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

VERMONT SUPREME COURT
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NOV 18 2009

ENTRY ORDER

SUPREME COURT DOCKET NO. 2009-157

NOVEMBER TERM, 2009

State of Vermont	}	APPEALED FROM:
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Bennington Circuit
	}	
Michelle K. Checklick	}	DOCKET NO. 1-1-09 Bncs
		Trial Judge: John P. Wesley

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

Defendant appeals from the trial court's order granting judgment to the State in this civil suspension proceeding. She argues that the arresting officer lacked a reasonable basis for administering a preliminary breath test (PBT). We affirm.

The record indicates the following. In late December 2008, at approximately 1:30 a.m., a police officer observed defendant drive through two stop signs without stopping and then change direction without using her turn signal. The officer stopped defendant and observed that she had watery, bloodshot eyes; he also noticed a strong odor of intoxicants coming from the vehicle. There were two passengers in the vehicle who were highly intoxicated, but defendant told the officer that she had had only one drink earlier that night. The officer believed that defendant was possibly intoxicated and asked her to exit the vehicle. When she did so, the officer detected an odor of alcohol emanating particularly from defendant. He asked defendant to perform field sobriety exercises. The officer observed five clues in the walk-and-turn test, which, based on his training, indicated intoxication. Defendant performed satisfactorily on the one-leg-stand test, although she put her foot down once. The officer then administered a preliminary breath test, following which defendant was processed for driving while intoxicated. Civil suspension proceedings were also initiated.

In February 2009, defendant identified the issues she intended to raise at the final hearing in the civil case, and she also moved the trial court to suppress all evidence against her. Defendant asserted in relevant part that a video-recording of the stop showed that she satisfactorily performed the field sobriety exercises. She also noted that she was not slurring her words. Defendant maintained that at the time she was required to take the preliminary breath test any reasonable suspicion or probable cause to believe that she was under the influence had dissipated, and she should have been released.

Following a hearing, the court denied the motion to suppress and entered a finding for the State in the civil suspension proceeding. The court credited the officer's testimony regarding the reasons for his initial suspicion. As it explained, defendant committed three traffic violations in

rapid succession, raising a reasonable suspicion from the outset that she was impaired. After stopping defendant, the officer was immediately confronted with a strong odor of alcohol emanating from the vehicle, and while defendant stated that she had had only one drink, her two passengers were highly intoxicated. The court found that the presence of these passengers added to the officer's reasonable suspicion, as did his observation of defendant's watery, bloodshot eyes. Taken together, the court concluded, these factors provided sufficient grounds for the request to exit the vehicle. The officer then observed that defendant was still displaying a strong odor of alcohol, justifying further inquiry.

At that point, the court found, the officer had enough indicia of impaired driving to support the full panoply of typical roadside testing in whatever order he might have decided was appropriate. The officer asked defendant to perform field sobriety exercises. The court observed that a videotape of the stop seemed to indicate that defendant did very well on the field sobriety exercises. While it acknowledged that the officer may have been able to observe defendant's actions better than the court, given that the videotape was not particularly high quality and it was recorded at night, the court found nothing on the video that added to the quanta of information that the officer already had with respect to suspecting impaired driving. Nonetheless, the court disagreed with defendant's assertion that the video was so clearly supportive of sobriety that the officer was not justified in furthering the seizure and asking defendant to submit to a nonevidentiary breath test. The court concluded that there was a sufficient reasonable and articulable suspicion for each of the levels of detention that occurred during the processing. It thus denied the motion to dismiss and entered a finding for the State in the civil suspension matter. This appeal followed.

On appeal, defendant reiterates her argument that following her performance on the field sobriety exercises, the officer could not reasonably suspect that she was impaired. Thus, according to defendant, the officer should have released her rather than administering a PBT.

We reject this argument. We have explained that "[i]n the DUI context, a brief investigative detention is justified if a police officer has a reasonable and articulable suspicion of criminal activity, and may include a preliminary breath test if the officer has reason to believe that a person is driving under the influence." State v. Mara, 2009 VT 96A, ¶ 6 (quotations omitted); see also 23 V.S.A. § 1203(f) ("When a law enforcement officer has reason to believe that a person may be violating or has violated section 1201 of this title, the officer may request the person to provide a sample of breath for a preliminary screening test . . . ."). Based on the court's unchallenged findings, the officer had reason to believe that defendant was driving under the influence here. See Mara, 2009 VT 96A, ¶ 6 (reviewing ruling on motion to suppress, Supreme Court will uphold findings of fact unless clearly erroneous; reviews trial court's legal conclusions de novo).

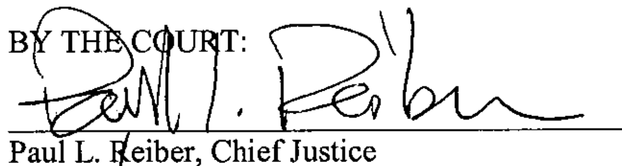
We recently considered and rejected an argument identical to that raised by defendant here. In Mara, the defendant was similarly stopped for a traffic violation, and the officer observed signs that he was intoxicated. The defendant had watery, bloodshot eyes, and he smelled of alcohol. The defendant's speech was normal, however, and he successfully completed two of three field sobriety exercises. Following a PBT test, the defendant was processed for DUI. As in this case, the defendant argued that even if the officer was justified in ordering him out of the car, his performance of the field sobriety exercises dissipated any "reason

to believe" that he was driving under the influence. Id. ¶ 4. The trial court agreed, and it granted the motion to suppress. We reversed its decision on appeal. Id. ¶ 1. Given the indicia of intoxication cited above, we rejected the notion that the trooper's suspicion of DUI became "unreasonable" simply because the defendant passed two field sobriety tests. Id. ¶ 9. We emphasized that "external manifestations of drunkenness are not required for an officer to have a reasonable suspicion of DUI and to administer a PBT." Id. ¶ 8. To hold otherwise, we continued, "would be to reward the experienced drinker who consumes excessive amounts of intoxicants without obvious physical impairment." Id. (quotation omitted). We concluded that "[a]dministering a PBT to a driver who has already performed three other field-sobriety tests and who is already out of his vehicle is a very slight intrusion, especially when weighed against the public's compelling interest in having drunk drivers off the roads." Id. ¶ 11.

We reach a similar conclusion here. Indeed, the facts justifying the officer's suspicion are even stronger in this case. As recounted above, the officer saw defendant commit three successive and potentially dangerous traffic violations. He observed her watery, bloodshot eyes and smelled alcohol coming from her person. Her passengers were very intoxicated and defendant admitted consuming alcohol. Even if a defendant's performance of field sobriety tests would not in itself have supported a reasonable suspicion of DUI, this fact alone does "not as a matter of law compel the trooper to cease his roadside investigation." Id. ¶ 10. As we stated in Mara, a police officer "must interpret the test results based on his training and experience in light of the totality of the circumstances, and some discretion inheres in that interpretation." Id. In this case, the officer reasonably suspected that defendant was intoxicated given the totality of the circumstances, and he was justified in administering the PBT. The motion to suppress was therefore properly denied.

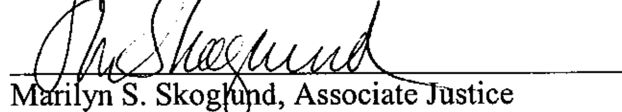
Affirmed.

BY THE COURT:



Paul L. Reiber, Chief Justice

Denise R. Johnson, Associate Justice



Marilyn S. Skoglund, Associate Justice