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

ENTRY ORDER

SUPREME COURT DOCKET NOS. 2007-275 & 2007-285

MARCH TERM, 2008

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 1, Windham Circuit
	}	
Kevin Lee Duby	}	DOCKET NOS. 395-3-07 WmCr & 43-3-07 Wmcs

Trial Judge: Katherine A. Hayes

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

Defendant appeals the civil suspension of his driver's license and his conviction for driving under the influence (DUI), arguing that the district court erred in denying his motion to suppress. We affirm.

The record reveals the following facts. On March 12, 2007, defendant drove his truck up to an intersection and came to a stop in the left-hand turn lane, preparing to turn left when the light turned green. A Vermont state trooper pulled alongside defendant's truck on the passenger's side, in the next lane. The trooper testified that he "saw defendant with his hand in a . . . position as though he was going to open up a can of beer. His passenger then basically gave him a notion that there was a cop next to him and he quickly put the beer back down." The light turned and the trooper yelled at defendant to turn. After defendant turned, the trooper initiated a motor vehicle stop. Defendant was charged with DUI pursuant to 23 V.S.A. § 1201(a)(2).

Defendant filed a motion to suppress, arguing that there was no evidence to demonstrate a reasonable suspicion of wrongdoing and therefore no grounds for the traffic stop. The court held a hearing on the motion and issued its findings from the bench. The court found that the officer saw defendant "take hold of a beer, begin to open it, and then sit it down in his cup holder." The court concluded that this action indicated that defendant "had begun to commit a criminal act" and therefore that "the officer had a reasonable suspicion that a violation of the law was being committed, or [was] about to be committed." The court denied defendant's motion. Defendant entered a conditional guilty plea and appealed.

On appeal, defendant contends that: (1) the trial court's findings are not supported by the evidence; (2) there was no reasonable suspicion of wrongdoing to support a stop of defendant's car; and (3) the trooper violated defendant's privacy by observing defendant in his vehicle.

We review a motion to suppress under a mixed standard of review. We will accept the trial court's factual findings unless they are clearly erroneous. State v. Simoneau, 2003 VT 83, ¶ 14, 176 Vt. 15. "The question of whether the facts as found met the proper standard to justify a stop is one of law." Id.

Defendant argues that the court's findings are not supported by the evidence. Specifically, defendant contends that the court erred in finding that the trooper saw defendant "take hold of the beer, begin to open it, and then set it down in his cup holder." Defendant claims that this finding is not supported by the evidence because the officer testified that he saw defendant "with his hand in a position as though he was going to open up a can of beer," but never testified that he saw defendant open a beer. We conclude that the court's finding is supported by the officer's testimony. The court did not find that defendant opened the beer, rather that the officer observed defendant "begin" to open the can. This is entirely consistent with the officer's testimony that defendant was holding the can "as though he was going to open it."

Defendant also argues that the trooper lacked grounds to effectuate a stop. "A police officer is authorized to make an investigatory stop based on a reasonable and articulable suspicion of criminal activity." Simoneau, 2003 VT 83, ¶ 14. This means that the officer needs more than "an unparticularized suspicion or hunch of criminal activity, but needs considerably less than proof of wrongdoing by a preponderance of the evidence." Id. Defendant claims that because the trooper admitted on cross examination that the beer was not opened, there was no suspicion of wrongdoing. We disagree. Contrary to defendant's contention, an officer may effectuate a vehicle stop when, "based on objective facts and circumstances, [the officer] reasonably believes that the suspect is, or is about to be, engaged in criminal activity." State v. Kettlewell, 149 Vt. 331, 334 (1987) (emphasis added). In this case, there was evidence to support the trooper's reasonable suspicion that defendant was about to commit a crime by opening an alcoholic beverage while operating a motor vehicle. See 23 V.S.A. § 1134(b) (prohibiting an operator of a motor vehicle from possessing an open container of alcohol in the passenger area). The trooper was not required to wait until he actually observed defendant committing an illegal act to effectuate the stop.

Finally, defendant argues for the first time on appeal that the trooper unjustifiably intruded upon his reasonable expectation of privacy and security by pulling up alongside defendant's car and looking into defendant's car. Because defendant failed to raise this argument in the trial court, we review for plain error. See V.R.Cr.P. 52(b) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the [trial] court."). "Plain error exists only in exceptional circumstances where the failure to recognize it would result in a miscarriage of justice or where the error is so grave and serious that it strikes at the heart of defendant's constitutional rights." State v. Kinney, 171 Vt. 239, 253 (2000). Defendant argues that the United States and Vermont Constitutions protect against unreasonable government intrusion such as this. A person cannot, however, rely on either constitution "to protect areas or activities that have been willingly exposed to the public."

State v. Kirchoff, 156 Vt. 1, 7 (1991) (holding the same under Article 11 of the Vermont Constitution); see Katz v. United States, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection."). Given that the officer was in a public place and engaging in a lawful activity when he observed defendant's suspicious behavior, we conclude that the court did not commit plain error in admitting the officer's observations. See State v. Bauder, 2007 VT 16, ¶ 30 (holding that, under the plain-view doctrine, when an officer observes an object from a legal vantage point, the owner's privacy interests are forfeited).

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