

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-454

JUNE TERM, 2003

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| | } | APPEALED FROM: |
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| State of Vermont | } | District Court of Vermont, Unit No. 3, Orleans Circuit |
| | } | |
| v. | } | DOCKET NO. 781-12-01 OsCr |
| | } | |
| Nelson Bushaw | } | Trial Judge: Walter M. Morris, Jr. |
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In the above-entitled cause, the Clerk will enter:

Defendant appeals his conviction of driving while intoxicated (DWI), third offense, arguing that the trial court abused its discretion and violated his right to a fair trial by refusing to allow him to present evidence of the infrared breath testing machine malfunctioning after it was used to analyze his breath sample. We affirm.

On December 7, 2001, defendant was stopped on suspicion of DWI. After telling the officer that he had had a couple of beers and failing to satisfactorily perform field dexterity tests, defendant provided a preliminary breath test that registered his blood-alcohol content at .153. Later, during DWI processing, the Data Master machine registered defendant's blood-alcohol content at .135, which relation-back evidence put at .165.

At his jury trial, defendant attacked the reliability of the Data Master machine, which had had problems before and after it was used to analyze defendant's breath sample. In her opening statement, defense counsel told the jury that the evidence would show that the Data Master machine used to analyze defendant's breath sample had a history of problems and was not reliable on December 7. She further indicated that she would show that the particular machine was no longer in service. During her cross-examination of the officer who had stopped defendant, defense counsel asked whether he was aware that the Data Master machine used to test defendant was still in service. The State objected, arguing that the witness was not the processing officer. Defense counsel emphasized that she intended to ask the witness only if there was a different machine at the police station, and that she would question other witnesses later about the history of the machine used to test defendant. The court ultimately sustained the State's objection, finding that the potential for confusion outweighed the probative value of the answer, given that the witness was not the processing officer.

Later, there was extensive questioning of several witnesses on the history of the Data Master machine used to analyze defendant's breath sample. The state chemist called by the State testified that, in his opinion, the machine was operating properly at the time that it was used to analyze defendant's breath sample. On cross-examination, defense counsel meticulously questioned the state chemist regarding that machine's failure on October 26, 2001, its later repair, its reinstallation in the newly painted processing room on the same day defendant's breath sample was analyzed, and further problems that were encountered with the machine on December 21, two weeks after defendant's sample was analyzed. When defense counsel asked the state chemist to look at a notation on the Data Master log for January 19, 2002, the State objected. Defense counsel explained that she wanted to show that the machine had had problems before defendant's test was analyzed, that problems continued after the test was analyzed, and that only eight samples were analyzed by the machine after December 7 before it was replaced. The court stated that it would not allow further

evidence on problems with the machine occurring beyond December 21 unless defendant could provide expert testimony relating those later problems to problems that existed before defendant's test was analyzed. After defense counsel indicated that her expert would provide such testimony, the court stated that it would reserve judgment until that foundation was laid.

Defense counsel then solicited more evidence " this time from the officer who served as the Data Master supervisor " on the history of the problems with this particular machine. The supervisor went over problems that were encountered from early 2001 through December 21 of that year. Defendant's expert also testified on those same problems and stated his opinion that the machine in question was not reliable on the date that it analyzed defendant's breath sample. At one point during her examination of the expert, defense counsel asked to approach the bench. Although much of the bench conference was inaudible and thus not transcribed, the court stated at the conclusion of the conference that whatever defense counsel wished to present was not relevant to the circumstances of December 7.

On appeal, defendant argues that the trial court denied him a fair trial by restricting his exploration of problems with the Data Master machine in the weeks following December 7. We find this argument unavailing. The court gave defendant substantial leeway to demonstrate that the Data Master machine was not reliable on December 7. Several witnesses, including experts on both sides, testified in great detail on the state of the machine from early 2001 through the end of that year. There was extensive testimony concerning the reliability of the machine on December 7. Moreover, two witnesses testified about problems with the machine that occurred on December 21, two weeks after defendant's breath sample was analyzed. Further, the court was willing to allow defendant to solicit additional evidence on the machine's subsequent history as long as his expert could relate those problems to the problems existing before December 7. No such testimony was forthcoming, however. Under the circumstances, we conclude that the court's evidentiary rulings on the scope of the questioning concerning the reliability of the Data Master machine were well within its discretion. See State v. Webster, 165 Vt. 54, 56 (1996) (trial court's ruling on exclusion of evidence will not be disturbed absent showing of abuse of discretion, with proviso that discretion is limited by demands of due process and defendant's constitutional right to confront witnesses). In short, defendant had a full and fair opportunity to demonstrate that the Data Master machine was unreliable, and he took advantage of that opportunity.

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

Frederic W. Allen, Chief Justice (Ret.)

Specially Assigned