

STATE OF VERMONT

SUPERIOR COURT
Rutland Unit

CRIMINAL DIVISION
Docket No. 338-3-15Rdcr
40-3-15Rdcs

STATE OF VERMONT

V

J. B.

**DECISION ON MOTION TO SUPPRESS AND
FOR JUDGMENT IN FAVOR OF OPERATOR; AND
DECISION ON CIVIL SUSPENSION**

The above matter came on for hearing on Defendant's Motion to Suppress and for Judgment in favor of Operator filed May 22, 2015. The State filed a memorandum opposing the motions on June 17, 2015.

Defendant filed a Supplemental Memorandum on October 27, 2015 and a civil suspension memorandum November 2, 2015. By letter filed November 16, 2015 the State requested that in the event suppression were granted that the matter not be immediately dismissed so that the State could consider whether to file an appeal.

The parties agreed that the hearing would be a consolidated hearing on suppression and the final civil suspension hearing. A hearing was held on November 12, 2015. The State was represented by Assistant Attorneys General David Tarter and Gregory Nagurney. The Defendant was present and was represented by his attorney, Bradley Myerson.

In the criminal case, Defendant is charged in a single count Information with DUI. There is also a corresponding civil suspension proceeding. In the Motion,

Defendant alleges that there was no basis for the stop. In the civil suspension action he also asserts that the breath test was not accurate and reliable.

In addition to witness testimony the parties stipulated to the admission of Exhibits 1-3 and A-K. Based upon the evidence submitted at the hearing, the Court issues the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

On March 7, 2015, Officer Ryan Ashe was on duty with the Rutland City Police Department. Officer Ashe has been a certified officer in Vermont since March 2014, and prior to that time had been an officer in New York State. After being certified, he attended a specialized DUI school in Vermont in May 2014.

At approximately 12:54 a.m., Officer Ashe was traveling east on West Street (Business Route 4) and was stopped at the flashing red light at the intersection of North Main Street (Route 7). West Street is a three lane road at this point with the right lane for right turns, the center lane for traveling across North Main Street onto Terrill Street or turning left to travel north on North Main Street, and a left lane for turning left to travel north on North Main Street.

At the intersection there is a crosswalk crossing north to south. A few feet behind the crosswalk is a solid stop line for the right and center lanes on West Street. There is also a solid stop line for the left lane, which line is set back slightly more than a car length from the stop line for the other two lines. There is a solid line marking the left side of the center lane which goes to the stop line. There is also a solid line marking the left side of the left lane which goes to the left lane's stop line. There is no lane marking

for the left lane between the solid stop line and the crosswalk to designate the area in front of the left lane stop sign as being part of the lane for that lane. See Exhibits I & J.

Officer Ashe was stopped in the center lane and there was a vehicle stopped in the left lane. Officer Ashe observed a gray SUV traveling south on Main Street and turning onto West Street. The vehicle traveled into the unmarked area in front of the West Street left turning lane stop line. The vehicle then moved into the westbound lane of West Street and continued traveling. The vehicle did not enter into the marked lane area of the left turning lane from West Street. Officer Ashe believed that the SUV had made the turn too wide and that this was a violation of Vermont motor vehicle law.

At the time the vehicle turned right, Officer Ashe did not know how far the vehicle was from the curb, how far it traveled into the area in front of the vehicle in the left lane, how far it was from the other vehicle in the left lane during the turn, nor how far it was from his cruiser. There was also no testimony introduced as to whether there were any pedestrians standing at the crosswalk, whether there was any snowbank or other obstruction at the corner or on the roadway, or whether there was any traffic entering onto West Street from the store parking lot on the northwest corner.

Due to his belief that a traffic violation had occurred, Officer Ashe made a U-turn and began to follow the vehicle. He followed the vehicle for more than a mile. During this time he used his cruiser computer to run the license plate. He learned that the vehicle was registered to Justin Barrell. He was familiar with Mr. Barrell ("Defendant") since Defendant was currently attending the Vermont Police Academy on behalf of the Rutland City Police Department prior to becoming an officer with the Department.

