

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-316

FEBRUARY TERM, 2008

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Caledonia Circuit
	}	
John Howard	}	DOCKET NO. 849-9-06 CaCr

Trial Judge: M. Kathleen Manley

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

Defendant appeals from a DUI conviction. He contends the trial court erred in denying a motion to suppress evidence based on a claim that the police failed to honor his request to consult an attorney before deciding whether to submit to a blood alcohol test. We affirm.

The material facts as found by the trial court may be briefly summarized. On September 3, 2006, defendant was stopped for a motor vehicle violation in the Town of Hardwick. After observing a number of indications that defendant was intoxicated, the investigating officer arrested defendant for DUI and transported him to the police station for processing. Before requesting that defendant provide a breath sample, the officer read defendant the implied consent provisions from the DUI processing form. The officer re-read the provisions at defendant's request, after which defendant acknowledged that he understood them. The following colloquy then occurred:¹

Officer: Do you want to talk to a lawyer before deciding whether or not to submit to a test?

Defendant: I probably do but let me think about it; let's go on . . .

Officer: We can't go any further until you decide whether you want to talk to a lawyer—yes or no?

¹ The dialogue is set forth in the court's written decision and is based upon the court's viewing of a videotape of the processing. Neither party has challenged the accuracy of the court's transcription.

Defendant: Ummm, I'm not sure where I stand . . . what time is it, 1 o'clock?

Officer: Quarter to one.

Defendant: Let's say no for now.

Officer: No?

Defendant: Yeah.

Officer: OK, I just need you to sign this that you said No.

Defendant: 'Cuz I just wouldn't call Bob this time of morning.²

Defendant thereupon signed the waiver acknowledging that he waived the right to talk to an attorney before deciding whether or not to submit to the test, and provided a breath sample. The test result revealed a blood alcohol content of .197. Before trial, defendant move to suppress the test result, claiming that the police had improperly failed to accede to his request to consult with an attorney before deciding whether to submit to the test. See State v. Gilman, 173 Vt. 110, 114-19 (2001) (discussing decisions holding that failure to comply with statutory provision affording the right to consult with counsel before deciding whether to submit to blood alcohol test requires suppression of test result).

Following a brief hearing, the court issued a written decision denying the motion. The court found that, although defendant sought "to cast his initial response to the question of whether he wished to speak to counsel as an unequivocal answer in the affirmative, the evidence does not support such a conclusion." Rather, the court noted that defendant had merely indicated he "probably" wished to talk with a lawyer, but immediately qualified that response by stating that he wanted to "think about it." He was then asked again and, after inquiring as to the time, clearly said "no for now." He then confirmed that his answer was "no," indicating that he did not wish to disturb his attorney at that hour. Defendant thereupon signed the form indicating a waiver of the right, and provided the sample requested. The court thus concluded that the State had adduced substantial evidence of a knowing and intelligent waiver of the right to consult an attorney, and accordingly denied the motion. Defendant subsequently entered a conditional plea of guilty, preserving his right to challenge the court's ruling. This appeal followed.

Vermont's implied consent statute provides that a person who is requested to take an evidentiary breath test has a right to consult with an attorney before deciding whether to submit to the test. 23 V.S.A. § 1202(c). This Court has recognized that a suspect may waive the statutory right, although we have cautioned that there is a presumption against such a waiver and that the State has the burden of adducing substantial evidence to establish a knowing and intelligent waiver. State v. Nemkovich, 168 Vt. 8, 11 (1998).

On appeal, as below, defendant asserts that he "initially responded affirmatively" to the officer's question whether he wished to consult with a lawyer before deciding whether to take

² The parties agree that "Bob" is a reference to defendant's attorney, Robert Gensburg.

the test, and argues that the police were therefore obligated to cease questioning defendant and withhold administration of the test until they had acceded to his request. Indeed, defendant goes so far as to characterize his initial response as “clear and unequivocal,” although he also acknowledges that it was “perhaps ambiguous,” asserting nevertheless that any ambiguity was offset by an equally equivocal waiver. We agree with the trial court, however, that the evidence does not support the claim. As noted, although defendant’s initial response to the question concerning counsel was a somewhat equivocal “probably . . . but let me think about it,” any uncertainty was immediately resolved by defendant’s clear statement that he did not wish to consult with an attorney at that time, a waiver which he then confirmed for the officer. Any doubt was further resolved when defendant signed the form indicating a waiver of his statutory right to consult an attorney. Therefore, absent any claim or evidence of coercion or undue police pressure, we conclude—as the trial court here—that the State amply satisfied its burden of proving through substantial evidence a knowing and intelligent waiver of defendant’s statutory right to consult with counsel. Therefore, we discern no basis to disturb the judgment.

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice