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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-235

DECEMBER TERM, 2001

State of Vermont	}	APPEALED FROM:
v.	}	District Court of Vermont,
Daniel St. Hilaire	}	Unit No. 2, Chittenden Court
	}	DOCKET NO. 1589-3-00 Cncr
	}	Trial Judge: Edward J. Cashman

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

Following a conditional plea, defendant appeals from his conviction for driving while intoxicated (DWI), third offense. We affirm.

On February 27, 2000, a Town of Shelburne police officer stopped defendant for speeding and subsequently arrested him for DWI. After transporting him to the Shelburne Police Department, the officer informed defendant of his rights. Defendant indicated that he did not wish to speak to an attorney and would take a breath test. The officer observed defendant for a fifteen-minute period and received confirmation from him that he had not burped or vomited during that period, only to discover that the Datamaster machine was not functioning. The officer then transported defendant to the South Burlington Police Department, where he waited an additional fifteen minutes before administering the breath test, which indicated a blood-alcohol level of .126. After being charged with DWI, defendant moved to suppress the test result and dismiss the civil suspension petition. The district court denied both motions. Defendant then entered into a conditional plea agreement under which he pled no contest to DWI, third offense, and reserved the right to appeal the court's pre-trial rulings and the civil suspension of his license.

On appeal, defendant first argues that his breath test result must be suppressed because the processing officer failed to read him his rights a second time and to provide him with another opportunity to consult an attorney immediately before he took the test at the South Burlington Police Department. We find no merit to this argument. It is undisputed that approximately one hour before the officer administered the test in South Burlington, that same officer informed defendant of his right of refusal and his right to consult an attorney before deciding whether to take a breath test. Plainly, defendant was fully aware of his rights at the time he took the breath test in South Burlington. Defendant's reliance on State v. Gracey, 140 Vt. 199 (1981) is misplaced. There, the defendant was not fully informed of her rights until after she had already decided to take the test. See id. at 201 ("a person asked to take a breath test must be informed of his right to consult with an attorney before making a decision") (emphasis added). Here, on the other hand, defendant had been fully informed of his rights when he decided to take the test; the fact that the test was actually administered one hour later does not cast doubt on defendant's knowing and voluntary waiver of those rights.

Defendant also argues that the district court should have suppressed his test result because the State failed to establish a proper foundation for its admission. According to defendant, the State failed to show that the processing officer at the South Burlington Police Department observed him continuously for a fifteen-minute period immediately before he took the test, and thus could not prove that the test was "analyzed in compliance with rules adopted by the department of

health," 23 V.S.A. 1203(d). Again, we find no merit to defendant's argument. We first note that this case is unlike the case relied upon by defendant, State v. Benware, 165 Vt. 631, 632 (1996) (mem.), where we upheld the trial court's ruling that the defendant had impliedly refused to take a breath test by forcing numerous burps during the statutory thirty-minute time limit for deliberation. Here, the officer testified that defendant was in his peripheral vision throughout the fifteen-minute period, and that defendant did not complain of any gastrointestinal problems or indicate that he had burped or vomited. Defendant himself testified that he did not remember whether he had belched during the fifteen-minute period.

In any event, neither 1203(d) nor the Department of Health rules mention a fifteen-minute observation period. A manual published by the Vermont Criminal Justice Training Council, in conjunction with the Department of Health, indicates that residue from alcohol regurgitated into the mouth will diminish below significant levels within fifteen minutes. Consequently, the DWI processing form indicates that there should be an uninterrupted, fifteen-minute observation period immediately before a breath test is administered. But "[t]he step-by-step procedures in the Council student training manual that are outlined on the DUI processing form do not affect the foundational requirements for admissibility." State v. Massey, 169 Vt. 180, 187 (1999). Because defendant is not "attacking the DataMaster's reliability," his argument "go[es] only to the weight that the jury could give to the test results, and not to admissibility." Id. at 187. Thus, his contention that the test is inadmissible because the State failed to establish a proper foundation must fail. See id. at 186-87 ("Once the foundation facts for admissibility are established, the defendant may question the validity of the test result, but it is for the jury to decide the weight to give the test.").

Affirmed.

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