

VERMONT SUPERIOR COURT

SUPERIOR COURT  
Bennington Unit

CRIMINAL DIVISION

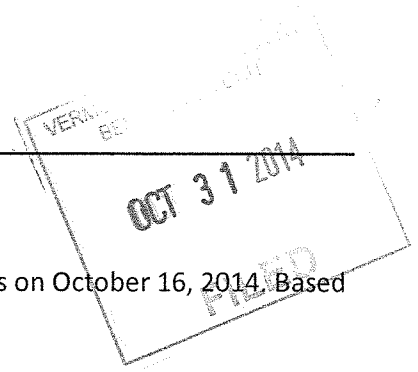
State of Vermont

v.

HB \_\_\_\_\_  
Defendant

DECISION ON MOTION TO SUPPRESS

This matter came on for hearing on defendant's Motion to Suppress on October 16, 2014. Based on the evidence admitted, the court **grants** the motion.



Findings of Fact

Defendant was processed for suspected DUI by Officer Stange of the VT State Police on May 24, 2014. She had been involved in a one car accident. He had responded to the scene with another officer. The call came in at 12:40 AM. He was there a short time later. She was being treated by the rescue personnel and he only had a limited conversation with her at the scene. He observed the vehicle had gone off the road and hit a tree head on.

Defendant said she had been at her daughter's home to help them move that evening. She stated she had some alcohol to drink there and some food. She said she had consumed two beers and two glasses of wine. The officer smelled an odor of intoxicants on defendant and that her speech was somewhat slurred and she had watery eyes. In his opinion, field sobriety tests could not be done with her treatment going on and he did not ask about them.

The rescue folks determined she needed to go to the hospital and headed out with her. Stange followed. It was about 2:00 AM when they were at the hospital. The officer was told by medical personnel HB \_\_\_\_\_ was going to have a cat scan and x-rays. He was told her release was uncertain. He

was not told of any specific injuries. He learned this in the first five or so minutes at the hospital. He did not get to talk further with defendant at that point. After 30 minutes or so, he did get to talk to her. At 2:35 AM he gave her the Miranda Rights. He asked if she would give a preliminary breath test and she agreed to do so. In her attempt to give the sample, she experienced chest pain. The officer used a manual override on the device to capture a result rather than let the automatic timing do it. This allowed him to capture a result after only a few seconds rather than the several seconds longer the automatic system would have required. He did this specifically because she indicated chest pain and that he believed she would not complete a full breath for the length needed for the automatic capture.

In talking to defendant, she was unaware of any decision on her release or treatment plans by the medical providers. She had not had the above tests done and they did not get performed that evening, but the officer was not told of this by her or personnel. At 2:25 AM the officer gave defendant her Miranda Rights and obtained a waiver of them. She answered questions for him. At approximately 3:00 AM, Stange started the implied consent advice and asked her to provide an evidentiary blood test rather than a breath test. He felt he did not have any information that release would be happening soon. He believed the mentioned tests and all would mean a delay of at least some time before any release. He was still not aware of any specific injury defendant had or not. She appeared to be breathing okay aside from the pain mentioned when she tried to do the preliminary test. She did not seem to be in other distress to the officer. He still did not have any information on the tests that had been mentioned, including if they had been done or not. He had inquired about this again, but hospital personnel were not able to tell him anything more. Defendant was not having oxygen given to her and the officer does not recall an IV being used or not. From the evidence, it is unclear if the information about a cat scan and x-rays was simply wrong or if they were intended but never done. It would appear the former is more likely in that the written work-up in evidence does not contain any reference to such tests being ordered or considered.

He had brought into the hospital all the forms for both breath and blood samples. She did ask to talk to a lawyer after the implied consent information and a public defender was called at 3:10 AM. They spoke and then she consented to the blood test at about 3:30 AM.

Medical forms indicate she was "ready for discharge" at 2:56 AM. At 3:25 AM she signed a Patient Instructions Page noting she had received information that she had a contusion from a vehicle accident. At 3:36 AM the hospital records show she was "removed from tracker", indicating she was out of their system officially. She was released without any further treatment or tests. Stange had been about to leave but on hearing defendant was being discharged, he asked if she needed a ride anywhere. She did ask for one and he ended up transporting her to a requested location. They did not leave the hospital, though, until 3:52 AM.

The Bennington Sheriff's Department and the Bennington Police Department officers were about 5 minutes distance from the hospital. Both had breath testing equipment.

#### ANALYSIS AND DECISION

The defendant argues that the officer did not have a sufficient basis for asking for an evidentiary blood test rather than a breath test under 23 V.S.A. § 1202(a)(2). She points to the rather general information the officer had about any possible delays due to tests or treatment and the length of such that he relied upon to ask for blood rather than breath testing. She notes that discharge occurred right about the time the blood test was obtained, that she was ready for discharge a half hour before the test was obtained, and that no actual tests did occur to delay her discharge. The defendant refers to the trial court opinions in support of her motion. The court finds these cases each have unique facts that would allow them to support either party in this case. The state argues it is an objective test and the facts demonstrate that the equipment was not reasonably available due to the time involved for the possible treatment the defendant would be having.

23 V.S.A. § 1202(a)(2) provides that “if breath testing equipment is not reasonably available” an operator is deemed to have given consent for a blood test.<sup>1</sup> This has been interpreted to indicate a preference for breath testing and that the state must demonstrate why such did not occur. See *State v. Yudichak*, 147 Vt. 418, 419 (1986). Suppression of the results of any blood test taken in violation of this rule is required. 147 Vt. At 421.

Obviously, it must be an objective test so that an officer does not simply make his own decision as to availability and enforce it on a suspect. *State v. Ratliff*, 169 Vt. 599, 600 (1999) (mem.).

Even though the paperwork for a blood test had been brought to the hospital, this does not convince the court that the decision had been made already by the officer. He testified credibly that he brought both forms in routinely in his file to be ready for either situation.

While the sole test is not whether the time will be beyond the two hour period for the presumptions of 23 V.S.A. § 1204(a)(3) to be used and the officer’s concern for that is not an appropriate standard to determine a blood test should be used, that concern is not crucial here since either type of test would occur after the two hour window for presumptive use of the results. *State v. Dubuque*, 2013 VT 3, ¶ 9, 193 Vt. 180 (court must bear in mind the “evanescent nature” of blood alcohol evidence in judging reasonableness of a blood test request over a breath test). So the state would have to use “relation back” testimony” in either case to make use of any test result.

The court finds under the objective test required under § 1202(a)(2) that there were not reasonable grounds for the taking of a blood test instead of a breath test. The information that defendant was to undergo possible tests or some sort of treatment that would be take some time was very general and within a short time, demonstrated not to be correct, yet the officer somehow did not

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<sup>1</sup>§ 1202(a)(2) has other provisions for a blood test that would not apply here.

determine this fact. Certainly by 3:00 AM, he objectively could have known she was ready for discharge, which then happened about a half hour later. This is not to place on the officer the burden in every case to seek out the actual doctor or get copies of actual test orders, but it is reasonable to expect he would obtain information by 3:00 Am at the latest that she was not having the tests and would be released soon. The court actually would assume the delay was due as much to the fact that the officer had started the processing than to any action by the hospital between 3:00 to 3:30 AM, perhaps even from the point Miranda Rights were given at 2:25 AM and he spent time from then to 3:00 AM questioning her.

ORDER

The Motion to Suppress is **granted**. The results of the blood test and testimony about a test will be suppressed as evidence in the case. The matter shall be set for the next calendar call.

Dated at Bennington, VT, this 3/30 day of October 2014.



Judge David Howard