

VERMONT SUPERIOR COURT

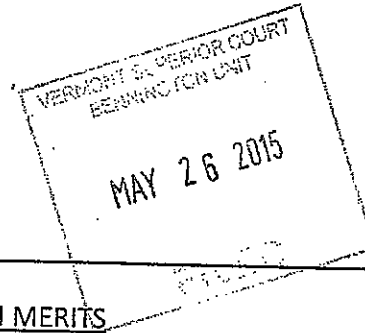
SUPERIOR COURT  
Bennington Unit

CRIMINAL DIVISION  
Docket No. Bncs

State of Vermont

v.

Defendant



DECISION ON CIVIL SUSPENSION MERITS

This matter came before the court on March 24 and April 24, 2015, for a merits hearing on a civil suspension proceeding under 23 V.S.A. § 1205. Based on the evidence admitted the court finds for the defendant and enters judgment accordingly.<sup>1</sup>

Findings of Fact

Trooper Stange responded to a report of an accident on Old West Road in Manchester, VT. This is a public highway. He found defendant at the scene being treated by emergency rescue people. He asked defendant if he had been operating the vehicle involved and defendant said "Yes". Defendant said he had been driving north when he slid off the road due to the snowy conditions. He said he had just dropped off a friend and was driving home.

The call to the officer came at about 1:00 AM. Ms. Sampson and her husband came across the vehicle where it had gone off the road. She had eventually called 911 after she dealt with defendant. Stange reached defendant about 1:15 AM. Ms. Sampson was unable to be specific on the time they found defendant, but estimated it to be around midnight.

Stange observed defendant had bloodshot and watery eyes. His speech appeared mumbled, although the officer had no prior experience with defendant or his speech. He could smell the odor of intoxicants on defendant.

The officer had observed six full beer cans in a twelve pack carton of beer in the vehicle before talking to defendant. There were no empty cans in the vehicle. He asked defendant in

<sup>1</sup> The evidence includes the admitted DVD's which the court has reviewed.

the rescue squad how much he had consumed of alcohol. Defendant denied consuming any. Stange did not request defendant do sobriety tests due to the snowy conditions on the road. He did ask for a preliminary breath test and the result was .142% at about 1:40 AM.

Defendant took an evidentiary breath test with a result of .127% obtained at 2:20 AM. The court finds the method of testing was accurate and reliable and produced a valid and accurate result.

Defendant was informed of his required rights under 23 V.S.A. § 1202(d) before taking the test. He did not ask to talk to a lawyer before agreeing to take the test.

Stange noted on the DUI form that he observed defendant for a fifteen minute period to make sure he did not burp, belch or vomit. From the video of the processing, the court can find he did not visually look at defendant that whole time, but was in very near proximity during it. There is no separate evidence that defendant did burp, belch or vomit during the fifteen to twenty minutes before taking the evidentiary breath test. Defendant answered "no" to the inquiry of whether he had done so.

The officer entered "01:30" for time of operation on the breath test ticket. He did this as he had not observed operation, but obviously that time was actually after he had arrived at the scene and after the call had come in from the Sampsons, so actual time of operation was before then. In his DUI affidavit, the officer noted "0100" as the time of operation. How long before is impossible for the court to determine accurately. In entering the "01:30" time, Stange actually has a conversation with another officer about what time to enter in the Datamaster and says "probably do 1:30" to the person after saying "That's a good question" in answer to what time to enter.

Ms. Sampson and her husband found defendant's car still running when they came across it. They had no idea how long it had been there. Her husband checked the driver and returned to their car and asked her to call 911. She then went to the vehicle also and tried to arouse the driver, who seemed asleep or unconscious. He was in the driver's seat. It was the defendant.

Concerned that the car was running and that the operator might suffer from carbon monoxide, she continued to try to arouse him. He finally did awake. He said he was all right and he exited the vehicle. It is not clear when the ignition for the vehicle was turned off.

Ms. Sampson did not notice any signs of alcohol use on defendant. She did not smell intoxicants on him and did not notice the alcohol containers. Her face was within 4" or so of defendant at times in trying to wake him. Defendant appeared to her to walk okay when he left the vehicle and his speech seemed okay when he talked to them about getting the car out of the snow.

#### Analysis and Conclusions of Law

One of the elements the state must prove at a merits hearing under 23 V.S.A. § 1205(h) is whether a test result of .08% or greater at the time of operation was obtained. § 1205(h)(D). Under § 1205(n), if a test result of .08% or higher is obtained within two hours of operation, then there is a rebuttable presumption the person had a level of .08% or higher at the time of operation. Otherwise, the state needs to present evidence relating the test results back to the time of operation. *State v. Burgess*, 2010 VT 64, ¶ 6, 188 Vt. 235.

Here, the evidence of time of operation is far too suspect to allow the presumption to be used at all. Officer Stange clearly indicates he is simply making a best guess as to time of operation when he responded to the other officer's inquiry as to what time to enter for the Datamaster. The 1:30 AM time was clearly not reliable based on all the other facts found as to the times involved. Nor is the estimate of 1:00 AM reliable enough when the defendant has offered evidence rebutting the presumption. *State v. Giard*, 2005 VT 43, ¶ 9, 178 Vt. 544 (evidence "fairly and reasonably tending to show that the real fact is not as presumed" rebuts the statutory presumption of the two hour rule); *State v. Pluta*, 157 Vt. 451, 454 (1991). The very fact that the officer enters times some thirty minutes apart when noting time of operation for the different forms demonstrates the lack of reliable evidence as to when operation actually was. Ms. Sampson's testimony throws further doubt on the time of operation. Although operation may have been after 12:20 AM, it could just as easily been before that deadline.

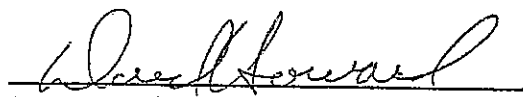
Without the two hour presumption, the state fails in its evidence on the element of § 1205(h)(D). The court need not address the issues of whether the evidence otherwise

supported the officer's decision to process defendant or if anything about his observation period made the test unreliable. But see *State v. McQuillan*, 2003 VT 25, ¶ 8, 175 Vt. 173 ("we have consistently refused to suppress breath tests based on claims that the processing officer failed to follow the adopted procedures for administering the tests."); *State v. Guidera*, 167 Vt. 598, 600 (1998) (mem.); *State v. Massey*, 169 Vt. 180 (1999).

JUDGMENT

Judgment is entered for the defendant.

Dated at Bennington, VT, this 15<sup>th</sup> day of May 2015.

  
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Superior Judge David Howard