Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-312

MAY TERM, 2003

State of Vermont v. George Maniatty	}	APPEALED FROM: District Court of Vermont, Unit No. 3, Franklin Circuit DOCKET No. 47-4-01 Frcr Trial Judge: Hon. James R. Crucitti

In the above-entitled cause, the Clerk will enter:

Defendant George Maniatty appeals from his conditional plea of no contest to driving under the influence, third offense. He argues that the trial court erred in: (1) denying his motion to suppress evidence obtained after the officer placed him under de facto arrest; and (2) denying his claim that the state' s refusal to pay for an independent blood test violated his constitutional rights. We affirm.

Defendant was stopped for speeding in April 2001. The arresting officer testified that he smelled alcohol when he approached defendant. A videotape of the encounter revealed the following. The officer asked defendant several times if he knew why he had been stopped, and whether he had been drinking. The officer then stated, " If I pulled you out of the car right now, would you do some field sobriety tests?" When defendant indicated that he didn' t have " any choice," the officer informed defendant that he could say " no" and accompany the officer to the police barracks where he would be arrested for DUI. Defendant then took the field sobriety tests and a preliminary breath test. His breath test indicated a blood alcohol level of .165, and he was arrested. Defendant was later asked if he wanted an independent blood test at his own expense. Defendant indicated that he would like the independent test but could not afford it.

After defendant was charged with DUI, third offense, he filed a motion to exclude evidence obtained after the outset of the traffic stop. Defendant maintained that the officer subjected him to a de facto arrest and had not warned him of his rights under Miranda v. Arizona, 384 U.S. 436 (1966). Defendant also argued that the state' s failure to provide him with an independent blood test when he could not afford one violated his rights under the Equal Protection Clause of the United States Constitution and the Common Benefits Clause of the Vermont Constitution. The court issued a written opinion denying defendant's motion in all respects material to this case. The court concluded that defendant had not been subjected to a de facto arrest at the outset of the traffic stop, and that, consistent with State v. Wright, 169 Vt. 573 (1999) (mem.), the officer informed defendant that he had a right to an independent blood test if he desired one. Defendant then entered a conditional plea of no contest to DUI, third offense, and this appeal followed.

Defendant first argues that the court improperly denied his motion to suppress all evidence obtained after the outset of the traffic stop because he was subject to a de facto arrest without being advised of his Miranda rights. Defendant asserts that the officer' s " threat to arrest him" if he did not submit to roadside testing, in conjunction with questioning that constituted " custodial interrogation," placed defendant under the " functional equivalent of a formal arrest."

We review motions to suppress de novo. State v. Pierce, 173 Vt. 151, 152 (2001). We have stated that the procedural safeguards of Miranda only apply where a defendant is " in custody" and is subjected to custodial interrogation. State v. Lancto, 155 Vt. 168, 170-71 (1990). A person who has been temporarily detained pursuant to a traffic stop is not " in custody" under Miranda " absent some showing that they were ' subjected to restraints comparable to those associated

with a formal arrest.' " Lancto, 155 Vt. at 171 (quoting Berkemer v. McCarty, 468 U.S. 420, 440-41 (1984)); see also State v. Boardman, 148 Vt. 229, 231 (1987). In determining whether an " arrest" has occurred, we look at the totality of the circumstances to determine whether a reasonable person would believe he was free to leave or refuse to answer police questioning. State v. Willis, 145 Vt. 459, 475 (1985).

Defendant' s argument that the officer subjected him to a de facto arrest at the outset of the traffic stop is without merit. The record does not support defendant' s assertion that the officer exercised " apparent authority" to arrest him or subjected him to custodial interrogation. As the videotape reveals, the officer was alone when he approached defendant, and the encounter occurred on the roadside of a public highway. While defendant remained in his own vehicle, the officer asked defendant if had been drinking, and if he knew why he had been pulled over. He informed defendant that he could refuse to take the field sobriety tests, in which case he would be arrested for DUI. This does not constitute " custodial interrogation," nor does it demonstrate the exercise of apparent authority to arrest. See Boardman, 148 Vt. 229, 231 (roadside interrogation during routine traffic stop generally does not constitute " custodial interrogation" for purposes of the Miranda rule). Similarly, the officer' s request that defendant exit his vehicle to perform field sobriety tests does not justify suppression of the evidence. See State v. Sprague, 2003 VT 20, 14 Vt. L.W. 39 (2003). In Sprague, we stated that " the 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 suspected crime." Id. at § 20, 14 Vt. L.W. at 41. In this case, the officer suspected defendant of driving under the influence. This provided a sufficient basis to ask defendant to exit his vehicle. See id. at § 22, 14 Vt. L.W. at 41. We therefore conclude that the trial court properly denied defendant' s motion to suppress.

Defendant next argues that his breath test results should be suppressed because the state refused to pay for an independent blood test in violation of his equal protection rights and his rights under the Common Benefits Clause of the Vermont Constitution. We rejected a similar claim in State v. Benoir, __ Vt. __, __ , 819 A.2d 699 (2002) (mem.). In Benoir, we concluded that an indigent DUI suspect does not have the right to an independent blood test at the state' s expense. Id. at 701. We explained that a defendant has the right to obtain an independent blood sample under 23 V.S.A. § 1203a(a), but he bears the responsibility for its cost. Id. at 701; see also 23 V.S.A. § 1203a(e). Thus, contrary to defendant' s assertion, 23 V.S.A. § 1203a does not establish defendant' s " fundamental right" to a independent blood test at the state' s expense. We therefore reject defendant' s argument that his breath test results should be suppressed.

Affirmed.

BY THE COURT:

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Frederic W. Allen, Chief Justice (Ret.)

Specially Assigned