VERMONT SUPERIOR COURT

SUPERIOR COURT
Bennington Unit

CRIMINAL DIVISION
Docket No. 413-4-16Bncr
& 38-4-16Bncs

VERMONT SUPERIOR COURT
BENNINGTON UNIT
AUG 15 2016
FILED

State of Vermont

v.

R. B.
Defendant

DECISION ON MOTION TO SUPPRESS
AND MERITS HEARING

These matters came on for hearing on May 31, 2016, for motions to suppress evidence filed in both matters and for merits in 38-4-16Bncs. Based on the evidence admitted, the court makes the following findings, analysis and conclusions of law and **grants** the second motion for suppression as set out below and enters judgment for Defendant in 38-4-16Bncs.[1] The other motion is found **moot.**

Findings of Fact

Trooper Hess of the Vermont State Police was on patrol on April 12, 2016, when he observed a vehicle pass him in the opposite direction with what appeared to be no inspection sticker on the vehicle. He turned around and eventually stopped the vehicle using blue lights. He saw no other poor operation or violations of any statutes.

The cruiser was equipped with video and audio functions to record such interaction by the trooper and a person. This was not working at the time. Hess did not realize this. He believes the battery for the system had died as usually everything was automatic once the blue lights were activated. A light on the camera would show it was working, but a light on his belt would show if the battery was working and he did not look at it or notice it was not activated.

He approached the vehicle. Defendant was the operator. There were two dogs in the vehicle, so Hess stood slightly further away from the vehicle than he normally would have. Defendant provided his identification material as requested. Hess detected a slight odor of intoxicants. Defendant's speech was normal. Defendant admitted to consuming one beer some hours previous.

[1] An initial set of motions was heard on May 31, 2016. A second motion raising the issue of the exit order was filed after that date and will be decided based on the evidence from the May 31st hearing per the entry order of June 21, 2016 and the lack of any objection by the parties.

The officer returned to his cruiser to run the information obtained. He then returned to Defendant's car. Due to the activity of the two dogs, he quickly asked Defendant to exit the car to speak further. The smaller dog was actually coming up on Defendant's lap and the larger dog was moving about the passenger area. Defendant exited the car without difficulty. He asked Defendant if he had consumed alcohol and Defendant said he had one beer. Hess noted Defendant's eyes were watery, but not bloodshot. The odor was somewhat stronger outside.

The officer asked Defendant to perform certain field sobriety tests. He did the horizontal gaze nystagmus test (HGN) after asking Defendant if he had any trouble with his eyes and being told he did not. He observed four clues on this exercise. Defendant did the walk and turn test. He scored five clues on this effort. He then did the one leg stand test and scored one clue on that effort. The officer also then did the eye conversion test. [2]

Based on all of this interaction and his experience with impaired people and non-impaired people, the officer believed Defendant was under the influence of alcohol. He asked Defendant to take a preliminary breath test and Defendant declined to do so. The officer then arrested Defendant to process him for DUI. Another trooper arrived at the scene and they arranged to take the dogs home and then they went to the Manchester police station for processing.

The processing at the station was not recorded by video or audio. The officer assumed the system was working and on when he started his processing, but it was not. He did not ask anyone about the system or if it was working. He had done numerous DUI processings at this station.

The officer advised Defendant of his Miranda Rights and Defendant agreed to talk and waive the rights. He signed the form indicating his waiver. The time was not noted for this nor was it dated in the space provided. Hess started the Datamaster machine before giving the above rights. The machine was operating, but it would not print out the information it would usually do. It otherwise indicated it was functioning properly.

After obtaining the waiver of the Miranda Rights, the officer did not immediately ask the usual questions following such a waiver. Instead, he went to the implied consent language on the form and reviewed that with Defendant. Defendant said he did not want to talk to a lawyer and Hess marked this response on the form, but he did not have Defendant actually sign the space noting such declination. This was not a deliberate act on his part. He then asked Defendant if he would take an evidentiary test and Defendant refused. The time of this was noted at 8:59 PM.

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[2] A challenge to this test is found moot based on the legal basis for the ruling below.

Hess then went back on the form and asked the interview questions noted after a Miranda Rights waiver. The officer did not explain why he did the processing in this manner, skipping part of the form to return to it later.

Defendant had been processed before for DUI. He was aware of public defenders, but thought they were assigned at court. He had refused to take an evidentiary test in his prior DUI processing. The Miranda Rights given explained an attorney would be contacted if Defendant could not afford one. Defendant did not ask Hess about this and how one was contacted.