Officer Ashe activated his blue lights and pulled Defendant's vehicle over. He did not call the stop in to his dispatcher. After pulling over the vehicle his intention was to tell Defendant about the perceived violation and to tell him to be more careful in the future. When he approached the vehicle he recognized Defendant. He also observed that Defendant's eyes were glassy and bloodshot, that his speech was impaired, and he detected the odor of alcoholic beverages. He suspected that Defendant was under the influence. Defendant admitted to having two drinks.

Officer Ashe believed he was in a "tough spot" and communicated this to Defendant. He called Officer Whitehead to discuss the situation, since the officer in charge, Sgt. Bartlett, was on another stop at the time. He called Officer Whitehead from his cruiser using his personal phone. He turned the microphone off on his recording system during the call. Officer Whitehead apparently told Officer Ashe to call the stop in and said he (Whitehead) would contact Sgt. Bartlett.

Sgt. Bartlett arrived on the scene and took over the DUI investigation. Defendant submitted to field sobriety exercises. His performance on those tests led Sgt. Bartlett to conclude he was operating under the influence. Sgt. Bartlett placed him into custody and took him to the Rutland City Police Station for processing. Sgt. Bartlett is a certified officer and certified to operate the Datamaster.

During the processing Sgt. Bartlett read to Defendant the standard processing form and his implied consent rights. After consulting with counsel Defendant agreed to submit to an evidentiary breath test which yielded a result of .164% B.A.C. at 2:16 a.m. Defendant then requested a second infrared test.

The Datamaster indicated that the simulator was out of range for the second test. This occurred on two occasions. Sgt. Bartlett then again tried and a second test was able to be obtained. This test yielded a result of .147%BAC at 2:51 hours.

Amanda Bolduc is a forensic chemist employed by the State of Vermont. She is familiar with the Datamaster. She is familiar with the type of error messages given in this case and states that such messages do not negate the "validity, reliability, and accuracy of any of the successful subject testing sequences" of a Datamaster. *See* Exhibit 2. This view is shared by Trisha Conte, the Alcohol Program Supervisor, who asserts that so long as the Datamaster is able to generate a ticket it means the machine has passed its quality assurance checks.

Darcy Richardson is a toxicologist and provides forensic toxicology testimony and consultation. From 2002-2010 she was employed by the State of Vermont and provided officers in the State with training on how to operate the Datamaster. She is familiar with the training manual officers used at the time of the testing at issue in this case. She does not believe that Sgt. Bartlett followed the dictates of the training manual as it related to the error messages and how an officer should respond to them. She contends he should have taken defendant to a different machine. Her review of data for the machine identified additional error messages reported by other officers on the same machine and she believes that the machine was not properly maintained. *See* Exhibit K.

The Court finds the testimony of Ms. Bolduc and Ms. Conti establishes that the results of both the first and second Datamaster tests were valid, reliable, and accurate.

CONCLUSIONS OF LAW

A. THE STOP.

It is well-settled that “[a] police officer is authorized to make an investigatory stop based on a reasonable and articulable suspicion of criminal activity.” *State v. Chapman*, 173 Vt. 400, 402 (2002). Of course, “[t]he officer must have more than an unparticularized suspicion or hunch of criminal activity, but needs considerably less than proof of wrongdoing by a preponderance of the evidence. *State v. Welch*, 162 Vt. 635, 636 (1994) (mem); *State v. Lussier*, 171 Vt. 19, 34 (2000) (“The law is well-settled that police may stop a vehicle and briefly detain its occupants to investigate a reasonable and articulable suspicion that a motor vehicle violation has taken place.”). When considering the basis for a stop, “the totality of the circumstances—the whole picture—must be taken into account.” *State v. Paquette*, 151 Vt. 631, 635 (1989).

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). A court will, however, “avoid interpretations that would lead to an unjust, unreasonable and absurd consequence. *Id.* (quotations omitted).

Title 23 V.S.A. § 1061 provides, in relevant part, that: “A driver intending to turn at an intersection or into an alley, private road or driveway shall proceed as follows: (1) Right turn. Both the approach for a right turn and a right turn shall be made as close as practicable to the right-hand curb or edge of the roadway.”

Here, the State contends that the officer had a reasonable articulable suspicion that Defendant had violated § 1061 and that this provided a valid basis for the stop. Defendant does not agree.

