

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

**ENTRY ORDER**

SUPREME COURT DOCKET NOS. 2002-276 and 2002-288

APRIL TERM, 2003

State of Vermont	}	APPEALED FROM:
	}	
v.	}	District Court of Vermont, Unit No. 3,
	}	Franklin Circuit
Randy Pudvah	}	
	}	
State of Vermont	}	DOCKET Nos. 1004-8-01 Frcr & 1487-11-
	}	01 Frcr
v.	}	
	}	
Shane A. Mercy	}	Trial Judge: James R. Crucitti

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

In these two consolidated cases involving prosecutions for driving under the influence of intoxicating liquor (DUI), the State of Vermont appeals the district court's interlocutory ruling that because the State was not able to show that defendants had been observed for an uninterrupted fifteen-minute period immediately before they provided breath samples, the State was not entitled to the statutory presumption of the validity of the breath test results. We reverse the court's ruling because the State's failure to demonstrate an uninterrupted fifteen-minute observation does not affect the admissibility of the tests, only their potential weight.

Both defendants agreed to submit breath tests after being stopped and charged with DUI. In one case, the district court found that defendant had not been observed for an uninterrupted fifteen-minute period immediately before providing a breath sample, and had not been asked if he had burped within the immediately preceding fifteen-minute period. In the other case, the processing officer observed defendant for at least part of the fifteen-minute period, but did not observe him for a few minutes while typing the processing form. The evidence in the latter case also failed to establish that the officer asked defendant if he had burped during the preceding fifteen minutes.

In both cases, the district court noted that Department of Health regulations incorporated the procedures set forth in the Vermont Criminal Justice Training Council manual, including the fifteen-minute observation period aimed at ensuring that the infrared machine does not register mouth alcohol in producing test results. The court then ruled as follows in both cases on defendants' motions to exclude the breath tests:

The state has failed to establish compliance with the training manual and therefore is unable to rely upon the prima facie rule created for civil suspension proceedings in 23 V.S.A. § 1205(h) (4) and § 1203(d) for purposes of the criminal proceeding. Failure to comply with the Health Department Regulations however does not require exclusion of the test if the state is able to satisfy requirements of admissibility through expert testimony.

The motion to exclude the results of the breath test for failure to comply with the Department of Health Regulations is denied. However, before reference to the test before a jury, the state must be prepared to offer expert testimony which satisfies criteria for admission of the breath test result.

In short, the district court ruled that the breath tests would be inadmissible unless the State could present expert

testimony demonstrating that the infrared machine would provide accurate results within the performance standards even in the absence of an uninterrupted fifteen-minute observation period.

We conclude that the district court's ruling is directly contrary to this Court's established case law. Recently, after reviewing our previous decisions, we reiterated that "[a]s long as the State demonstrates that the analysis of the challenged sample was performed by an instrument that meets the Department's performance standards, the defendant may not otherwise challenge the admissibility of the test result . . . ." State v. McQuillan, 2003 VT 25, § 7, 14 Vt. L.W. 102 (citing State v. Rolfe, 166 Vt. 1, 13 (1996)). We emphasized that the foundation for admissibility focuses on the instrument, not the manner in which the breath sample was taken. Id. at § 8 (only statutory requirement regarding collection of sample is that breath test be administered by certified officer); see State v. Massey, 169 Vt. 180, 187 (1999) (failure to adhere to step-by-step procedures in student manual does not affect foundational requirements for admissibility, but rather is relevant only to weight that fact-finder might give to test).

We reasserted these principles in McQuillan, notwithstanding the defendants' arguments, much like those made by defendants in this case, that adherence to the fifteen-minute observation period is critical to ensuring the absence of mouth alcohol and thus the reliability of the samples. See 2003 VT, at § 10. We concluded that, given the statutory requirements for rulemaking in 23 V.S.A. § 1203(d), the State can demonstrate "all that is required" for the admissibility of test results, irrespective of adherence to the manual's observation period. Id. at § 15. Accordingly, defendants may present testimony, including expert testimony, suggesting to the fact-finder that the processing officer's failure to observe them for an uninterrupted fifteen-minute period as established by the training manual casts doubt on the reliability of the test results, but they may not use such testimony to prevent the State from admitting the test results for the fact-finder's consideration. See Rolfe, 166 Vt. at 12-14 (presumption in 23 V.S.A. § 1205(g)(4), now § 1205(h)(4), arises only after test result is admitted; standard for admissibility remains that in § 1203(d)).

Finally, we grant the State's motion to strike the portions of defendants' printed case, pages 12-51, that included documents not a part of the trial court record. See Hoover v. Hoover, 171 Vt. 256, 258 (2000) (appellate review is confined to record and evidence adduced at trial; therefore, Supreme Court will not consider facts not in record).

Reversed and remanded.

BY THE COURT:

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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Ernest W. Gibson III, Associate Justice (Ret.)

Specially Assigned