Defendant testified he was not asked about contacting or speaking to an attorney after the implied consent information was provided. He testified he only was told about an attorney at the Miranda Rights stage and believed he could talk to one if he had his own attorney. He agreed he must have signed the waiver, although he did not recall this, but that he did not understand about having a public defender contacted for him.

Analysis and Conclusions of Law

Defendant moves to suppress all evidence from after the initial stop as the exit order or request lacked grounds to do so. *State v. Sprague*, 2003 VT 20, ¶ ¶ 18-20, 175 VT. 123; *State v. Burgess*, 2010 VT 64, ¶ 8, 188 Vt. 235 (mem.). Defendant also moves to suppress the evidence of his refusal on grounds that he did not validly waive his right to consult with an attorney before deciding to take or not take the test. A right provided by statute. 23 V.S.A. § 1202(c). If there is a violation of this right, resulting evidence is to be suppressed. *State v. Vezina*, 2004 VT 62, ¶ ¶ 6-7, 177 Vt. 488 (mem.); *State v. Madonna*, 169 Vt. 98, 99 (1999).

The court first addresses the issue of whether the officer's order or request Defendant exit his vehicle was a violation of Defendant's rights since a decision on that issue could make the second argument moot. A law enforcement officer can make a legal motor vehicle stop for a motor vehicle violation. *State v. Howard*, 2016 VT 49, ¶ 6, __ Vt. __ (crossing center line with one side of tires); *State v. Lussier*, 171 Vt. 19, 34 (2000); *State v. Fletcher*, 2010 VT 27, ¶ 9 (violation of turn signal rule allows for vehicle stop); *State v. Marshall*, 2010 VT, ¶ 9, 188 Vt. 640 (driving to left of center, even briefly, provides grounds for vehicle stop). Failing to stop at a stop sign and speeding would both support such a stop. 23 V.S.A. § 1048(b) & § 1081(b). Defendant makes no argument the initial stop was illegal.

An officer can proceed with an investigation of suspected DUI depending on the observation they make as they progress from initial contact. The observations justifying further action upon a state do not have to be extreme or conclusive as to alcohol use or intoxication. *State v. Santimoro*, 2009 VT 104, ¶ 11, 186 Vt. 638 (observation of speeding, odor of alcohol and bloodshot and watery eyes

sufficient for asking subject to submit to further testing); *State v. Mara*, 2009 VT 96A, ¶ 2, 186 Vt. 389 (observation of possible inspection sticker violation and odor of alcohol and bloodshot and watery eyes sufficient for further testing); *State v. Orvis*, 143 Vt. 388, 389 (1983) (administration of preliminary breath test supported where officer detected "faint" odor of alcohol and suspect admitted to consumption of six beers, even though no external signs of impairment and no dexterity tests given). This extension of the stop can involve an order or request the suspect exit the vehicle to pursue the investigation if supported by observations. *State v. Sprague*, 2003 VT 20, at ¶ 20.

Under *Sprague*, an officer can order or request a person leave their vehicle both for safety reasons and to investigate a suspected crime. *Id.* ("...facts sufficient to justify an exit order need be no more than an objective circumstance that would cause a reasonable officer to believe it was necessary to protect the officer's, or another's safety or to investigate a possible crime.").

Few states have addressed the issue of what circumstances would justify such an order for safety. This is because only a few states restrict such orders with most following the federal rule that any traffic stop allows police to order a driver out of the vehicle. *Mimms v. Pennsylvania*, 434 U.S. 106 (1977). Massachusetts, which follows the Vermont analysis, has held that "[w]hile a mere hunch is not enough, it does not take much of a police officer to establish a reasonable basis to justify an exit order or search based on safety concerns...". *Commonwealth v. Gonsalves*, 711 N.E>2d 108. 112-13 (Mass. 1999). But the focus is usually on a reasonable threat of weapons and furtive movements to conceal something or to retrieve an object. *Commonwealth v. Stampley*, 771 N.E.2d 784, 789 (Mass. 2002).

The limited testimony about any safety issue was the officer's concern over the two dogs, but this was expressed more as a personal dislike and not really as a safety issue. There was no description of the dogs by size or aggressiveness. The testimony was limited to their movement about the front of the car and the officer being reluctant to get too close to the window because he wasn't fond of dogs, although the video still shows him fairly close to it. The court finds from the evidence that an exit order for safety purposes cannot be justified on these circumstances. The officer was still able to get close enough to Defendant in the vehicle to have the necessary conversation and obtain his paperwork.

