

STATE OF VERMONT

SUPERIOR COURT
Rutland Unit

CRIMINAL DIVISION
Docket Nos. 557-5-15 Rdcr
78-5-15 Rdcs

STATE OF VERMONT

v.

FILED

FEB 18 2016

S. W.

VERMONT SUPERIOR COURT
RUTLAND UNIT

**DECISION ON MOTION TO SUPPRESS
AND DECISION ON CIVIL SUSPENSION**

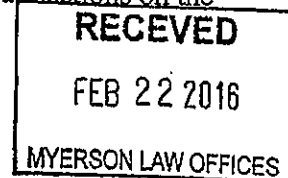
The above matters came before the Court on Defendant's Motion to Suppress in the criminal proceeding and the final civil suspension hearing on February 9, 2016. The State was represented by Deputy State's Attorney Karen Reynolds. The Defendant was present and represented by Bradley Myerson.

Based upon the evidence submitted at the hearing, which consisted of the testimony of Elias Anderson and Defendant, the audio recording of the processing, and the processing form, the Court issues the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS

On April 26, 2015, Defendant was stopped for a motor vehicle violation by Rutland City Police Officer Elias Anderson. The Officer believed Defendant was substantially impaired and Defendant was taken into custody for suspected DUI. After being taken into custody, he was transported to the Rutland City Police Department for processing. The evidence does not establish that Defendant was discourteous or uncooperative at the roadside prior to being taken into custody.

Once at the station, the Officer went over the standard processing form with Defendant. During the implied consent portion, he read to him the language from the various sections on the



form. Notably, after reading some of the sections, he interjected his own unscripted summary of what he had just read. He testified that he did this in an attempt to clarify the information for Defendant.

For example, the Officer read to Defendant the section which set forth that:

Your privilege to drive shall be suspended for at least six months if you refuse the evidentiary test and the court finds my request is reasonable.

He immediately summarized this section by stating: "Okay, so if you give a sample of your breath and it shows you're above a .08 your license gets suspended for 90 days. If you refuse to provide a sample of your breath your license gets suspended for six months. Okay, that's basically what those are saying." In his unscripted explanation the Officer omitted the clause advising that for a six month refusal suspension to be effective a court would need to find the Officer's request for a breath test was reasonable.

The Officer then read to Defendant the information about his statutory right to a lawyer. After telling Defendant he had no more than 30 minutes to decide whether to submit to a test from the time of the first attempt to speak with counsel, he asked Defendant if he understood. Defendant responded by asking if could wait an hour to take the test. The Officer told him no. The Officer then asked Defendant if he understood the rights and, if not, to ask him the question.

After Defendant told him he had no questions about his rights, the Officer next asked him if he understood them. Defendant said "no." In response, the Officer said "all right, come on, we're not going to play that game. What don't you understand? Unless you're going to have a specific question I am going to assume you understand."

After further back and forth, the Defendant said he did not want to talk to a lawyer. When the Officer asked him to sign the form indicating he did not want to speak to a lawyer, Defendant said "I don't want to sign anything." The Officer then again asked if he wanted to

talk to a lawyer and Defendant said "I don't know." The Officer responded, "okay, it's very simple. I've explained everything to you. If you want to play these games..." whereupon Defendant interrupted him saying that he was not trying to play games.

The Officer continued on stating that he knew Defendant was trying to eat up time. He then told Defendant, "all I'm going to do is charge you with a refusal if you're going to play these games and it's a stiffer penalty." In response, Defendant told him "I'm not refusing anything if you want me to sign..."

The Officer then told Defendant if he didn't want to talk to a lawyer to sign the form, but that if Defendant wanted to speak to a lawyer the Officer would call one for him. Defendant then said, "and if I talk to a lawyer there's going to be stiffer penalties you said." The Officer told him, "no, no. There are stiffer penalties if you refuse the test and if you keep playing games with me I'm going to charge you with refusal." Defendant subsequently stated, "I'm not trying to play games. Okay if you want me to sign I'll sign. Where do you sign?"

Though Defendant's behavior may be viewed as changing later in the processing, the evidence does not establish that Defendant was discourteous or uncooperative during the processing up until the time he submitted to a breath test, nor that he was playing games. Rather, he appeared to be confused due to a lack of familiarity with the process, his state of intoxication, or both.

CONCLUSIONS OF LAW

A. MOTION TO SUPPRESS

Defendant contends that the Officer coerced him to waive his right to counsel such that his decision to submit to the evidentiary test should be found to be invalid and the results of it should be suppressed. The State does not agree.

