

## DUI - REFUSAL - SUPPRESSION OF EVIDENCE

Docket Nos. 725-6-99Bncr and 52-6-99Bncs

### STATE OF VERMONT

v.

### CHRIS SARGENT

Bennington District Court

September 27, 1999

HOWARD, J. This matter came before the court on September 14, 1999, on defendant's Motion to Suppress in the criminal matter and for merits on the civil suspension matter. The defendant argues that her actions during processing for DUI did not amount to a refusal of the evidentiary breath test as alleged by the state. She therefore seeks judgment for her in the civil suspension matter and an order that evidence of any alleged refusal be suppressed in the criminal case. The state argues that they have met their burden of demonstrating a refusal occurred and should have judgment in their favor on the civil suspension matter and the suppression motion should be denied in the criminal case. Based on the evidence presented, the court makes the following Findings of Fact, Analysis and Conclusions of Law, Decision, and Order.

#### Findings of Fact

1. On May 27, 1999, at approximately 10:20 p.m., the Manchester police received a call on a motor vehicle accident. Trooper O'Brien initially responded to the scene as he was at the department when the call came into it. Officer Hall responded to the scene after having to deal with another matter.

2. When Officer Hall reached the scene, he observed EMT personnel dealing with a woman later identified as the defendant. He observed a vehicle that had been involved in an accident striking a telephone pole. The front of the vehicle was substantially damaged.

3. The defendant is 64 years old. She has two years of college and has worked at various jobs. Presently she works as a folk artist.

4. Upon approaching the defendant, he could hear her telling the EMT personnel that she did not want to be treated and did not want to go to the hospital. He could observe some injuries. She had a cut about the lip, bruises and cuts on her legs and arms. Officer Hall spoke to the defendant, encouraging her to go to the ambulance. She did eventually go to the ambulance but continued to state that she wanted to leave and go home and did not want treatment or to be brought to the hospital.

5. The defendant did not have health insurance. She did not want to incur any costs for medical treatment.

6. Officer Hall also observed that the defendant's speech was slurred, her balance appeared to be off as she walked, he smelled a strong odor of alcohol on her, and her eyes were watery. He asked the defendant if she had been drinking any alcohol, and she indi-

cated she had one glass of wine earlier in the evening. She also admitted she was operating the vehicle that had the accident. She indicated she had been blinded by an oncoming vehicle's headlights and had gone off the road and hit the pole. Officer Hall did not request she do any field sobriety tests, as he felt she was not being very cooperative in general and that he had already observed her lack of balance. She was asked to take an alcocensor test and declined to do so.

8. The defendant used some swearing in this period and was not cooperative in discussing the situation with the EMT personnel or Officer Hall. At one point she became very adamant that she was leaving the scene. Officer Hall then informed her she could not leave and that she was going to be processed for operating under the influence.

9. She was transported in the cruiser to the police station. She requested a cigarette during the ride but was told she could not have one.

10. At the station, she was read her "Miranda Rights". She indicated she understood these and did not request an attorney. She was then read the "informed consent" information. This included her right to consult with an attorney before deciding to take the test or not. She indicated a desire to speak with counsel, but would not name an attorney. Officer Hall telephoned the public defender on call that evening.

11. The defendant was given access to the phone and spoke to the lawyer. Officer Hall left the room during this time. He heard her slam the telephone down after a period, and he went back in. The defendant said she was not speaking to "any fucking public defender." After some discussion about the test, Officer Hall re-contacted the lawyer, as he was not sure the defendant had made a decision about the test. During this period of first contacting an attorney and the second attempt, the defendant was verbally abusive at times. She indicated the matter was "bullshit". When she was told she could not have a cigarette, she swore at the officer and told him she would "get a lawyer and fight you."

12. The defendant also wanted to have a cigarette during this period and was verbally abusive on being told this was not permitted. She also placed a lozenge in her mouth at one point and had to be told to take it out and was again confrontational.

13. The defendant spoke to the lawyer for a period and then consented to taking an evidentiary test. Officer Hall gave her the instructions on taking the test. These included the need to give a hard, continuous blow of breath into the tube until the officer told her to stop. The defendant started the procedure. The officer was holding the tube by her mouth and could feel the breath coming around the tube rather than going into it. He told the defendant she had to close her lips tightly around the tube to create a seal. She made several more such attempts with the same result.

