

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-130

SEPTEMBER TERM, 2002

	}	APPEALED FROM:
	}	
State of Vermont	}	District Court of Vermont, Unit No. 1,
	}	Windsor Circuit
v.	}	
	}	
Thomas A. Comstock	}	DOCKET NO. 505-4-01 Wrcr
	}	
	}	Trial Judge: Paul F. Hudson
	}	

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

Defendant entered a conditional guilty plea to driving on a public highway while under the influence of intoxicating liquor, second offense, in violation of 23 V.S.A. § 1201. He appeals the Windsor District Court's denial of his motion to suppress the results of an evidentiary breath test he provided after his arrest. Finding no error in the court's disposition of defendant's motion, we affirm.

The trial court's factual findings, which were based on evidence admitted during the suppression hearing, establish that on March 25, 2001, at approximately 6:20 p.m., Vermont State Police Trooper Bruce Wolkenbrod observed defendant driving fifty-two miles-per-hour in a thirty-five mile-per-hour zone. He pulled defendant over and asked him for his license and registration. Trooper Wolkenbrod noticed that defendant's eyes were bloodshot and watery, and he smelled a moderate odor of alcohol on defendant. He administered a preliminary breath test using an alco-sensor while defendant was still seated in his vehicle. The trooper used a fresh mouthpiece on the testing instrument when he administered the preliminary test, which resulted in a reading of .149. Although Trooper Wolkenbrod waited only four minutes before administering the preliminary test, defendant had informed him that his last drink was twenty minutes previous to the stop. Thus, the court found a period of twenty-four minutes had elapsed between defendant's last drink and his preliminary breath test.

Trooper Wolkenbrod then asked defendant to leave his car and perform dexterity tests. Defendant had difficulty following directions on the heel-to-toe test, but performed the other tests correctly. The officer informed defendant that he was going to arrest him for driving while intoxicated, and defendant denied that he was under the influence of alcohol. Trooper Wolkenbrod therefore provided a second and third alco-sensor test, but the results showed defendant's blood alcohol was not decreasing. The court found that defendant did not belch, burp, or vomit during the time he was with Trooper Wolkenbrod. Defendant was subsequently processed for driving while intoxicated, and he submitted to an evidentiary breath test. The results of that test were the subject of defendant's suppression motion before the district court.

Defendant sought suppression of the post-arrest breath test results claiming that Trooper Wolkenbrod lacked probable cause to require him to submit to the test. Probable cause was lacking, defendant argued, because the officer did not have sufficient justification for requesting the preliminary breath test. He also argued that even if Trooper Wolkenbrod had reason to request the preliminary test, he administered the test improperly so the results were unreliable and cannot

form the basis for probable cause to arrest defendant and require him to submit to an evidentiary breath test. The court rejected defendant's claim, concluding that the clinical symptoms of alcohol influence that the trooper observed (i.e., bloodshot, watery eyes and the odor of alcohol), combined with defendant's excessive speed, gave the officer ample reason to request a preliminary breath test. The court also concluded that the initial test was properly administered, and its results, along with defendant's clinical symptoms, met the statutory basis for requesting an evidentiary test under 23 V.S.A. § 1202(a)(3). On appeal, defendant makes essentially the same arguments he made before the trial court.

As defendant correctly points out in his brief, our review of the district court's legal conclusions is nondeferential and plenary. Thompson v. Dewey's S. Royalton, Inc., 169 Vt. 274, 276 (1999). Under 23 V.S.A. § 1203(f), a police officer may request a driver to provide a preliminary breath sample if the officer "has reason to believe that [the driver] may be violating or has violated section 1201" of Title 23, which prohibits driving while under the influence of alcohol. The results of a preliminary test may not be used as evidence against defendant, but may be used to decide whether an arrest and further evidentiary testing are warranted. 23 V.S.A. § 1203(f).

Defendant first argues that the smell of alcohol about him alone was not enough to give Trooper Wolkenbrod reason to believe he was driving under the influence of alcohol. We need not decide that question because the odor of alcohol was only one of the factors leading to the officer's suspicion. The court found that defendant had watery and bloodshot eyes. The district court correctly concluded that those indicia of intoxication were enough to give the officer reason for further inquiry by way of a preliminary breath test. See Hager v. Comm'r of Pub. Safety, 382 N.W.2d 907, 911 (Minn. Ct. App. 1986) (preliminary breath screening test appropriately administered where police officer observed defendant's bloodshot and watery eyes and odor of alcohol emanated from his breath).

Defendant next argues that Trooper Wolkenbrod did not follow proper procedure when he administered the preliminary alco-sensor test, and therefore the results are unreliable and cannot be used in the probable cause equation necessary for an evidentiary breath sample. The problem with defendant's claim is that it contradicts the court's factual finding that the test was properly administered. We will overturn the court's findings only upon a showing that they are clearly erroneous or unsupported by the evidence. State v. Zaccaro, 154 Vt. 83, 86 (1990). The evidence supports the court's findings here. Trooper Wolkenbrod testified at the suppression hearing that in accordance with established protocol, he used a fresh mouthpiece for the initial alco-sensor test that he conducted while defendant was still seated in his vehicle. Defendant asserts that there was no such test shown on the videotape of the stop and subsequent arrest so the court's finding must be clear error. While the videotape may be subject to differing characterizations, we cannot say that it demonstrates that the court's findings are unsupported by the evidence. The videotape shows Trooper Wolkenbrod at the driver's side of defendant's vehicle for some length of time. The quality of the tape makes it impossible to determine exactly what either the officer or defendant was doing during that time. Trooper Wolkenbrod testified that he took so long by defendant's vehicle because he was administering the preliminary breath test. The credibility of the officer's testimony, and the weight we accord it, were determinations committed to the district court's discretion, not ours. See Kasnowski v. Dep't of Employment Sec., 137 Vt. 380, 381 (1979) (" [w]eight, credibility and persuasive effect are for the trier of fact").

Defendant also claims the court's finding is erroneous because Trooper Wolkenbrod failed to observe defendant for fifteen to twenty minutes before having defendant submit to the test as required. Although the officer did not confirm in advance of the test when defendant had last consumed alcohol, he did so after the test, thus confirming that the test was administered within the appropriate time frame. We therefore find no error in the court's finding that the preliminary test was properly administered.

Affirmed.

BY THE COURT:

Jeffrey L. Amestoy, Chief Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice