcohol Analysis, § C(I)(3), [http://healthvermont.gov/regs/breath\\_bloodalcohol\\_analysis.pdf](http://healthvermont.gov/regs/breath_bloodalcohol_analysis.pdf). In addition, the rules require measuring instrumentation to be “capable of determining the breath alcohol concentration of the person sampled within plus or minus 10%.” Id. § C(I)(4). At the motion to suppress hearing, defendant’s expert testified that the rules imply that two successive breath samples from the same person taken within five minutes of each other should not differ by more than ten percent. The expert conceded that the rules do not require more than one test, but opined that if two tests are administered, the rules require that they be within ten percent of one another.

We disagree with defendant’s interpretation of the regulations. The plain language of the regulations does not require two separate test results to be within ten percent of one another, rather, the ten percent deviation requirement in the regulations is focused on the accuracy of the instrumentation. The DataMaster must be “capable of” determining the breath alcohol concentration of the person sampled with an accuracy of plus or minus ten percent. As the trial court explained, “The two tests of defendant’s breath did not measure the same thing; instead, they measured, at two separate times, two separate samples of breath, not one continuous breath at two separate times.” The evidence before the trial court, which included the State chemist’s affidavit, see V.R.Cr.P. 47(b)(1), demonstrates that the DataMaster machine used to measure defendant’s breath alcohol properly performed its internal checks and provided a consistent external sample concentration. Thus, the measurements comported with the Department’s standards, and the trial court properly denied defendant’s motion to suppress. We need not decide if the court erred in discussing the “mean” value of the tests, as defendant argues, because we conclude that the performance standard does not require that the two tests be compared at all.

On appeal, defendant also challenges the admissibility of the breath test results on the ground that the State could not lay a foundation pursuant to V.R.E. 702. Defendant contends that the State needed to present expert testimony to establish the reliability of the test results. We disagree. Defendant’s challenge centered on the requirements of the Department of Health regulations. The interpretation of these rules is a legal question that the trial court was competent to assess without expert testimony. See Rolfe, 166 Vt. at 8-9 (reviewing Department of Health’s interpretation of enabling statute and related rules as a question of law).

We turn next to defendant's challenge to the trial court's order granting judgment to the State in the civil suspension proceeding. Defendant maintains that the State failed to meet its burden of proof because it failed to present sworn testimony or affidavits regarding the breath test. Specifically, defendant argues that there was no evidence as to the reliability and accuracy of the test results, as required by 23 V.S.A. § 1205(b)(1)(D).

Crediting this argument would allow defendant to take unfair advantage of the way in which this case was presented to the trial court. The sole issue pertaining to the breath results was whether the results were inadmissible because they violated a certain performance standard. The court rejected defendant's argument, and thus, the breath test results and the arresting officer's affidavit were admissible. In light of the limited issue presented to the court, the State met its burden of proof. See State v. Lowe, 169 Vt. 575, 576 (1999) (mem.) (in civil suspension proceeding, State must prove by preponderance of evidence that officer had reasonable grounds to believe that person was operating vehicle in violation of 23 V.S.A. § 1201, that person submitted to a test, and that the test result indicated a BAC of .08 or more at the time of operation).

The record shows that defendant challenged the initial admissibility of the breath test results, not their validity and accuracy once admitted. Cf. 23 V.S.A. § 1205(h)(1)(D) (at final civil suspension hearing, a defendant may raise issue of whether testing methods used were valid and reliable and whether test results were accurate and accurately evaluated). Once the court found that the breath test results were admissible, defendant necessarily conceded that the court could find the results reliable and accurate. See Rolfe, 166 Vt. at 13-14 (breath test results admissible where State shows analysis performed by an instrument that meets the performance standards contained in rules of Department of Health, and instrument met those performance standards while employed to analyze sample). Defendant's breath test included the readings of the internal and external standards, which indicate that the DataMaster was working properly. We also conclude that the court could consider the State chemist's affidavit in reaching its decision, given the way in which the case was presented to the court as well as defendant's awareness of this evidence, including his discussion of it at the hearing. See Miller v. Superior Court, 124 Cal. Rptr. 2d 591, 602 (Ct. App. 2002) ("Where documents are not formally introduced, but it is apparent that the court and the offering party understood that they were in evidence, they must be so considered." (quotation and citation omitted)).

We note that the Legislature intended that a determination that a breath test is admissible because the machine complied with the Department of Health rules also meets the State's burden in a civil suspension hearing. Upon admission of the test results, the State is entitled to a presumption that the breath test results were valid, reliable, and accurate. See 23 V.S.A. § 1205(h)(1)(D) (evidence that test was taken and evaluated in compliance with rules adopted by department of health is prima facie evidence that testing methods used were valid and reliable and that test results are accurate and were accurately evaluated); see also Rolfe, 166 Vt. at 14 (presumption arises only after test result is admitted). Defendant did not present any evidence to rebut this presumption because his arguments below were addressed solely to the initial admissibility of the breath tests. See id. at 14 (discussing burden shifting in civil suspension proceedings); see also Lowe, 169 Vt. at 350 (same). In any event, the record supports a finding that the tests were valid, reliable, and accurate, and the evidence here was plainly sufficient to warrant judgment in the

State's favor. We note, moreover, that both breath tests were well above the legal limit.

The cases cited by defendant do not convince us otherwise. They largely involve procedural requirements not present here or situations where evidence was created and submitted after judgment was rendered and the case was on appeal. See, e.g., Henning v. Dir. of Revenue, 790 S.W.2d 513, 514 (Mo. Ct. App. 1990) (where appellant was required to provide court of appeals with legal file containing all evidence necessary for determining question presented and failed to do so, appeals court would not consider document attached to appellant's brief as part of record on appeal, nor would it consider an affidavit created nearly three weeks after trial); Smith v. Diamond Milk Prods., 198 N.E.2d 72, 73 (Ohio 1964) (under Ohio procedure, evidence must be included in a "bill of exceptions," certified by the trial court, to be considered part of record on appeal, and thus in this context, court stated that "depositions or affidavits relating to facts in the case do not become a part of the record on appeal simply because they are filed in the court below"); see also Suydam v. Williamson, 61 U.S. 427, 433-38 (1857) (describing method applied in 1800's for bringing claims of error before court of appeals). We find the reasoning of Miller, 124 Cal. Rptr. 2d at 602, more persuasive, and find no error in the trial court's decision.

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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Brian L. Burgess, Associate Justice