

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

**ENTRY ORDER**

SUPREME COURT DOCKET NOS. 2005-180 & 2005-182

FEBRUARY TERM, 2006

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Orleans Circuit
Timothy Annis	}	
	}	DOCKET NOS. 86-11-04 Oscs &
		610-11-04 Oscr

Trial Judge: Brian J. Grearson

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

Defendant appeals from his civil license suspension and conditional guilty plea for driving while intoxicated, arguing that the breath analysis test result relied on by the trial court was invalid. We affirm.

The facts are undisputed. Defendant was pulled over on November 10, 2004 for faulty equipment. Based on his admission that he had been drinking and on his performance of field sobriety tests, he was taken to the State Police Barracks and administered a breath analysis test. The first test indicated a breath alcohol level of .238. Defendant requested a second test, which returned an Ainvalid sample@ message. Defendant requested a third test, but then declined the third test when it was offered.

At trial, defendant moved to exclude the evidence of the results of his first breath test. Defendant argued that the Ainvalid sample@ message on the second breath test called into question the reliability of the first breath test, such that the results of the first test should not be admitted. The trial court rejected this argument.

On appeal, defendant reiterates his argument that the Ainvalid sample@ message from the second breath test demonstrates that the first breath test was also unreliable. We reject this argument. Under 23 V.S.A. ' 1205(n), the results of a breath analysis test are presumed valid, and a defendant must offer specific evidence to overcome the presumption. See State v. Pluta, 157 Vt. 451, 454 (1991). Nothing about the Ainvalid sample@ message from the second test casts doubt, however, on the validity of the first test. At most, defendant argues that because the police officer administered the second test only three minutes after the first, there must have been a deficiency with the first test as well, despite the fact that there was no Ainvalid sample@ message with the first test. This amounts to nothing more than speculation, and is insufficient to defeat the presumption of validity. See Pluta, 157 Vt. at 455 (evidence of a general, theoretical nature insufficient to defeat presumption). Further, the simple fact that a second test result was unavailable does not render the first test inadmissible. There was no evidence that defendant=s right to a second test was denied. See State v. Vezina, 2004 VT 62, &8 (failure of second test did not mandate suppression of first test where there was no deliberate deprivation of statutory rights). To the contrary, after the error message on the second test, defendant was offered a third test, which he declined.

Because defendant presents no specific evidence challenging the presumed validity of the first breath analysis test result, the result was properly admitted and considered in the proceedings against him.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Brian L. Burgess, Associate Justice