VERMONT SUPERIOR COURT

SUPERIOR COURT
Bennington Unit

CRIMINAL DIVISION
Docket No. 870-8-13 Bncr
60-8-13 Bncs

State of Vermont

v.

Defendant.

Order on Defendant's Motions to Suppress

Background

The State charges Defendant with driving with a blood alcohol concentration above the legal limit and driving while under the influence of intoxicating liquor. *See* 23 V.S.A. §§ 1201(a)(1), (a)(2). The facts of the case are largely undisputed. On August 3, 2013, Jeff Pritsky observed a vehicle driving erratically and on the left side of the road. Mr. Pritsky observed the vehicle drive onto Stratton Mountain Access Road, which is a mountain road with curves. Defendant drove the vehicle observed by Mr. Pritsky. Mr. Pritsky is not a law enforcement officer. Mr. Pritsky was able to stop Defendant's car by pulling in front of Defendant and slowing to a stop, Defendant parked his car in a way that opposed oncoming traffic. Once stopped, Mr. Pritsky removed Defendant's car keys and called the police.

Officer Craig Watrous, of Winhall Police & Rescue, responded to the call. Officer Watrous observed Defendant's eyes were blood shoot and watery, Defendant smelled of intoxicants, Defendant's speech was slurred, Defendant was unable to maintain his balance, and Defendant admitted to consuming four alcoholic beverages. Officer Watrous decided Defendant was too impaired to attempt field sobriety exercises. Defendant refused a preliminary breath test. Officer Watrous arrested Defendant and then took Defendant to Winhall Police Station for an evidentiary test. The DataMaster at the Winhall Police Station malfunctioned. Officer Watrous then took Defendant to the Manchester Police Station for an evidentiary test. The DataMaster at the Manchester Police Station indicated Defendant had a blood alcohol concentration of 0.278%.[1]

After processing, Officer Watrous wanted to release Defendant but was concerned for Defendant's safety. Defendant stated he was not from the area, had no friends or family in the area, and was unable to state where he planned to spend the night. Under the circumstances, Officer Watrous decided it was unsafe to release Defendant. Officer Watrous made arrangements for Defendant to spend the night at Grace House. Grace House is an unlocked facility in Rutland that allows people to sleep and recover from intoxication. Officer Watrous

[1] As the evidence developed at the combined motion to suppress and civil suspension final hearing, it became clear that the Datamaster Test was administered more than two hours after operation. No expert "relate back" testimony was proffered. As such, the rebuttable presumption does not apply, and the state has failed to meet its burden in the civil suspension matter. The court is compelled to grant judgment in favor of the operator on the civil suspension.

gave Defendant the choice of spending the night at Grace House or the Marble Valley Correctional Facility. Defendant decided to stay at Grace House.

Officer Watrous also asked Defendant if he wanted an independent evidentiary test. Defendant stated he did not want a second test. On the DUI Affidavit, Officer Watrous checked box 9.A. Box 9.A. reads: "Since you are being released, if you wish additional tests, to be paid for at your own expense, you will have to make your own arrangements." Officer Watrous did not read or check Box 9.B. Box 9.B. reads: "Because you are being detained for a short period prior to being released, I will make arrangements for you to have an additional test, at your expense, if you so desire." Officer Watrous then transported Defendant to Grace House, where Defendant spent the night.

Procedural History

Defendant moved to suppress the evidence obtained on August 3, 2013. Defendant filed three motions to suppress. On September 17, 2013, Defendant argued Officer Watrous lacked probable cause to arrest Defendant based on his observations of Defendant at the side of the road. On September 25, 2013. Defendant argued Mr. Pritsky conducted an unlawful citizen's arrest. Also on September 25, 2013, Defendant argued he was denied his right to an independent blood test under 23 V.S.A. § 1203a(b) because Officer Watrous detained Defendant and did not inform Defendant of Officer Watrous's obligation to arrange an independent blood test. On October 11, 2013, the State opposed the motions to suppress. The State argued there was sufficient evidence for Officer Watrous to form probable cause to arrest Defendant, Mr. Pritsky was not a government actor, and Defendant was not detained by Officer Watrous. On January 7, 2013, the State opposed the second motion to suppress.

