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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2003-161

DECEMBER TERM, 2003

State of Vermont	}	APPEALED FROM:
v.	}	District Court of Vermont, Unit No. 2, Chittenden Circuit
Matthew D. Ormsbee	}	DOCKET NO 17-1-03 Cncs
	}	Trial Judge: Ben W. Joseph

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

The State sought suspension of defendant Matthew Ormsbee= s driver= s license for operating a motor vehicle while under the influence of alcohol (DUI). The Chittenden District Court awarded judgment to defendant, concluding that the deputy sheriff who stopped defendant did not have reasonable grounds to believe that defendant was DUI. The State appeals, and we reverse and remand.

The court= s findings establish that at approximately two o= clock in the morning of January 11, 2003, a Chittenden County deputy sheriff observed defendant driving ten miles over the posted speed limit in Winooski. The streets were snow covered and it was snowing heavily. The officer followed defendant= s car onto a side street before stopping it. The court found that the officer= s two reasons for stopping the car were that defendant had been speeding on Main Street and that the car was registered to a Highgate, Vermont address. When the officer spoke to defendant, he smelled a strong odor of alcohol and noticed that defendant= s eyes were watery. Although missing from the court= s findings, it is undisputed that defendant told the officer that he had consumed two beers before getting into his vehicle. The officer asked defendant to exit his vehicle and perform dexterity tests. Defendant agreed. Notwithstanding the officer= s testimony that defendant showed signs of intoxication when performing the dexterity tests, the court, upon viewing a videotape of the stop, found that defendant performed the tests without difficulty despite the snowy conditions of the roadway. Next, the officer asked defendant to submit to a preliminary breath test to screen him for alcohol use, but defendant refused. Following defendant= s refusal, the deputy sheriff arrested him, transported him to the police station, and obtained an evidentiary sample of his breath. The State thereafter charged defendant with DUI and commenced civil suspension proceedings.

Before the final civil suspension hearing, defendant moved to suppress the evidentiary breath test in the criminal matter and to dismiss the charges against him. On February 26, 2003, the court took evidence on defendant= s suppression and dismissal motions in conjunction with the final civil suspension hearing. The deputy sheriff was the State= s sole witness, although the court also viewed a videotape of the roadside encounter between the officer and defendant. The court subsequently issued a written order finding in favor of defendant on the civil suspension matter, and the State filed the present appeal.

The State challenges the district court= s conclusion that the officer lacked reasonable grounds to believe that defendant was driving his vehicle while under the influence of alcohol. We will uphold the court= s conclusion if it is supported by the court= s findings and reflects the correct application of the law. Luneau v. Peerless Ins. Co., 170 Vt. 442, 444-45 (2000). In a final civil suspension hearing, the issues for the court= s determination are limited. 23 V.S.A. ' 1205(h). At issue here is A whether the law enforcement officer had reasonable grounds to believe the person was operating, attempting to operate or in actual physical control of a vehicle in violation of section 1201 of [Title 23].@ Id. ' 1205(h)

(1); id. ' 1205(i). The district court in this case reasoned that the odor of alcohol emanating from defendant, his watery eyes, and his refusal to provide a preliminary breath sample B assuming the refusal was admissible* B did A not add up@ to a reasonable belief that defendant had violated ' 1201. To violate ' 1201, defendant must have operated, attempted to operate, or be in physical control of a vehicle on a highway when the person (1) has a blood alcohol concentration of .08 or more,(2) is A under the influence of intoxicating liquor,@ or (3) is A under the influence of any other drug or under the combined influence of alcohol and any other drug to a degree which renders the person incapable of driving safely.@ 23 V.S.A. ' 1201(a)(1)-(3). A defendant violates ' 1201(a)(2) if he is under the influence of intoxicating liquor even to the A > slightest degree.= @ State v. Curavoo, 156 Vt. 72, 75-76 (1991) (quoting State v. Frigault, 151 Vt. 537, 538 (1989)). Thus, to request an evidentiary sample of a driver= s breath, a law enforcement officer must, at a minimum, reasonably believe the driver is under the influence of alcohol to the A slightest degree.@

Given the standard under ' 1201(a)(2), the district court= s findings in this case establish that the deputy sheriff had sufficient indicia of intoxication to reasonably believe that defendant was driving under the influence. According to the court= s findings, at the time the officer stopped defendant, it was snowing and the roads were snow covered . The court found that defendant had been speeding, he smelled of alcohol, and his eyes were watery. Moreover, no party disputes that defendant admitted he had consumed two alcoholic beverages before driving his vehicle. Considering the road conditions, defendant= s excessive speed demonstrated a lack of judgment that the officer could reasonably attribute to defendant being under the influence of alcohol.

Defendant= s successful completion of the dexterity tests does not negate the other objective indicia of alcohol consumption confronting the deputy sheriff. As we explained in State v. Orvis, 143 Vt. 388 (1983), prosecution for DUI does not depend upon external manifestations of intoxication. 143 Vt. at 391. A To so hold otherwise would be to reward the experienced drinker who consumes excessive amounts of intoxicants without obvious physical impairment.@ Id. In other words, the lack of obvious physical impairment does not mean that a driver= s judgment is not affected by alcohol consumption. If we were to require a law enforcement officer to refrain from further inquiry upon a driver= s successful completion of roadside dexterity tests in every case, we would defeat the intent of ' 1201(a)(2) to keep even slightly impaired drivers off the road. That we are unwilling to do.

The district court applied the wrong legal standard to its findings in this case, and thus, its conclusion that the deputy sheriff did not have reasonable grounds to believe defendant was DUI cannot stand.

The court= s judgment in favor of defendant on civil suspension is reversed and remanded for further proceedings.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice

Footnote

* The State argues that the court erred by not considering defendant’s refusal to take a preliminary breath test as evidence of his consciousness of guilt. We do not reach that issue because we conclude that the officer had a sufficient

basis to reasonably believe the driver was under the influence of alcohol prior to the driver's refusal to provide a preliminary breath sample.