14. The defendant did not indicate verbally that she was having any particular problem with the attempt. She did indicate she was attempting to do as instructed, but continued to fail to create a seal around the tube. She was told after a few minutes that it would be considered a refusal if she did not give a good breath for a test. After another few moments and no success, Officer Hall considered it a refusal and terminated the attempt.

15. Officer Hall finished the processing forms, and he and another officer transported the defendant back home. She never made any request for medical treatment or indicated any specific injuries.

16. The defendant had been out to dinner that evening with her friend Theresa DeNatale. They had dinner at a local restaurant. The defendant had two glasses of wine with dinner. She had this alcohol between 6 p.m. and 8 p.m. After the dinner, Ms. DeNatale drove the defendant home and left her there. At some point in the next half-hour, the defendant decided to go to another local restaurant to join a birthday party with friends. It was in this trip that she had the accident that caused the police to respond and eventually process her.

17. The following day after the accident and processing, the defendant was seen by Mary McVean at the Northshire Medical Center. Ms. McVean is a registered nurse and certified family nurse practitioner. She has 20 years of experience in medicine. The defendant presented to her with face cuts, contusions on her knees, and some swelling to her face. She found cuts around defendant's lips, especially noticeable about her upper left lip. There was still some swelling about that area. The defendant indicated pain about her chest, but this could only be judged subjectively by her report and not by any tests. The defendant did not have insurance and would not agree to any extra tests or work up due to the costs, except that an x-ray was taken that showed her lungs were normal.

18. The defendant's heart rate was slightly raised, her respiration rate was at the high end of normal, and her pulse was normal. The defendant was upset, although not hysterical or in shock.

19. On June 4, 1999, the defendant went to Mary Squire. Ms. Squire is a licensed dentist working in Arlington, Vermont. Dr. Squire did a dental exam, including radiographs of some of the teeth. She found 5 upper teeth and 4 bottom teeth were sufficiently loosened as to be able to move about their sockets. Dr. Squire also found significant lacerations to the gum area on the inside of the lower lip. There was tenderness to the area of the mouth where the lower jaw passes into the inner surface of the cheek.

20. These injuries would be totally consistent with the defendant having suffered a severe blow in the accident approximately one week earlier. They would have been painful at the time immediately after the

accident and could interfere with the ability to fasten one's lips about a tube for a length of time to create a tight seal and blow into the tube. There is no evidence that her airway was obstructed during the processing.

21. Several weeks after the accident the defendant was taken to the hospital on an emergency basis. She had emergency surgery for bleeding in her abdomen, and it was found that her pancreas had suffered an injury and had been bleeding. It is reasonable to find this was an injury from the accident that had not been diagnosed due to the limited medical exam the defendant allowed.

22. Some signs of shock can be similar to intoxication or being under the influence of alcohol. This can depend upon the individual person and personality. These signs can be aggressiveness, confusion, agitation, and irrationality. The odor of alcohol would not be a sign of shock.

#### Analysis and Conclusions of Law

Under the procedure for a civil suspension, 23 V.S.A. § 1205, the state must demonstrate that the officer had reasonable grounds to believe the person was operating under the influence of intoxicating liquor, that the person was informed of their rights under § 1202(d), and that the person either refused the test or took one with a result of an alcohol concentration of .08% or more. In this case, the allegation is that a refusal took place.

The defendant does not raise specific challenge to the first two issues. The court finds based on the evidence that there were reasonable grounds to process the defendant and that she was informed of her rights under § 1202(d). The accident, her appearance and behavior at the scene, and her admission to having consumed alcohol provided such grounds to the officer. There appears to be no dispute over the recitation of her rights and the documents submitted demonstrate compliance. The contested issue that remains is whether a refusal took place.

It is clear that a refusal does not have to be verbally communicated by a suspect. The Vermont Supreme Court has often discussed this situation and found that conduct can equal a refusal. As it stated in *State v. Benware*, 165 Vt. 631, 632 (1995):

The applicable statute provides a defendant with a reasonable amount of time to decide whether to submit to the breath test, but no longer than thirty minutes after the first attempt to contact an attorney. 23 V.S.A. § 1202(c). A refusal to submit to testing may be inferred from the suspect's behavior. As we have explained: It is not necessary as a matter of law that a refusal to submit to testing by a DUI suspect can be evidenced only by an express, affirmative statement of refusal. In the absence of such a statement, a refusal may be implied from the totality of the surrounding facts and circumstan-

ces. *Stockwell v. District Court*, 143 Vt. 45, 50, 460 A.2d 466, 468 (1983). Thus, if a reasonable person in the officer's position could believe that the driver understood that he had been asked to take a test and nevertheless behaved in a way that demonstrated he was unwilling to submit, a refusal may be recorded by the officer. *Id.* These principles have been reiterated in recent cases. See, e.g., *Gilman v. Commissioner of Motor Vehicles*, 155 Vt. 251, 252, 583 A.2d 86, 86 (1990); *Fontaine v. District Court*, 150 Vt. 28, 30, 547 A.2d 1362, 1363 (1988).

The defendant clearly did not end up taking the test. Nor did she verbally refuse. So the issue is whether her conduct was a demonstration of an unwillingness to take the test. This language clearly indicates, though, that there must be a willing and deliberate refusal by conduct. Obviously, someone who cannot take the test is not refusing. The test is an "objective, factual inquiry" as to whether the person was able to give a sample. *State v. Ratliff*, 10 Vt.L.W. 222 (1999).

Based on the evidence presented, the court finds that the defendant could not give a breath sample and therefore did not refuse under the statute. While her conduct may have been inappropriate at numerous times during the session, this does not overcome the evidence that she had suffered injuries to her mouth and internal injuries. These, especially the former, would have caused her to have great difficulty in trying to properly give a valid sample. While her failure to verbally indicate some of this difficulty has to be weighed, the court finds that she simply did not voice such due to the stress of the situation and perhaps her failure to fully understand her injuries at the time.

Her verbal abusiveness also has to be weighed and the court has done so, but does not find this requires a finding of a refusal. Much of it had to do with wanting to avoid medical treatment and to go home. Even that at the station, while offensive, was not to such a degree as to provide a basis for a refusal finding. While the officer does not have to read minds in judging whether actions are a refusal, and obviously also cannot know of injuries that are not clearly evident, the court must make the decision on the above objective standard. Doing so, it finds that the full facts, including the medical situation proven by the evidence, do not meet the state's burden of demonstrating a refusal.

The defendant also moved to suppress "evidence" of a refusal in the criminal charge of operating under the influence. The state initially argues that the court cannot suppress such evidence. The court disagrees. Depending upon the reason, it can suppress such evidence if it is produced from a violation of defendant's rights under 23 V.S.A. § 1202. *State v. Berini*, 167 Vt. 565, 566

(1997). This line of cases does not require all such evidence be suppressed where the court finds against the state on the facts in a civil suspension. See *State v. Welch*, 159 Vt. 272 (1992) (on the facts of the case, ruling for defendant in civil suspension hearing that no refusal occurred is not binding on criminal prosecution). The court did not find any violation of defendant's rights under § 1202. Rather, it found factually the defendant could not take the test. Unlike *Welch*, though, in this matter there was a "full and fair opportunity" for both parties to litigate all the issues. 159 Vt. at 272. This was not a case of litigation by ambush at the civil hearing where the state was depending solely on affidavits. Both parties were aware of the issues, presented testimony and fully dealt with the contested issue of a refusal. The state had its arresting officer present and he testified. Therefore, the court finds it appropriate to suppress evidence of a refusal in the criminal case.

This does not mean the state may not introduce evidence of the defendant's behavior generally during the processing. That is clearly relevant to the issue of whether she was under the influence. One can be injured and unable to give a sample, yet still be under the influence, and evidence of swearing and abusive behavior is relevant and separate from the refusal. Obviously, the defendant can attempt to rebut such with medical testimony. What is suppressed is any testimony that a "refusal" occurred or argument based on that claim. No instruction will be given concerning any inference from a refusal. Testimony will be limited to that the defendant could not give an adequate sample of breath in addition to the details of her other conduct during the processing. The fact that she did not give a sample will not be labeled or designated a refusal.

#### Order

Judgment is entered for the defendant in the civil suspension case. The Motion to Suppress in the criminal case is GRANTED in part. While testimony concerning the processing will be admissible, including that a test was not obtained, no testimony will be allowed that a "refusal" took place or argument that such took place. The evidence of a refusal mentioned in 23 V.S.A. § 1202(d)(6) shall not be admitted.

Kerry McDonald, Deputy Bennington State's Attorney, Bennington, for State  
Bradley Myerson, Manchester, for defendant