The Court held a hearing on Defendant's motions on January 3, 2014. Defendant was represented by Attorney Bradley Myerson. Due to automobile difficulties, Defendant was not present. Attorney Myerson indicated he had permission from Defendant to go forward with the hearing. Deputy State's Attorney Alex Burke represented the State. At the hearing, Defendant presented a supplemental memorandum on unlawful citizen's arrest. The Court gave the parties until January 17, 2014 to supplement any of their arguments. On January 7, 2014, the State argued suppression is not appropriate because Mr. Pritsky was not a state actor and made a valid citizen's arrest. On January 16, 2014, Defendant filed a supplemental memorandum. Defendant argued Mr. Pritsky's citizen's arrest violated Defendant's rights under the Fourth Amendment and Article 11, Officer Watrous should have informed Defendant of Officer Watrous's obligations to arrange for an independent test, and the State failed to present an expert at the hearing to relate the sample back to the time when Defendant drove his automobile.

Discussion

1. Mr. Pritsky's Citizen's Arrest

The first issue in these motions is whether Mr. Pritsky conducted a valid citizen's arrest. "Private citizens are empowered to arrest fellow citizens for misdemeanors committed in their presence if the misdemeanor constituted a breach of the peace." *State v. Barber*, 157 Vt. 228,

231 (1990). In *Barber*, the Vermont Supreme Court summarized when driving can be a breach of the peace authorizes a citizen's arrest.

> Our cases provide some guidance on what facts will give rise to a breach of the peace. In Hart, we held that driving very slowly and failing to stop at a stop sign is not a breach of the peace. Similarly, in LeBlanc, we held that operating a motorcycle without a rear registration plate and in such a way as to weave across the double centerline of the road did not constitute a breach of the peace. In State v. Sanderson, 123 Vt. 214, 216, 185 A.2d 730, 731 (1962), however, we held that the public peace may be transgressed by the reckless, offensive operation of a motor vehicle in such a manner as to endanger the safety and security of persons lawfully on or near the highway. In Sanderson, defendant departed from a driveway at a high rate of speed, screeching the tires. In addition, the vehicle was not equipped with a muffler. We held that these facts justified the conclusion that there was an offense against the public safety, peace, and good order.

Id. In *Barber*, the Court suggested the trial court could have found a valid citizen's arrest.

> [T]wo Shelburne police officers witnessed defendant's vehicle hit a stationary vehicle and pull off its bumper on a busy city street with numerous other persons around. Defendant slowed down for a moment and then speeded up to avoid being apprehended. During the ensuing chase, defendant weaved in and out of traffic and ran at least two stop lights.

Id. at 331–32. The Court remanded for the trial court to consider the breach of the peace issue. *Id.* at 332.

The current case presents facts that are in between the cases described. Mr. Pritsky observed erratic driving and driving on the wrong side of the road. This Court finds the two are sufficient to constitute a breach of the peace. Erratic driving alone may not be enough to sustain a citizen's arrest. However, Defendant drove on the wrong side of the road. Driving on the wrong side of the road, especially on a curvy mountain road, is likely to cause a collision. In this case, Mr. Pritsky was justified in conducting a citizen's arrest.

Even if the Court found Mr. Pritsky's citizen's arrest unjustified, Defendant's remedy would not be suppression because Mr. Pritsky was not a government actor. The majority of reported Vermont cases that discuss citizen's arrest concern cases where police officers who are either off-duty or operating outside of their jurisdiction. *See, e.g.*, *State v. Young*, 2010 VT 97, ¶ 2, 189 Vt. 37 (considering role of off-duty police officer); *State v. LeBlanc*, 149 Vt. 141, 141 (1987) (considering role of Colchester police officers in Winooski). In *Young*, an off-duty police officer followed a defendant who pulled into the off-duty police officer's driveway. 2010 VT 97, ¶ 2. The Court analyzed whether the police officer was a government actor and affirmed the defendant's conviction. *Id.* ¶ 19. Further, "[w]e note, at the outset, that there is little question defendant would have no constitutional claim if a private citizen, who is not a police officer, engaged in the same conduct as the officer in this case and, on observing signs of intoxication, called the police." *Id.* ¶ 11.

Suppression would not be a remedy to Mr. Pritsky's alleged unlawful arrest because Mr. Pritsky was not a state actor. None of the evidence indicates Mr. Pritsky had any law enforcement training or worked for any law enforcement agency. Mr. Pritsky stopped the Defendant's car, removed his keys, and then called the police. Mr. Pritsky did no more than necessary to stop Defendant's dangerous driving and then allowed Officer Watrous to conduct the investigation. Nothing suggests Mr. Pritsky acted as an agent of the State. Under the reasoning of *Young*, there can be no constitutional violation where there is no state actor. *Id.*

Defendant cites to several cases from other jurisdictions that suppressed evidence obtained from a citizen's arrest. *See, e.g., People v. Martin*, 36 Cal. Rptr. 924 (Cal Ct. App.1964); *Commonwealth v. Corley*, 462 A.2d 1374 (Pa. Super. Ct. 1983); *Garner v. State*, 779 S.W.2d 498 (Tex. Crim. App. 1989). *Martin* concerned a case where police officer operating outside of his jurisdiction stopped a defendant. 36 Cal. Rprt. at 925. *Corley* involved a private security officer. 462 A.2d at 1376. *Garner* also involved a sheriff operating outside of his jurisdiction. 779 S.W.2d at 500. These cases are distinguishable from the current case because Mr. Pritsky was not trained to act as officer. Security guards and off-duty law enforcement officers maintain order and investigate crimes as their profession. Additionally, on the appeal in *Corley*, the Pennsylvania Supreme Court held "the exclusionary rule does not apply to citizen's arrests." 491 A.2d 829, 834 (Pa. 1985) None of the evidence suggests Mr. Pritsky had any kind of training in detaining citizens or that he had any prior involvement with the government. Under these circumstances, the reasoning of *Young* indicates that he was not a government actor and therefore could not have violated Defendant's Fourth Amendment or Article 11 rights. *See* 2010 VT 97, ¶ 11.

2. *Officer Watrous's Probable Cause to Arrest Defendant*

The Court next considers if Officer Watrous had probable cause to arrest Defendant. "Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed." *State v. Phillips*, 140 Vt. 210, 215 (1981). An officer may consider the officer's observations and the observations of a reliable informant when determining probable cause. *State v. Arrington*, 2010 VT 87, ¶ 11, 188 Vt. 460.

In this case, Officer Watrous had probable cause to arrest Defendant. Officer Watrous arrived on Stratton Mountain Access Road and observed Defendant. Defendant had parked his car on the wrong side of the road, had blood shot and watery eyes, smelled of intoxicants, had slurred speech, was unable to balance himself, and admitted to having four drinks. Moreover, Mr. Pritsky informed Officer Watrous that he saw Defendant driving erratically and on the wrong side of the road. Mr. Pritsky was a reliable informant because he was able to speak to the officer in person and describe how the situation developed in a plausible manner. Even without a preliminary breath test or field sobriety exercises, these observations gave Officer Watrous probable cause to believe Defendant had driven under the influence of alcohol.

3. *Officer Watrous's duty to inform Defendant of Officer Watrous's Obligation to Arrange for an Independent Test*

Finally, the Court considers whether Officer Watrous should have informed Defendant of Officer Watrous's duty to arrange for an independent test if Defendant desired an independent test. In Vermont, a person tested for driving under the influence of alcohol has a right to an independent test at the person's expense. 23 V.S.A. § 1203a(a). Where a person is detained after the stop and requests an independent test, the police officer must make arrangements for the independent test. 23 V.S.A. § 1203a(b). Cases from the Vermont Supreme Court and Vermont Superior Court further define this right.

In *State v. Normandy*, police officers arrested and processed the defendant for DUI. 143 Vt. 383, 384–85 (1983). The defendant appealed his conviction because he was not informed of the police officers' obligation to arrange for an independent test. *Id.* The defendant had not requested an independent test. *Id.* at 385. The State stipulated the defendant would have requested an independent test if he had been informed of his rights. *Id.* at 387. The Court found that although it would not require futile gestures, the police had an obligation to inform the defendant of their obligation to arrange for an independent test. *Id.*

The Vermont Supreme Court considered a similar issue in *State v. Hoffman*. 148 Vt. 320 (1987). Again, the defendant appealed a conviction of driving under the influence. *Id.* at 321. The police informed the defendant that they were taking him to jail and the defendant needed to tell them if he wanted an independent test so they could make arrangements. *Id.* at 322. The defendant remained silent. *Id.* at 323. The Vermont Supreme Court found the trial court could have correctly concluded the defendant waived his right to an independent test. *Id.* at 323–24.

The Vermont Supreme Court also considered a similar question in *State v. Karmen*. 150 Vt. 547 (1988). In *Karmen*, the police indicated they would release the defendant to a relative and he would have to make his own arrangements for an independent test. *Id.* at 547–48. It took the defendant's relative approximately two hours to arrive at the station and the police handcuffed the defendant in the meantime because of the defendant's unruly behavior. *Id.* The trial court determined the defendant was detained. *Id.* at 548. The Supreme Court indicated the defendant should have been informed of his right to have the officers make arrangements even if the defendant made no request for a test. *Id.*

In *State v. Homan*, Judge Griffin suppressed an evidentiary test based on the police officer's failure to inform the defendant of his rights. 3051-7-13 Cncr; 275-7-13 Cncv (September 20, 2013). The police arrested the defendant and determined his blood alcohol content was 0.174%. The police indicated the defendant was being released and would have to make his own arrangements. Instead of releasing the defendant, the police took the defendant to ACT 1 house, a locked detox center. Judge Griffin found placing the defendant in a locked detox center was detained and therefore the police should have informed the defendant of their obligation to make arrangements for an independent test.

