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VERMONT SUPERIOR COURT

SUPERIOR COURT
Bennington Unit

CRIMINAL DIVISION
Docket No. 392-4-11Bncr
& 30-4-11Bncs

State of Vermont

v.

John
Defendant

VERMONT SUPERIOR COURT
BENNINGTON UNIT
SEP 12 2011
FILED

DECISION ON MOTION TO SUPPRESS

This matter came before the court on August 23, 2011, on defendant's Motion to Suppress and for Merits in the civil suspension matter. The court issues the following findings and decision **granting** the Motion to Suppress and entering **judgment for the defendant** in 30-4-11Bncs.

Findings of fact¹

Officer Blanchard of the Manchester Police Department was outside his parked cruiser at the Maplefield store in Manchester on April 14, 2011, at about 11:40 PM. He was speaking to a couple of people a few feet from the front entrance to the store. The cruiser was by the gas pumps closest to the entrance. Defendant parked his vehicle in a marked spot some distance away from the cruiser and entrance. He was not at any of the gas pumps for fueling. Defendant walked to the front entrance and passed by Blanchard. He was within a few feet of the officer for a few seconds in passing but he did not stop there.

Defendant was coming from his business. He had consumed about seven beers in the 90 minutes or so before getting to the store. He went into the store to purchase some beer.

Blanchard spoke to the defendant in a casual manner. Defendant relied with a simple "Okay". There was no extended conversation. They did not know each other. Blanchard noticed an odor of

¹ There was disputed testimony as to some facts. The findings the court makes indicate the credible and reliable evidence in the court's judgment.

alcohol from defendant's person and a slight or little sway to his walk. Defendant was in the store for a time. Exactly how long is not clear but it was in terms of minutes. Blanchard stayed where he had been standing and defendant exited by him. The officer again noted an odor of alcohol and the slight sway to his walk. Blanchard made another casual remark to defendant but there was no reply. Again, defendant went by the officer in a matter of a few seconds. He did not stop during the exchange.

Although the officer testified to defendant's speech being mumbled or slurred the court does not see how this observation could be reliable or based on sufficient facts to be reliable from the limited word or two defendant would have spoken. Nor can the court find reliable that the officer saw the condition of defendant's eyes in any reliable manner if the interaction was as described.

Defendant had purchased beer which was in a paper bag. One of the clerks on duty testified that he has had training on the selling of alcohol and intoxicated patrons. He is aware not to sell alcohol to such persons. The court can not find he specifically sold the beer to defendant. Other clerks were in the store and while he worked the register he could have been away from it at times and other clerks could have done sales. He has no specific recall of defendant that night.

After defendant went by Blanchard exiting the store, the officer noticed defendant getting into a truck across the parking area. He had not been paying attention to his movement across the lot and defendant was partially in the vehicle when the officer again took notice of him. In concern for what he thought he had noticed previously, Blanchard went to his cruiser and followed defendant out of the parking lot. Defendant turned onto the street and then signaled a turn within a short distance. Blanchard observed no traffic violations in this time. Defendant actually lived just a short distance from the store and was turning into his drive. Blanchard turned on his blue lights and defendant completed his turn into his drive and stopped. Blanchard pulled in behind defendant.

The officer asked for license and registration and told defendant why he had initiated the stop. Defendant agreed to field sobriety tests and scored clues on several of them. The officer asked for a

preliminary breath test sample. Defendant asked what would happen if he declined the test and was told based on what the officer had observed defendant would be taken in for processing. Defendant took the preliminary test and the result was over .08%.

Blanchard took defendant into custody and to the station where defendant was processed for DUI. Defendant took the evidentiary breath test without talking to an attorney. It had a result of .182%. Defendant believed that he should take the test to avoid being detained further. He felt the officer's remarks about the preliminary test had forced him to take that test and would mean he would somehow be further detained and not released if he refused the evidentiary test. Nothing the officer told defendant at the station would have directly conveyed such an impression. The officer gave defendant the standard required information about taking the evidentiary breath test and the results of a refusal. He said nothing about further detaining the defendant or bail or such concerns.

Analysis of Law and Conclusions

An officer can stop a vehicle on reasonable articulable suspicion of operating under the influence. *State v. Fletcher*, 2010 VT 27, ¶ 9; *State v. Orvis*, 143 Vt. 388, 389 (1983). An officer can request a person exit a vehicle after the stop upon continuing suspicion based on further observations that the operator might be operating under the influence. *State v. Sprague*, 175 Vt. 123, ¶ 22 (2003); *State v. Mara*, 2009 VT 96A, ¶ 2.

