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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-384

MAY TERM, 2003

State of Vermont v. Ptolomy Spaulding	}	APPEALED FROM: District Court of Vermont, Unit No. 3, Franklin Circuit DOCKET No. 76-7-02FrCs Trial Judge: Charon A. True

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

Defendant appeals from a judgment for the State in this civil license suspension proceeding. Defendant contends the court erred in ruling that his refusal to submit to a blood alcohol test need not be knowing. We affirm.

The underlying facts are derived principally from the arresting officer' s affidavit of probable cause and are not disputed by defendant. On November 3, 2001, at approximately 3:00 a.m., a State Trooper was dispatched to the scene of a one-vehicle accident on Interstate 89 in the town of Georgia. Upon arriving at the scene, the trooper observed a vehicle on its side in the center median and an individual, later identified as defendant, on the ground about fifteen feet from the vehicle. An officer who had preceded the trooper to the scene informed the trooper that defendant had admitted he was the only one in the vehicle. About an hour later, the trooper met defendant at the Northwestern Medical Center and asked him what had happened. Although defendant indicated that he could not remember anything, the trooper concluded " that [defendant] was the operator by various statements that he made at the hospital." He asked defendant if he had been operating the vehicle, to which defendant responded, " I was driv, oh Mike was driving." As he talked with defendant further about the accident, the trooper noted that defendant changed the name of the alleged driver several more times. Eventually, defendant refused to talk further. The trooper detected a strong odor of intoxicants on defendant' s breath.

The DUI affidavit executed by the trooper at the time indicates that he started observing defendant at 4:08 a.m., and ended eleven minutes later at 4:19 a.m. The affidavit states that defendant " refused" to submit a blood sample, " would not answer" the trooper' s questions concerning his alcohol consumption, stated " no" in response to the question whether he understood his rights, and " yes" when asked if he wished to speak with a lawyer. The affidavit further indicates that a lawyer was contacted at 4:19 a.m., and that the contact ended nine minutes later at 4:28 a.m..

Defendant was the only witness at the civil suspension hearing. He testified that he remembered nothing about the accident or the interview at the hospital. He also stated that he had suffered severe injuries in the accident, including a broken back and fractured pelvis. At the conclusion of the hearing, the trial court found that the officer had reasonable grounds to believe that defendant was operating a vehicle while under the influence of alcohol, and that defendant had refused to take an evidentiary test, contrary to 23 V.S.A. § 1205(a) (six-month suspension for person who " refused to submit to a test"). The court rejected defendant' s argument that it was necessary to find that defendant had " knowingly" refused to submit to the test. The court entered judgment for the State. This appeal followed.

Defendant renews his claim on appeal that the court erred in concluding that it was not required to find a knowing

refusal to submit to an evidentiary test. He argues that his injuries rendered him incapable of rendering a knowing refusal, and, therefore, that he must be deemed to have impliedly consented to the test. See 23 V.S.A. § 1202(a)(2) (" If in the officer' s opinion the person is incapable of decision or unconscious or dead, it is deemed that the person' s consent is given and a sample of blood shall be taken.").

We have not previously addressed the precise question presented, nor need we do so here. Defendant' s contention - based on the holdings in two out-of-state cases - is that a defendant has the right to prove an incapacity to make a knowing and conscious refusal to take an evidentiary test. See Ostermeyer v. Commonwealth, 703 A.2d 1075, 1077 (Pa. Commw. Ct. 1997) (" Once the Department has met its burden . . . it is the driver' s responsibility to prove that he was not capable of making a knowing and conscious refusal to take the test."); Hughey v. Dept. of Motor Vehicles, 1 Cal. Rptr.2d 115, 121 (Cal. Ct. App. 1991) (" If . . . the driver is able to convince a trier of fact that he or she was incapable of refusing a test for reasons unconnected with the consumption of alcohol, the statute contemplates a restoration of the driver' s license."). Both decisions place the burden of proof on the defendant, and both generally require expert medical testimony to establish such an incapacity. See Ostermeyer, 703 A.2d at 1077; Hughey, 1 Cal. Rptr.2d at 121. The only exception is where the defendant' s injuries are so obviously severe and incapacitating that medical testimony to establish an inability to make a knowing refusal is unnecessary. Ostermeyer, 703 A.2d at 1077.

Even assuming, without deciding, that defendant was entitled to demonstrate that his refusal was not knowing, the record shows that he failed to carry his burden of proof in this regard. He adduced no expert testimony or any other evidence indicating a diminished mental capacity at the time. Indeed, all of the record evidence, however minimal, indicates that defendant was capable of engaging in conscious conversation throughout the incident, initially with the first officer on the scene and later with the trooper at the hospital. Accordingly to the trooper' s DUI affidavit, defendant was responsive to all of the trooper' s questions for a period of over ten minutes, positively indicating that he would not answer the questions and affirmatively refusing the request for a blood test. The affidavit also shows that defendant had contact with an attorney for a period of nine minutes. Thus, the record does not support the claim that defendant was mentally incapacitated at the time of the refusal. Although defendant claims that his injuries alone prove that he was incapable of rational thought, we are not persuaded that defendant' s after-the-fact description of the injuries B absent any other evidence that he was disoriented by pain or medications - demonstrate mental incapacity. Accordingly, we perceive no basis in the record to find that defendant was incapable of rendering a knowing refusal, and therefore discern no grounds to disturb the judgment.

Affirmed.

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Frederic W. Allen, Chief Justice (Ret.)

Specially Assigned