VERMONT SUPERIOR COURT

SUPERIOR COURT
Bennington Unit

CRIMINAL DIVISION
Docket No.

State of Vermont

v.

Defendant

DECISION ON MOTION TO SUPPRESS
AND MERITS IN THE CIVIL SUSPENSION

These matters came before the court on December 11, 2014, on defendant's Motion to Suppress. Based on the evidence admitted, the court makes the following findings and analysis of law and **grants** the motion and enters judgment for defendant on the civil suspension.

Findings of Fact

Officer Murawski responded to a dispatch call of a car accident. Officer Thompson also responded. This was on September 30, 2014. He found a male subject lying on the ground on the south side of the roadway some 100 to 150 feet distance from a vehicle that had apparently gone off the road some 50 feet or so on the north side. He went and checked on the male. He found some red marks on his face and a cut there, but did not notice bleeding. In response to questions from the officer about identification and what had happened, the male just kept saying "2298".

Murawski detected an odor of alcohol on the male. It was what he "labeled "extreme.

The male's eyes were watery and bloodshot. What speech the officer heard was slurred. A beer bottle was located underneath the male when he was moved.

After these initial odd responses, defendant did affirm his seat belt had been used and pointed down the road when asked where he had been coming from.

Thompson inspected the vehicle. Officer Burnham had also arrived and was with her for this. The vehicle had extensive front end damage. It had a cracked windshield and the windshield washer container appeared to be missing. She observed a trail of liquid on the road from the vehicle's location. She followed this down the road and found an apparent accident scene about a quarter mile away. A guardrail was damaged and pieces of a vehicle were on the ground. These included a Toyota emblem. Defendant's vehicle was a Toyota. There was also what appeared to be a windshield washer container on the ground. Although the officer could not say exactly how old the damage was to the guardrail, it was fresh damage versus much older. The guardrail had not identification on it as to ownership.

EMT's arrived. They started treatment of the male. Murawski was able to identify the male about this time from identification found in his wallet, which the officer had taken to check. Officer Thompson had also found registration material in the vehicle identifying defendant. The male was defendant. Defendant was put into an ambulance to be transported to the hospital. Murawski had been with him about ten minutes. Murawski followed the ambulance about five to ten minutes later. He located defendant in the emergency room area in a room. Staff was treating defendant, but the officer was not able to testify to any particular treatment details.

He was told treatment might be two to four hours and involved possible x-rays and cat scans, but he was not told why these were being requested.

Murawski started reading defendant his Miranda Rights. He read the form rights advising defendant properly of these rights. In response to whether he understood them, defendant said, "I don't know, I am pretty buzzed." The officer took this to be a non-waiver and did not pursue further questioning of the event. He moved onto the implied consent form and rights. When defendant was asked if he understood those, he said "No". The officer marked this as the response on his form. Murawski read them again. There is no notation on the form changing the response of "no" even though the officer testified defendant did eventually say he understood.

Murawski then asked defendant about contacting a lawyer five times due to defendant either not responding or being vague on the response. Defendant never said he did want one or indicated he might want one, but either did not reply or gave a vague response that was not a waiver. Defendant finally indicated he did not want to talk to an attorney. Murawski then asked if defendant would provide a breath sample. Defendant said he would not.

Murawski did not mark the box noting the inquiry about having an attorney contacted had been made. The court finds this an oversight, but finds factually the officer did ask this question a number of times. Defendant refused to sign the implied consent form at all, though. The signature line is at the end and after both the general implied consent information and the inquiry about counsel. There is not a separate line for understanding his rights and one for the issue of counsel. The signature line comes before the actual request for a test and there is no signature line for that specific inquiry. Murawski did not call an attorney even though the form

indicates an attorney is to be called if a suspect won't sign the signature line. The officer was not recording the session on his body microphone. The officer testified it was his mistake in not calling an attorney when defendant refused to sign the form, but did not further explain why he ignored or missed this instruction.

In conversations at the hospital, defendant appeared coherent and logical to the officer as opposed to the odd responses at the scene to questions. He did make some responses to the questions asked that were not directly responsive, but they were not as odd as the "2289" response at the scene.

Analysis and Conclusions of Law

Defendant moves to suppress evidence of his refusal to take an evidentiary test on grounds he did not validly waive his right to speak to an attorney before making that decision. 23 V.S.A. § 1202(c) provides this statutory right and suppression is required if it is violated. *State v. Madonna*, 169 Vt. 98, 99 (1999); *State v. Vezina*, 2004 VT 62, ¶ ¶ 6-7, 177 Vt. 488 (mem.). A waiver of this statutory right can be made orally. *State v. Fuller*, 163 Vt. 523, 528-29 (1995) (holding that requirement of a written or recorded waiver of counsel under Vermont Public Defender Act is not applicable to implied consent waiver of counsel, which can be oral and not recorded). There is a presumption against a finding of a waiver and the state has the burden of proving a knowing and intelligent waiver. *State v. Hoffman*, 148 Vt. 320, 322 (1987). There must be "substantial evidence" to support a finding of a waiver. *State v. Nemkovich*, 168 Vt. 8, 11 (1998).

Although the fact the officer did not mark the box as to counsel has to be weighed, this does not require suppression. Nor is suppression required even though the process form

instructs an officer to call counsel if a suspect does not sign the waiver. This may be adviseable and might have avoided this entire proceeding and hearing had it been done, but it is not statutorily required where an actual waiver is found to have been given. Yet, where defendant had indicated an inability to decide about waiving his Miranda rights due to his possibly intoxication, then gives a series of either non-responsive or vague answers to waiving counsel under the implied consent law, then actually refuses to sign the form indicating his alleged waiver and understanding, this failure to call counsel could be a violation of the right to counsel under the DUI statute.

The court has factually found that defendant did eventually say he did not want an attorney after the officer made repeated efforts to get a clear answer. The initial responses by defendant, or failure to respond, reasonably allowed the officer to try to get a more definite answer. This is not a case where an officer ignored an initial definite affirmative request for counsel and by repeated inquiry obtained an alleged waiver. But then defendant refused to sign the form which would affirm his alleged waiver and understanding of the implied consent information.

The court has considered the fact defendant did not waive his Miranda Rights prior to the implied consent process in determining the waiver issue and his comment he was "buzzed" in responding to that inquiry. Although separate issues, see *State v. Nemkovich*, 168 Vt. 8, 11-12 (1998) (invalid Miranda waiver does not taint later waiver of counsel for implied consent purposes), the former is a factor here in deciding if there is sufficient evidence of a waiver for the latter, considering how close in time they occurred and that the lack of waiver in the former was due to the defendant indicating he was too "buzzed" and the officer taking that as a non-

waiver. Taking this comment and then the refusal to sign his alleged waiver a short time later after a series of vague non-responsive answers, which were not recorded, to whether he wanted an attorney contacted indicates a serious issue over whether the state has proven a waiver by "substantial evidence" .

Considering the burden is on the state and the level of that burden and weighing the conflicting evidence about defendant's alleged waiver of counsel, the court finds that the state has not met its burden. Where the officer did little to record the details of multiple efforts to inquiry about counsel, failed to mark that he had asked the question, and failed to make an attempt to clarify the issue of defendant refusing to sign the waiver by calling counsel as the procedure advised, together with the earlier comments as to how "buzzed" he was, the court must find for defendant on his motion.

ORDER

The Motion to Suppress is **granted**. Evidence of the refusal to take the evidentiary test is suppress and will not be admitted in evidence.

Based on the above decision, judgment for the defendant is entered in the civil suspension.

will be scheduled for the January 23, 2015, calendar call for further scheduling needs or review.

Dated at Bennington, VT, this 7nd day of January 2015.

Superior Judge David Howard