This leaves the issue of whether the exit order can be justified on the more usual basis of circumstances showing enough suspicion of operation under the influence to allow for such an extension of the stop. At that moment, he had only the "slight" odor of alcohol, an admission to consuming one beer a number of hours before and the issue of no inspection sticker, which has little if anything to do with intoxication. Although there was testimony concerning Defendant's eyes, the court cannot find credible evidence these were noticed prior to Defendant being asked out of the vehicle.

Mara, cited above, represent the lowest standard of suspicion justifying an exit order that the court can find. As noted, in *Mara* the officer detected a "moderate" odor of alcohol coming definitely from the suspect's person; he had bloodshot and watery eyes, and the suspect had admitted to consuming 24 ounces of beer about seven to nine hours previous. The stop was for a cracked taillight and invalid inspection sticker. 2009 VT 96A, at ¶ 2 .

Other cases in addition to ones cited above all had at least some other sign of possible impairment to justify an exit order. *State v. Young*, 2010 VT 97, ¶ 21, 189 Vt. 37 (strong odor of alcohol and slurred speech); *State v. Burgess*, 2010 VT 64, ¶ 9, 188 Vt. 235 (exit order reasonable where suspect had been speeding in a snowstorm, had an odor or alcohol, watery eyes and admitted to consuming alcohol at a party); *State v. Freeman*, 2004 VT 56, ¶ ¶ 8-9, 177 Vt. 478 (mem.) (reasonable suspicion based on odor of alcohol, watery and bloodshot eyes and slightly slurred speech)

In *Orvis*, cited above, the officer had an admission of consuming six beers, Defendant's vehicle had been in an accident, he had a faint odor of alcohol and appeared upset. But in *Orvis* the suspect was already out of the vehicle and the issue was whether the officer needed to have done field sobriety tests before asking for a preliminary breath test. The Court found the tests were not necessary on those facts, but those observations far exceed what the officer had here.

Here, we have fewer observations and facts than in the above cases. The court has not found the officer saw the condition of Defendant's eyes before having him exit and the odor was described as "slight".. There is no evidence Defendant had speech issues. He produced his paperwork without difficulty. He had admitted to the prior alcohol consumption of one beer, but nothing contradicted this modest admission.[3] The video shows the officer at the vehicle fairly briefly before going back to his cruiser and when he returns, he almost immediately has Defendant get out of the car.[4]

The court would not find these limited facts sufficient to have Defendant exit the vehicle. To hold otherwise would set a standard that the merest odor of alcohol from the interior of the vehicle and admission to consuming alcohol, which would be evident from the odor anyway, justifies an exit order even where there was no erratic operation and the stop was concerning an inspection sticker and no

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[3] The court is not relying on the truth of the statement Defendant only had one beer nor does an officer have to necessarily accept the claim of a suspect as to how much he has consumed. *State v. Mara*, 2009 VT 96A, ¶ 9 ("a driver's mere assertion that he had not drunk to excess need not be accepted at face value by an officer who observes other indicia of impairment." [emphasis added]). The court merely notes the slight odor of alcohol would not drastically contradict Defendant's statement and the officer had no other signs of impairment here.

[4] The court also does not find the facts support that the presence of the dogs interfered with the officer's interaction with Defendant. The video shows him fairly close to the window in his initial approach and there is no indication he could not convers easily with Defendant.

other physical observations or incriminating admissions were made before the exit. While the Supreme Court has held that the "smell of alcohol emanating from a person is a factor that can support an officer's reasonable suspicion", *State v. Sullivan*, 2013 VT 71, ¶ 22, 194 Vt. 361 it has never held that alone suffices and this court will not set that standard.

This decision makes the issues over whether Defendant properly waived his right to counsel moot.

DECISION AND JUDGMENT

The Motion to Suppress based on an invalid exit order is **granted**. All evidence after the initial stop and this exit order is suppressed. The Motion to Suppress as to the waiver of counsel is found **moot**.

The court will enter a dismissal in 434 -4-16Bncr unless the State files argument on why it still has evidence to go forward to trial or it files a notice of appeal in a timely fashion. The case will be placed on the August 29, 2016, calendar call pending possible dismissal or appeal.

Judgment is entered for Defendant in 38-4-16Bncr.

Dated at Bennington, VT, this 10th day of August 2016.

David Howard

Superior Judge David Howard