The observations justifying further action upon a state do not have to be extreme or conclusive as to alcohol use or intoxication. *State v. Santimoro*, 2009 VT 104, ¶ 11 (observation of speeding, odor of alcohol and bloodshot and watery eyes sufficient for asking subject to submit to further testing); *State v. Mara*, 2009 VT 96A, ¶ 2 (observation of possible inspection sticker violation and odor of alcohol and bloodshot and watery eyes sufficient for further testing).

Here the court has found factually that the officer smelled an odor of alcohol on defendant and observed his gait or walk to have a slight sway, but the latter could only have been from the few steps

defendant took close to the officer . He indicated he did not watch defendant walk the longer distance to and from his vehicle. So this observation has limited value. The court can not find credible that he could detect actual mumbled or slurred speech in the word or two spoken by the defendant as he walked by. There is no evidence defendant stopped to have any actual conversation. Nor is it credible that he could observe the condition of the defendant's eyes to the degree of making a reliable observation.² This would also be the least reliable factor alone considering the number of possibilities for such a condition and the hour of night. No traffic violations were observed as defendant pulled out of the parking area and travelled the short distance to his drive.

Based on what the court has found occurred and facts that did exist, the court can not find the stop was based on sufficient grounds. While it notes the above cases and many others in Vermont as to the minimal facts often needed to justify a stop, those did involve either some traffic violations, or erratic observations, or third party information as to suspected behavior, or closer observations of the suspect and signs of alcohol use, or a combination of these facts. Or the cases provided some other justification even without signs of alcohol. See *State v. Pierce*, 173 Vt. 151, 155-56 (2001) (officer legally stopped operator of second vehicle from leaving scene as possible witness to DUI of first vehicle); *State v. Marcello*, 157 Vt. 657, 658 (1991) (officer acted pursuant to community caretaking function). Here, we have a person walking by an officer for a second or two and then walking back by him a few minutes later in a very routine setting. Although the officer may have spoken several lines of conversation, the defendant responded with a word or two. There is no evidence the officer observed the defendant's movement aside from the momentary walk-by at the entrance. There is no evidence the odor was strong or overwhelming. None of the limited observations made caused the officer to more closely watch defendant move across the parking lot upon his exiting the store. He apparently only by chance

² Although the court does not find reliable or credible defendant's claims that they were never even as close as the officer testified, the court still can not find the claim of mumbled speech and condition of the eyes reliable.

saw him enter a vehicle rather than be watching him due to suspicions from their interaction and then decided to follow him.

The court notes it finds a "stop" occurred even though defendant turned into his own driveway. The officer did turn on his blue lights which would certainly cause a reasonable person to believe even if he was parking in his driveway that he was not free to walk away or ignore the presence of the cruiser and officer behind his vehicle. *State v. Paquette*, 151 Vt. 631, 635 (1989) (reasonable to assume officer who pursued suspect into dooryard of home would not allow him to leave if he refused to respond to inquiries).

The motion will be granted. All evidence from the illegal seizure is suppressed. This will include observations of the defendant after the stop in the driveway, verbal information from him from that point on, and test results and information from the actual processing.³

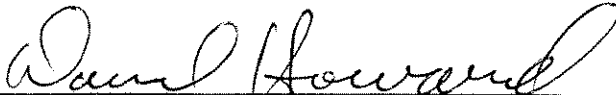
Based on the above findings and conclusions, judgment must be entered for the defendant in the civil suspension case. *State v. Lussier*, 171 Vt. 19 (2000) (requirements of civil suspension procedure require finding that the stop of defendant was legal in addition to the other statutory elements).

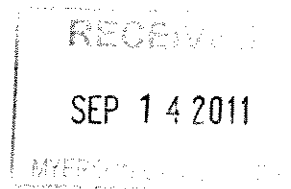
ORDER

The Motion to Suppress is **granted**. The case will be dismissed in 15 days unless appeal is taken or the state can file information as to sufficient evidence of the offense without the suppressed information.

Judgment is entered for the defendant in the civil suspension case.

Dated at Bennington, VT, this 17th day of September 2011.


Superior Judge David Howard



³ Based on this conclusion, the court does not reach the issue of defendant's claim his taking the evidentiary breath test was tainted by remarks about the preliminary test. Although very doubtful that claim is valid with the factual findings made, it does not have to be reached.