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

ENTRY ORDER

SUPREME COURT DOCKET NOS. 2007-158 & 2007-199

DECEMBER TERM, 2007

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Caledonia Circuit
	}	
Robert R. Lussier	}	DOCKET NO. 79-12-06 Cacs & 1179-12-06 CaCr
		Trial Judges: Theresa S. DiMauro, M. Kathleen Manley

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

In these consolidated appeals from a civil suspension and DUI conviction, defendant contends the lower courts erred in ruling that he failed to meet his burden of establishing a prima facie case on the elements of the affirmative defense set forth in 23 V.S.A. § 1201(f). We affirm.

The record evidence discloses as follows. At approximately 8:15 p.m. on the evening of December 9, 2006, a Vermont State Police officer responded to a report that a pickup truck was parked on the side of a road in Lyndon, and a female driver appeared to be intoxicated and possibly unconscious. The officer arrived about fifteen minutes later, pulled in behind the pickup, and observed smoke coming from the truck's exhaust pipe and the engine running. The officer approached the driver's side and observed a male, later identified as defendant, sitting in the driver's seat with his head against the window. Defendant was sweating and appeared to be asleep. The officer knocked loudly on the window and yelled for defendant to wake up, with no effect. The officer observed a twelve-pack Budweiser carton on the front floor of the passenger side. After several additional unsuccessful attempts to awaken defendant, the officer opened the driver's door and immediately detected a strong smell of intoxicants. The officer turned off the ignition and eventually managed to rouse defendant.

The officer asked defendant how much he had to drink, and defendant responded a six-pack. Defendant then put his hand on the key, but the officer grabbed defendant's arm and told him not to. In response to questioning, defendant reported that his last drink was several hours earlier at a club. When asked how long he had been parked there, defendant stated that he had left the club around 6:00 p.m. and "drove from there to Speedwell where he bought a soda." Defendant explained that he was "just going to go home" and asked the officer to follow him

there. The officer directed defendant to exit the vehicle, administered several field sobriety tests, and transported defendant to the station for a blood alcohol test. The test, administered at about 10:11 p.m., revealed a blood alcohol content (BAC) of .331%. The officer later interviewed the woman who had initially called the police, who stated that she had briefly pulled in behind the pickup and observed the compartment light on and the driver's door open, but that she left almost immediately when the door closed and the light went out.

Defendant was charged with a violation of 23 V.S.A. § 1201(a)(2), by operating or being in actual physical control of a vehicle on a public highway while under the influence of intoxicating liquor. At the civil suspension hearing in March 2007, the State proffered, without objection, affidavits from the investigating officer and state chemist. Defendant offered no evidence, but asserted 23 V.S.A. § 1201(f) as an affirmative defense. This section provides that a DUI defendant "may assert as an affirmative defense that the person was not operating, attempting to operate, or in actual physical control of the vehicle because the person: (1) had no intention of placing the vehicle in motion, and (2) had not placed the vehicle in motion while under the influence." Id. Following the hearing, the court issued a written decision, concluding that the officer had reasonable grounds to believe that defendant was in actual physical control of a vehicle while intoxicated, in violation of 23 V.S.A. § 1201, which was the only issue contested by defendant. The court further declined to consider the affirmative defense under § 1201(f), indicating that defendant had failed to carry his burden of establishing a prima facie case on each of its elements. Accordingly, the court entered judgment for the State. In the subsequent criminal proceeding the parties stipulated that the court could consider the evidence admitted in the civil suspension hearing. Based thereon, the court similarly concluded that defendant had failed to introduce sufficient evidence to support his request for an instruction on the affirmative defense provided by § 1201(f). Defendant thereupon entered a conditional plea of guilty. This appeal followed.

Defendant contends the lower courts erred in finding that he failed to meet his burden of establishing the elements of the affirmative defense provided by § 1201(f). We have held that "[b]ecause th[is] section specifies that it provides an affirmative defense, the defendant bears the burden of establishing a prima facie case on the statutory elements." State v. Leopold, 2005 VT 94, ¶ 11, 179 Vt. 558 (mem.). Thus, as we further explained, if a defendant—as here—is found to have been in actual physical control of a vehicle while intoxicated, "§ 1201(f) will excuse the crime if she can demonstrate that she neither placed the car in motion nor intended to do so." Id. ¶ 9. The State need not, however, "demonstrate that the defendant intended to move the vehicle during its case-in-chief." Id.

In asserting that he carried his burden of establishing the elements of the defense, defendant relies on the witness's initial report to the police identifying the occupant of the vehicle as a woman. Defendant argues that it is reasonable to infer from this that the original female driver left the scene during the fifteen minutes between the original report and the arrival of the officer, leaving defendant, who may have been a passenger, behind. Furthermore, although defendant placed his hand on the key, stated that he wanted to go home, and asked the officer to follow him, defendant asserts that he did not actually intend to place the car in motion without the officer's permission. These circumstances, plus the absence of any witnesses who actually observed defendant place the car in motion, establish—according to defendant—a prima

facie showing that he neither placed the vehicle in motion while intoxicated nor intended to do so.

The argument is unpersuasive. Far from establishing the lack of intent to place the vehicle in motion, all the evidence indicates that defendant, even in a highly inebriated state, intended to restart the car and leave, placing his hand on the key in the ignition (which the officer forcibly removed), informing the officer that he was just going home, and asking the officer to follow him there. Defendant's additional suggestion that the actual driver left the scene during the short time between the witness's report and the officer's arrival, leaving defendant behind sitting unconscious in the driver's seat is speculative at best, and is insufficient to establish a prima facie showing that he did not drive the vehicle while intoxicated. *In short, apart from defendant's unsupported assertions, the claim that he neither placed the car in motion nor intended to do so is unsupported by the evidence.* We note, furthermore, that defendant admitted driving from the club where he had been drinking at about 6:00 p.m.; denied having anything further to drink thereafter; and registered an extraordinarily high BAC of .331% at about 10:00 p.m. Although the rebuttable presumption of driving while intoxicated within two hours of a test registering 0.08% or higher may not apply, 23 V.S.A. § 1205(n), the evidence supports a reasonable inference that defendant was intoxicated at the time of operation. Therefore, we find no basis to disturb the court's conclusion that defendant failed to meet his burden of establishing a prima facie case on the elements of § 1201(f).

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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Brian L. Burgess, Associate Justice