Judge Zonay also considered the question as it relates to Grace House. *See State v. Wing*, 391-3-10 Rdcr; 47-3-10 Rdcs (July 8, 2010). In *Wing*, the defendant requested an independent test but the police took the defendant to Grace House and indicated he would have to make his own arrangements. Judge Zonay found no evidence of a knowing and voluntary waiver and therefore suppressed.

Finally, Judge Bent considered a case where the defendant told the police officers he did not want an independent test. *See State v. Hersey*, 77-10-13 Cacs (Dec. 3, 2013). In *Hersey*, the police indicated they would release the defendant and he had to make his own arrangements for an independent test. Instead of releasing the defendant, the police took the defendant to a detox center. The defendant informed the police he did not want an independent test. Judge Bent suppressed the test because the police failed to inform the defendant that they had an obligation to make arrangements when they detained him. Without this knowledge, the defendant could not voluntarily waive of his rights. Moreover, the defendant could have wanted to conceal his desire for an independent test.

In this case, Office Watrous should have informed Defendant of Officer Watrous's obligation to make arrangements for an independent test under 23 V.S.A. § 1203a. Officer Watrous did not release Defendant; instead, Officer Watrous took Defendant to Grace House. Defendant was in police custody for several hours as he was transported from Stratton Mountain Access Road, to the Winhall Police Station, to the Manchester Police Station, and finally to Grace House. Defendant was not from the area and knew no one to pick him up. Other than reading Box 9.A, Officer Watrous did not indicate that Defendant was free to leave and even indicated Officer Watrous would take Defendant to jail if Defendant did not agree to go Grace House. Although Grace House is not a locked facility, Defendant was detained within the meaning of 23 V.S.A. § 1203a. As in *Karmen* and *Normandy*, the police officer should have informed Defendant of his rights. *See* 150 Vt. at 547-48; 143 Vt. at 387.

This case is similar to the Vermont Superior Court cases cited above. In all three, the police officers took the defendant to a detox center but failed to inform them of their rights. In all three cases, the Superior Court found the detox centers were a form of detention that triggered the defendants' right to be informed that the police officers had an obligation to make arrangements. *Wing* is particularly helpful because the detox center was Grace House, the same facility involved in this case. Moreover, *Hersey* indicates it does not matter if the defendant indicates he does not want an independent test. Without proper information, the defendant cannot voluntarily waive his rights.

The State's attempts to distinguish *Homan* and *Wing* are unpersuasive. The State argued *Homan* does not apply to this case because ACT 1 was a locked facility. Whether the facility is locked is a relevant factor in considering whether a defendant is detained, but it is not the only factor. In this case, the totality of the circumstances indicated that Defendant was detained. Moreover, *Wing* found detention for Grace House. For the issue of whether placing Defendant in Grace House was a form of detention, it is unimportant whether Defendant requested a test. The reasoning of *Hersey* is persuasive in that Defendant must actually be informed of his rights to make a knowing and voluntary waiver of his right to an independent test.

4. *Conclusion*

The Court must suppress and exclude the results of the evidentiary test. Officer Watrous detained Defendant and failed to inform Defendant of his rights. The Court will not suppress any of the other evidence because Mr. Pritsky conducted a valid citizen's arrest, Mr. Pritsky was not

a state actor, and Officer Watrous had probable cause to arrest Defendant. The State may attempt to prove Defendant violated 23 V.S.A. § 1201 through testimony by Mr. Pritsky and Officer Watrous of their observations of Defendant.

Order

The Court **DENIES** Defendant's first motion to suppress. The Court **DENIES** Defendant's second motion to suppress. The Court **GRANTS** Defendant's third motion to suppress. Judgment is granted for the operator on the civil suspension matter. The court does NOT dismiss this case.

The case is set for final jury calendar call on APRIL 1, 2014 at 9:00 a.m. The court expects the parties to be ready to select a jury on April 8, 2014 and ready for trial on April 15, 22, 23 and/or 29.

Dated at Bennington, Vermont this 11 day of February, 2014.

Nancy Corsones
Superior Court Judge