In the DUI processing context, 23 V.S.A. § 1202(c) confers a statutory right to consult with an attorney before deciding whether or not to submit to evidentiary testing. *State v. Fredette*, 167 Vt. 586, 587 (1997) (mem.). The Vermont Supreme Court has recognized that “[t]he decision whether to take a breath test is an extremely important one to the motorist, and should not be lightly decided.” *State v. Nemkovich*, 168 Vt. 8, 11 (1998) (quotations omitted).

The Court has further held that:

There exists a presumption against an individual's waiver of the right to counsel, and the State has the burden of proving a knowing and intelligent waiver. We will not recognize a waiver of the right to counsel in the absence of substantial evidence to support a finding of waiver.

Id. (internal quotations and citations omitted).

Here, the Officer went through the implied consent section of the processing form with Defendant. Notably, he summarized the advisement on what would happen with a refusal. In doing so he left out the clause indicating that to suspend a license for six months the Court must find the Officer's request reasonable. Though perhaps a small point, its significance grew as the interaction between the Officer and Defendant continued throughout the processing and the Officer repeatedly referenced the impact of a potential refusal.

The advisements relating to implied consent are plainly designed to advise a Defendant of his or her statutory rights. Though adherence to the exact language of the form is not statutorily mandated, an officer who goes outside of those advisements risks clouding the voluntariness of a Defendant's decision to submit to an evidentiary test or waive his or her right to counsel. This is especially true where, as here, the information provided beyond the written advisement was incomplete and left a false impression that a suspension was automatic in the event of refusal.

Though the Officer's apparent motivation for traveling outside the language of the form advisements was to add a level of clarity he did not believe not found on the form, he

nonetheless gave incomplete information regarding refusal. Indeed, according to his statements to Defendant, if Defendant refused, Defendant would receive an automatic six month suspension. This was not true. At best, the Officer's statement, which followed his reading the full advisement, would have added a level of confusion to the Defendant's understand of what would happen in the event of a refusal. As the interactions played out, however, it became apparent that, beyond confusion, the impact of the Officer's statement likely was that Defendant came to have an erroneous view of the consequences of a refusal.

In considering the issue of Defendant's waiver of his right to a lawyer, the Court cannot overlook that it took place after the statement about suspension for refusal, nor the actual dynamic between the Officer and Defendant. Though the Officer told Defendant to ask him questions if he didn't understand something, when Defendant actually asked a question, the Officer accused him of playing games. The Officer's view that Defendant was playing games was not a single isolated statement, but was repeated several times. Though the Court is well-aware that an individual may attempt to play games during a processing, the facts before the Court simply do not establish that Defendant was playing games at this point in the interaction. Rather, he appeared to be confused and/or, as the Officer apparently believed, intoxicated such that he was having trouble understanding what was going on.

During the processing, Defendant's statements made it apparent that he was confused and believed, incorrectly, that he would be facing stiffer penalties if he spoke with a lawyer. Though the officer told him "no, no. There are stiffer penalties if you refuse the test and if you keep playing games with me I'm going to charge you with refusal," the impact on Defendant was apparent. Indeed, Defendant acquiesced, stating "I'm not trying to play games. Okay if you want me to sign I'll sign. Where do you sign?"

Fairly viewed, the interaction between the Officer and Defendant was such that the Court cannot find that, on the facts presented, the State has established substantial evidence to support a knowing and intelligent waiver of Defendant's statutory right to consult an attorney before deciding whether to submit to an evidentiary breath test. This is especially true when the facts are viewed in light of the presumption against an individual's waiver of the right to counsel.

In light of the foregoing, Defendant's Motion to Suppress must be granted and the evidentiary breath test must be suppressed. Suppression of the breath test does not, however, necessitate dismissal, as the State has other evidence upon which it can proceed.

B. CIVIL SUSPENSION

Given the suppression of the breath test, the State cannot establish a necessary element of civil suspension – to wit, that Defendant's BAC at the time of operation was .08 or higher. *See* 23 VSA § 1205 (h)(1)(D). Accordingly, judgment must be entered in favor of Defendant.

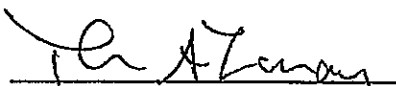
ORDER

For the reasons stated herein, in both the criminal and civil cases, Defendant's Motion to Suppress the evidentiary breath test is GRANTED.

In the civil action, the State cannot establish a necessary element of civil suspension. Accordingly, judgment in the civil action shall be entered in favor of Defendant.

The criminal matter shall be set for pre-trial conference and jury draw on the next list.

Dated at Rutland, Vermont, this 18th day of February, 2016.


Thomas A. Zonay
Superior Court Judge

