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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-269

APRIL TERM, 2008

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Chittenden Circuit
	}	
Michael Lee	}	DOCKET NOS. 817-2-07 Cncr & 75-2-07 Cncs
		Trial Judge: Cortland F. Corsones

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

Defendant appeals from a civil license suspension and a judgment of conviction of driving under the influence (DUI). Defendant contends that, in denying a motion to suppress, the trial court erroneously concluded that defendant knowingly and intelligently waived his constitutional and statutory rights to consult with an attorney. We affirm.

The record evidence may be summarized as follows. In the early morning hours of February 5, 2007, a Burlington police officer observed a vehicle make a number of turns without using a turn signal. The officer also observed that the turns were quite wide, and that the vehicle was traveling in excess of the speed limit. The officer stopped the vehicle and questioned the driver, later identified as defendant. The officer detected a faint odor of intoxicants and observed that defendant's eyes were watery, bloodshot, and glassy. In response to the officer's query as to whether he had been drinking, defendant stated that he had had "a few," which he later amended to just one. The officer ordered defendant to exit the vehicle and perform a number of field sobriety tests. Based on the results of these tests and the officer's observations, defendant was arrested for DUI and transported to the police station for processing.

At the station, the officer informed defendant of his Miranda rights, Miranda v. Arizona, 384 U.S. 436 (1966), and inquired whether defendant understood these rights. Defendant's response, indicated on the DUI affidavit, was to the effect that "I understand what you are saying but I do not accept it." At a later suppression hearing, the officer explained that defendant refused to give a yes or no answer, but merely responded that "I hear you speaking" and words to that effect. The officer checked the box on the form indicating that defendant did not wish to speak with the officer, and then proceeded to explain defendant's implied consent rights, including his right to talk with a lawyer before deciding whether to submit to a blood alcohol

test. The officer checked the box indicating that defendant understood these rights, and did not wish to talk with a lawyer. The DUI affidavit contains a note that defendant's response was, "I hear you speaking." At the motion hearing, the officer testified more specifically that defendant "said that he didn't need to speak with an attorney. He was just going to be arrested." Consistent with the officer's recollection, the affidavit form indicates that defendant refused to submit to a test, stating, "I am just going to be arrested."

Defendant was charged with DUI, and moved to suppress all evidence from the motor-vehicle stop and DUI processing, asserting, among other claims, that his waivers of the right to consult with an attorney were not knowing and intelligent. Apart from the officer, the only other witness to testify at the motion hearing was defendant, who denied that he was informed of the right to talk with a lawyer, but acknowledged that he was told that his license could be suspended if he refused to submit to a test. The court issued a written decision denying the motion. The court found that the officer adequately advised defendant of both his constitutional and statutory rights to consult with a lawyer, finding that defendant's claim to the contrary was not credible, and further, that defendant's waivers, though "evasive and indirect," showed that he clearly understood the rights and voluntarily waived them. The court entered judgment for the state on the civil suspension. Defendant later entered a conditional plea of guilty to the DUI charge, preserving his right to challenge the court's ruling on the suppression motion. This appeal followed.[*]

Defendant renews his claim that he never gave an intelligent and knowing waiver of his constitutional and statutory rights to consult with an attorney. As to the Miranda claim, however, the record plainly shows that defendant invoked his right to remain silent and was not thereafter questioned by the police. Accordingly, any alleged error concerning defendant's understanding of his Miranda rights or the validity of his waiver was harmless beyond a reasonable doubt. See State v. FitzGerald, 165 Vt. 343, 346 (1996) (Miranda error does not require reversal where record shows that error was harmless beyond a reasonable doubt). Nor is there any claim or support for an argument that the alleged Miranda error invalidated defendant's subsequent waiver of his statutory right to consult counsel. See State v. Nemkovich, 168 Vt. 8, 11-12 (1998) (holding that invalid waiver of Miranda rights does not taint subsequent waiver of statutory right to consult attorney, which protects different interests and requires "independent analysis").

As to the statutory right, we have held that there is a presumption against an individual's waiver of the right to counsel, and that the State has the burden of proving a knowing and intelligent waiver. Id. at 11. We have also held, however, that a valid refusal or waiver does not require an express statement where the totality of the circumstances otherwise indicate that the defendant understood his rights and voluntarily undertook the decision. See Stockwell v. Dist. Ct. of Vt., 143 Vt. 45, 50-51 (1983) (finding valid refusal to submit to blood alcohol test despite defendant's equivocal, indeterminate, and belligerent responses and behavior where evidence nevertheless indicated that defendant understood his rights and coherently answered other questions). Here, as the court noted, defendant's decision to be "evasive and indirect in his

[*] Although the State challenges the timeliness of defendant's appeal of the civil suspension, there is no question that defendant timely appealed the DUI judgment, and our conclusion that the court properly denied the motion to suppress renders moot any infirmity in this regard.

answers" was "a pattern" from the time the officer initially questioned him at the scene, but he displayed no confusion or uncertainty either about the information being conveyed or in his responses, and did not ask for any question to be repeated or explained. Furthermore, although the DUI affidavit and the officer's testimony indicates that defendant's frequent response to the officer was "I hear you speaking," the officer also testified without contradiction that defendant unequivocally "said he didn't need to speak with an attorney and was just going to be arrested." The totality of the evidence therefore amply supports a conclusion that defendant unequivocally and voluntarily waived his right to consult with an attorney before deciding whether to submit to a blood alcohol test.

Defendant also claims that his waiver of the statutory right was inadequate because he refused to sign the form indicating a waiver. This claim was not raised below and therefore was not preserved for review on appeal. See State v. Peterson, 2007 VT 24, ¶ 9, 923 A.2d 585. Furthermore, we have held that an oral waiver is adequate. State v. Fuller, 163 Vt. 523, 529 (1995).

Defendant additionally claims that his mental state at the time was inadequate to provide a knowing and intelligent waiver, citing a statement in the State's opposition to the motion to the effect that defendant's response to routine questions at the scene was "bizarre and confused." The argument was not raised before the trial court, and therefore was not preserved for review. See Peterson, 2007 VT 24, ¶ 9. Moreover, the record shows that, notwithstanding the State's characterization, defendant's responses at the scene were clear, albeit uncooperative and belligerent, and his responses at the station remained coherent even if indirect and evasive. Accordingly, we discern no basis to disturb the judgment.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Denise R. Johnson, Associate Justice

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Brian L. Burgess, Associate Justice