Initially, the Court observes that the statute at issue requires that the turn be made “as close as practicable to the right hand curb or edge of the roadway.” Like many statutes, this provision brings with it a certain element of subjectivity as to whether the operation could be reasonably viewed as being violative of the statute. Thus, the assessment of the totality of the circumstances leading to the stop—in particular, the specific facts available to the officer at the time of the stop as to what is, and what is not, practicable vis-à-vis how close one can safely travel to the curb or edge of the roadway—is critically important.

Here, the officer’s determination that Defendant made the turn too wide is a conclusion without sufficient factual support. That the Defendant’s vehicle may have traveled into the area between the stop line and North Main Street in front of the vehicle stopped in the left lane of West Street does not establish a violation for at least two reasons.

First, the area is not marked or designated as part of the left turning lane but is instead an unmarked area in front of it. Indeed, common experience identifies this marking configuration as one which is intended to take into account that vehicles negotiating turns from North Main Street onto West Street will need to travel into the unmarked area to safely make the turn. That being the case, merely traveling into this area does not evidence that a vehicle has made too wide a right turn for purposes of § 1061.

Second, the Officer's determination focused on the path actually taken by Defendant's vehicle, but utterly neglected to consider the practicability of alternative paths Defendant's vehicle could have taken. The Officer did not account for the distance of Defendant's vehicle from the curb, its distance from other lanes, or its distance from other vehicles, nor did the Officer account for the possible presence of persons, vehicles, or obstructions on the side of the roadway which may have impacted the location of the turn. In other words, the Officer articulated no factual basis for determining the critical issue under the statute. Namely, how close Defendant could have "practicably" been to the side of the road when he made the turn.

In considering the issue before it, the Court recognizes that the State does not need to establish an actual violation but only that the Officer has a reasonable belief of a violation. This burden lies with the State—it does not require Defendant to prove that he did not violate the statute at issue. Nevertheless, on all the facts, the evidence submitted by the State falls well-short of establishing even that the Officer's belief that there was a violation was reasonable. That being the case, the stop must be suppressed and the matters dismissed.

B. CIVIL SUSPENSION

The issues at a final civil suspension hearing are limited to the following:

- (1) whether the law enforcement officer had reasonable grounds to believe the person was operating, attempting to operate or in actual physical control of a vehicle in violation of section 1201 of this title;
- (2) whether at the time of the request for the evidentiary test the officer informed the person of the person's rights and the consequences of taking and refusing the test substantially as set out in subsection 1202(d) of this title;
- (3) whether the person refused to permit the test;

(4) whether the test was taken and the test results indicated that the person's alcohol concentration was above a legal limit specified in subsection 1201(a) or (d) of this title, at the time of operating,

(5) whether the requirements of section 1202 of this title [consent to taking of tests to determine blood alcohol content] were complied with.

23 V.S.A. § 1205(h).

Here, Defendant raises a challenge to the reliability of the Datamaster test.

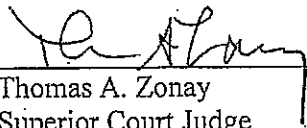
Having already determined that there was no reasonable suspicion to support the stop in the first instance, the Court need not reach the merits of the Defendant's challenge to the reliability of the test. In light of the lack of reasonable suspicion to support the stop, the State cannot prevail under 23 V.S.A. § 1205 and judgment in the civil suspension proceeding must be entered for the Defendant. See *State v. Lussier*, 171 Vt. 19 (2000)(Court holds that a valid stop is a necessary requirement for State to establish "reasonable grounds" in a civil suspension proceeding.)

ORDER

In light of the foregoing, it is ordered as follows:

1. The motion to suppress is **GRANTED** in the criminal action;
2. Judgment is entered for Defendant in the civil action; and
3. Given the granting of the suppression motion there is no evidence upon which the State can proceed in the criminal action. See V.R.Cr.P. 12(d). Accordingly, absent further order, objection, or appeal, the criminal action shall be deemed dismissed on December 4, 2015.

Dated at Rutland, Vermont, this 17th day of November, 2015.



Thomas A. Zonay
Superior Court Judge