

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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2007-465

AUGUST TERM, 2008

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Washington Circuit
	}	
Dennis Drew	}	DOCKET NO. 21-2-07 Wncs

Trial Judge: Walter M. Morris, Jr.

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

Defendant appeals the civil suspension of his driver’s license, arguing that the district court erred in determining that the arresting officer had a reasonable basis for asking him to submit to a breath test. We affirm.

On the evening of February 3, 2007, state police were dispatched to the scene of a one-car accident on a rural dirt road. Upon arriving at the scene, the arresting officer observed defendant sitting in a pickup truck located in a ditch beside the road, with a tow truck in the process of pulling the truck out of the ditch. Apparently, the operator of the vehicle had failed to negotiate a turn, crossed the road, knocked over a mailbox and several small trees, and finally wound up down an embankment. The officer asked defendant to exit the vehicle before it was moved. When defendant got out of the truck, the officer noticed that he was unsteady on his feet. He also noticed that his speech was slurred and his eyes were bloodshot and watery. When the officer asked defendant if he had been drinking, defendant claimed that he had not been drinking before he went off the road about two hours earlier, but that, after the accident, he walked to his nearby home and “got drunk” before returning to help the tow truck operator with the vehicle. After defendant failed several dexterity tests and then refused to submit to a preliminary breath test, the officer arrested him and took him to the state police barracks, where he was processed for driving while intoxicated (DWI).

At the police barracks, defendant waived his Miranda rights and told the officer that he had gone off the road approximately three hours before the police arrived. He also told the officer that he had drunk eight non-alcoholic beers and taken two sleeping pills at his home

before calling a tow truck to deal with his stranded vehicle. After waiving his right to consult with an attorney, defendant refused to submit to an evidentiary breath test.

Based on this refusal, the State charged defendant with DWI and sought suspension of his driver's license. At the final civil suspension hearing, the arresting officer testified that he asked defendant to submit to an evidentiary breath test because of the indicia of intoxication he observed, the failed dexterity tests, and the inconsistent statements defendant made about the timing of the accident and his pattern of alcohol and/or drug consumption. The district court entered judgment in favor of the State after determining that there was sufficient evidence to demonstrate that the arresting officer reasonably requested defendant to submit a breath sample. On appeal, defendant argues that the court erred in concluding that the officer had a reasonable basis for requesting that he submit to a breath test, given that the results from the test could not have demonstrated that he operated his vehicle while intoxicated. Defendant reasons that because the State could not prove when the accident occurred or whether defendant had been drinking before the accident, any test results would have been useless in determining whether he had driven while intoxicated.

We find this argument unavailing. The district court must suspend a person's driver's license upon finding either that (1) the officer had reasonable grounds to believe that the person was driving while intoxicated, and the person refused to submit to a breath test, or (2) the person submitted to a breath test based upon the officer's reasonable request, and the test result indicated that the person's blood-alcohol concentration exceeded the legal limit. State v. Green, 173 Vt. 540, 541 (2001) (mem.) (citing 23 V.S.A. § 1205(i)). Hence, in cases such as the instant one, where the defendant refused to submit to a test, the trial court is required to find only that the officer requested a breath sample based on a reasonable belief that the defendant had operated a vehicle while intoxicated. Id.; State v. Westcom, 173 Vt. 561, 562 (2002) (mem.) (in refusal cases, district court need determine only whether officer had reasonable basis for asking defendant to submit to breath test). In other words, "[i]f the person refuses to take the test, it is the refusal itself, not operation while intoxicated, that is the basis for any license suspension." Green, 173 Vt. at 541-42 (emphasis in original).

Here, the evidence supported the district court's findings that (1) the conditions of the road were such that prudent driving could have prevented the accident; (2) defendant was highly intoxicated at the scene of the accident, as evidenced by physical indicia of intoxication and his failure to perform dexterity tests; (3) defendant provided inconsistent statements as to the time of the accident and his pattern of alcohol consumption; and (4) defendant was unable to provide a plausible explanation for why he would walk home and get drunk before dealing with his truck. Under these circumstances, there was more than sufficient evidence for the district court to conclude that the officer had a reasonable basis to ask defendant to submit to a breath test. Submitting to a test would not have necessarily been a useless gesture, as defendant claims. Had defendant submitted to a test, the State would have had to prove intoxication at the time of operation, and the factfinder could have considered defendant's credibility and evidence relating back defendant's blood-alcohol concentration to his own testimony concerning his pattern of alcohol consumption in relation to his operation of his vehicle. As it is, however, defendant refused to take the test, and thus the only issue was whether the officer's request that defendant

submit to a breath test was based on a reasonable belief that defendant had been driving while intoxicated. It plainly was in this case.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice