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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-043

SEPTEMBER TERM, 2002

State of Vermont v. Jeremy P. Hatch	}	APPEALED FROM: District Court of Vermont, Unit No. 3, Franklin Circuit DOCKET NO. 445-4-01 Frcr Trial Judge: Dean B. Pineles

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

Defendant entered a nolo contendere plea to driving under the influence of intoxicating liquor and appeals the Franklin District Court' s denial of his motion to suppress results of an evidentiary breath test. We affirm.

The State charged defendant with driving under the influence of alcohol (DUI), second offense, in April 2001. See 23 V.S.A. § 1201(a)(2). While being processed for DUI, defendant agreed to provide a sample of his breath for analysis. The Datamaster machine functioned properly during the test, which showed that defendant had a blood alcohol content of .186. Defendant asked for a second test as 23 V.S.A. § 1202(d)(5) permits. Accordingly, the arresting officer attempted to take another breath sample from defendant. Defendant blew into the Datamaster machine for thirty-eight seconds. During the first eight seconds, the Datamaster emitted a constant tone signifying that defendant was blowing sufficiently hard to take a sample. The machine then began emitting a beeping tone indicating that defendant was not blowing hard enough. During the last nine seconds of the test, the Datamaster again indicated that defendant was blowing hard enough. Nevertheless, the machine did not accept the sample.

Believing erroneously that the Datamaster would not accept another sample, the arresting officer did not give defendant another opportunity to test his breath and terminated the testing. In fact, the machine could have taken another sample. If the machine had rejected the sample because defendant did not blow hard enough as the officer believed, the machine would have printed a ticket stating " invalid sample." Instead, the ticket it printed said " second test not requested." The officer' s mistake, the court found, was not made in bad faith.

Relying on testimony from the state chemist, the court refused to suppress the results of the first breath test. The chemist testified that the Datamaster' s failure to measure the second sample within eight seconds would not call into question the accuracy of the first sample. The chemist also testified that the officer followed the correct procedure for administering the test. The court determined that the absence of results from a second test did not render the first test invalid or unreliable, and that in the absence of bad faith by the arresting officer, the first test was admissible. This appeal followed.

Defendant first challenges as clearly erroneous the court' s finding that the absence of results from the second attempted test did not render the first test unreliable or invalid. We will set aside the court' s findings only if they are unsupported by the evidence or are clearly erroneous. State v. Sutphin, 159 Vt. 9, 11 (1992). We find no error here. The chemist' s testimony, which the court deemed credible, was sufficient for the court to make the contested finding. Although defendant is correct that the chemist did not use the same words the court used in its finding, the logical inference to be

drawn from the chemist' s testimony was the precise inference the court reflected in its finding.

Defendant also claims suppression of the results from the first test was required because the officer' s negligence denied defendant his statutory right to the second test. A second test is capable of demonstrating the unreliability and inaccuracy of the first test. Thus, defendant argues, the State denied him potentially exculpatory evidence and suppression is the appropriate remedy. We disagree.

In State. v. Guidera, 167 Vt. 598, 600 (1998) (mem.), we rejected a claim similar to defendant' s here. In that case, the officer did not administer the first test properly, rendering the first results invalid. However, the second test was administered correctly and we held those results were admissible: " Admitting one valid infrared BAC result is fully consistent with the statute, even if another BAC result is invalid, as long as the invalidity does not go to the performance of the instrument." Id. In this case, defendant makes no claim that the Datamaster malfunctioned, calling into doubt the reliability of the first test results, or that the State did not prove that the machine met performance standards. Instead, he focuses on the arresting officer' s mistaken belief that the machine would not accept another breath sample. That mistake, without more, is not grounds to suppress the results of the first test.

Defendant contests that conclusion by characterizing the officer' s negligence as equivalent to denying him potentially exculpatory evidence, and under State v. Devine, 168 Vt. 566 (1998), arguing that suppression is appropriate. See id. at 567-68. Even assuming defendant' s characterization of the officer' s conduct is accurate, State v. Devine does not support defendant' s claim. In that case, we set forth the factors a court must assess when determining the proper remedy for lost or otherwise unavailable exculpatory evidence in a criminal case: (1) the degree of the government' s negligence or bad faith; (2) the importance of the evidence at issue; and (3) other evidence of guilt admitted at trial. Id. at 567. Before the court weighs those factors, however, the defendant must first demonstrate a " reasonable possibility that [the] lost or otherwise unavailable evidence would have been exculpatory." Id. Defendant here did not make that initial requisite showing. Moreover, the officer' s purported negligence was minimal considering that he complied with § 1202(d)(5) by offering and attempting to administer a second test. See 23 V.S.A. § 1202(d)(5).

In sum, the trial court was correct in concluding that the arresting officer' s mistake in administering the second test, which was not made in bad faith, was not grounds to suppress the results of the first breath test.

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice