STATE OF VERMONT

SUPERIOR COURT
Rutland Unit

CRIMINAL DIVISION
Docket No. 391-3-10Rdcr
47-3-10Rdcs

FILED
JUL 08 2010
Rutland District Court

STATE OF VERMONT

V

RAYMOND WING

DECISION ON MOTION TO SUPPRESS AND EXCLUDE

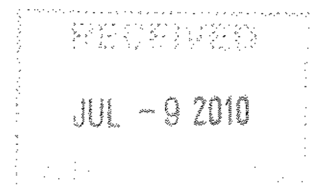
The above matter came on for final hearing on Defendant's Motion to Suppress and Exclude filed April 14, 2010. The State filed an Opposition on April 26, 2010. A hearing was held on July 7, 2010. The State was represented by Deputy State's Attorney Jane O'Neill. The Defendant was present and was represented by his attorney, Bradley Myerson.

Defendant is charged in a single count Information with DUI #1. There is also a corresponding civil proceeding. In the Motion, Defendant alleges that his right to an independent blood test was denied and that he did not waive that right.

Based upon the evidence submitted at the hearing the Court issues the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

At approximately 7:27 p.m. on February 27, 2010, Andrew Todd was on duty as a Corporal with the Rutland City Police Department. He observed a vehicle traveling north on Grove Street. He saw the vehicle make a left hand turn without using its signal. He also observed the vehicle have difficulty staying in its lane. He then effected a motor



cc: Atty O'Neill

vehicle stop as a result of the witnessed operation, which included a motor vehicle violation for turning without using a signal.

Upon approaching the vehicle, the Officer encountered Raymond Wing ("Defendant"). The Officer apparently believed that the Defendant may have been impaired as he placed him into custody for DUI and transported him to the police station for processing.

During the processing the Officer read to the Defendant the standard processing form. The Defendant agreed to submit to an evidentiary breath test. He submitted to two tests: the first test result was a .233% B.A.C., and the second result was a .219 % B.A.C. Defendant expressed surprise at the level of these test results. After these results the Officer inquired as to whether Defendant wanted an independent test. Defendant immediately indicated that he did. The Officer indicated that he would take Defendant to Rutland Regional Medical Center so that Defendant's request could be honored.

They finished the paperwork and left the station. While exiting the rear door, the Officer explained to Defendant the procedure and that he would subsequently be released to Grace House that night.

The Officer and Defendant had a discussion while Defendant was being placed into the cruiser. Their recollections of the substance of the discussion differ markedly. The Officer recalls that Defendant told him that he had changed his mind and would make his own arrangements for an independent test. The Defendant denies stating this and states that he did not change his mind about being taken for an independent test. The Defendant also states that he asked the Officer why he was not driving in the direction of

Rutland Regional Medical Center and that the Officer responded that he was driving Defendant to Grace House.

The Officer did not take Defendant for an independent test. Instead, he drove him to Grace House. The Officer and Defendant do agree that, after arriving at Grace House, the Officer told the Defendant that if he wished to have an independent test after being released, and the Officer was still on duty, the Officer would give him a ride.

At the time of the processing the Defendant resided in New Hampshire. He did not have anyone in the area to give him a ride to obtain an independent test.

Having had the opportunity to observe the witnesses' demeanor, mannerisms, and tone of voice, and to examine the quality of their testimony as a whole, including any bias or interest in the matter, the Court finds that both individuals testified in a manner which the Court finds credible and that their recollections differ. The Court also had an opportunity to review the videotape of the interaction relating to the evidentiary test and the initial request for independent testing. In sum, the Court does not find that the evidence supports a finding that Defendant waived his right to an independent test after leaving the station. This finding is also consistent with the Officer's view that the Defendant appeared confused throughout the proceedings.

Once at Grace House, the Defendant asked a staff member to take him to the Rutland Regional Medical Center for independent testing. This request was denied. Upon release, the Defendant went to Rutland Regional Medical Center to obtain an independent test but was informed that too much time had passed for an independent test to be of evidentiary value.

CONCLUSIONS OF LAW

Vermont's implied consent statute confers the right to an additional, independent test whenever enforcement officers administer evidentiary testing during DUI processing. See 23 VSA §§ 1202, 1203a. In providing for this right, the Legislature set forth that

> [t]he failure or inability to obtain an additional test or tests by a person shall not preclude the admission in evidence of the test taken at the direction of an enforcement officer *unless the additional test was prevented or denied by the enforcement officer*. *Id.* § 1203a(a) (emphasis added).

In interpreting a statute, a court must examine the plain meaning of its language in light of its legislative purpose. *State v. Pollander*, 167 Vt. 301, 308 (1997). Where the meaning of a statute is plain on its face, the statute must be enforced according to its express terms. *State v. Forcier*, 162 Vt. 71, 75 (1994); see also *Brennan v. Town of Colchester*, 169 Vt. 175, 177 (1999) (holding that the court must presume that the Legislature intended the plain, ordinary meaning of the language that it used).

By its plain language, § 1203a triggers suppression of evidentiary testing if an enforcement officer prevents or denies a defendant's right to an independent test. See 23 V.S.A. § 1203a(a). Because the right to independent testing has been recognized by the Legislature as an integral component of the implied consent law, once it has been invoked, courts may only recognize a subsequent waiver of the right when the State presents substantial evidence of such waiver. *State v. Hoffman*, 148 Vt. 320, 322 (1987). This standard requires that the State's evidence overcome a presumption against a finding of waiver. *Id.*

Here, the video evidence establishes that the Defendant clearly and unequivocally invoked his right to an additional, independent test. Because the Officer intended to detain the Defendant for a period of time after completion of the processing, he was

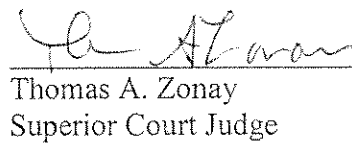
required to make arrangements for the Defendant's additional test unless the Defendant relieved him of that obligation through a knowing and intelligent waiver. See 23 V.S.A. § 1203a(b); *Hoffman*, 148 Vt. at 322. A failure to do so would be a denial of the Defendant's right to additional testing and trigger the exclusionary rule. See 23 V.S.A. § 1203a(a).

As set forth in the findings, the Court does not find that there was substantial evidence of a knowing and voluntary waiver of the independent test on the part of Defendant. Further, the Court concludes that the Officer prevented the Defendant from obtaining an independent test when he delivered him to Grace House rather than to the Rutland Regional Medical Center for the test to be taken.

ORDER

For the reasons stated herein, Defendant's motion to suppress and exclude is GRANTED.

Dated at Rutland, Vermont, this 8th day of July, 2010.



Thomas A. Zonay
Superior Court Judge