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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2003-450

MAY TERM, 2004

State of Vermont v. Brad Luck	}	APPEALED FROM: District Court of Vermont, Unit No. 2, Chittenden Circuit DOCKET No. 364-7-03 Cncs Trial Judge: Hon. Ben W. Joseph

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

The State of Vermont appeals from a district court judgment in favor of defendant in a civil suspension proceeding. The judgment was based on the court= s order granting defendant= s motion to suppress the results of alco-sensor and blood-alcohol breath tests. The State contends the court erred in determining that the arresting officer lacked a reasonable basis to administer the tests. We agree, and therefore reverse.

The parties agreed to submit the matter to the trial court on the basis of the facts set forth in the officer= s affidavit. As set forth therein, the record evidence may be briefly summarized. On July 20, 2003, at about 1:15 p.m., a Williston police officer traveling in his marked cruiser on Essex Road observed a vehicle with an expired inspection sticker, and effected a motor vehicle stop. While speaking with the driver, later identified as defendant, the officer observed defendant= s eyes to be extremely bloodshot and watery. The officer also detected a strong odor of alcohol from within the vehicle, and observed several unopened containers of beer in the back seat. Defendant admitted that he had consumed alcohol the previous night, but claimed that he had not had a drink since 1:00 a.m., and had just gotten up and was driving to work.

The officer asked defendant to step out of his vehicle to perform field sobriety tests. When defendant stepped from his vehicle, the officer detected a strong odor of alcohol A emanating from within his person.@ Although he appeared to be nervous, defendant performed the tests satisfactorily. The officer administered two preliminary breath, or alco-sensor, tests, which registered BACs of .116% and .128%. Defendant was then taken to the police station, where a breath test revealed a BAC of .098%.

Defendant later moved to suppress the test results. Following a hearing, the court issued a written decision, granting the motion to suppress and entering judgment in favor of defendant on the ground that the officer lacked a reasonable basis to administer the alco-sensor tests, and therefore lacked reasonable grounds to administer the subsequent breath test. This appeal by the State followed.

Under 23 V.S.A. ' 1203(f), A [w]hen a law enforcement officer has reason to believe that a person may be violating or has violated section 1201 of this title [prohibiting the operation of a motor vehicle on a highway when the driver is under the influence of intoxicating liquor or has a BAC in excess of 0.08%], the officer may request the person to provide a sample of breath for a preliminary screening test using a device approved by the commissioner of health for this purpose.@ The statute further provides that A [t]he results of this preliminary screening test may be used for the purpose of deciding whether an arrest should be made and whether to request an evidentiary test and shall not be used in any court proceeding except on those issues.@ Id.

Although we have not specifically defined the standard of review governing issues under ' 1203(f), we have repeatedly observed that this Court reviews motions to suppress de novo, see State v. Lawrence, 2003 VT 68, & 8 (mem.), and have recently held that, in assessing the reasonableness of a seizure leading to a DUI arrest, A we will apply a clearly erroneous standard to the trial court= s underlying historical facts, while reviewing the ultimate legal conclusion, whether the seizure of defendant was reasonable, given the underlying facts, de novo.@ Id. at & 9; see also State v. Simoneau, 2003 VT 83, & 14 (question whether facts support finding that stop was based on reasonable suspicion of wrongdoing is one of law). Here, similarly, we defer to the trial court= s findings of fact (which in this case were stipulated) while independently determining whether, as a matter of law, the facts satisfy the legal standard.

We have generally held that whether an officer= s suspicions of criminal activity are reasonable must be determined from the totality of the circumstances. State v. Warner, 172 Vt. 552, 553 (2001). Thus, while we have often recognized that the failure to pass a field sobriety test may be used to support a suspicion of DUI, we have never held that the adequate performance of such tests B standing alone B necessarily negates a reasonable suspicion where other evidence otherwise supports it. On the contrary, as we observed in State v. Orvis, 143 Vt. 388, 391 (1983), A while it is beyond dispute that external manifestations of intoxication are relevant and may be introduced at trial, this Court has never held that they are essential to a successful prosecution under 23 V.S.A. ' 1201(a)(1). To so hold would be to reward the experienced drinker who consumes excessive amounts of intoxicants without obvious physical impairment.@ (Internal citation omitted).

Consistent with this approach, other courts have held that the satisfactory performance of a field sobriety test is only one factor to consider in the totality of the circumstances, and does not automatically negate a reasonable suspicion of DUI. See, e.g., Gross v. Kan. Dept. of Revenue, 994 P.2d 666, 667 (Kan. Ct. App. 2000) (upholding administration of preliminary breath test and finding of probable cause to believe that defendant was DUI where B despite fact that defendant A for the most part, performed the [field sobriety] test satisfactorily@ B officer at sobriety check point detected odor of alcohol and observed glazed look in defendant= s eyes); State v. Medcalf, 675 N.E.2d 1268, 1271-72 (Ohio Ct. App. 1996) (where officer stopped defendant for speeding and smelled alcohol, satisfactory performance of field sobriety tests did not negate probable cause for arrest).

Here, similarly, we do not view defendant= s performance on the field sobriety tests as automatically negating a reasonable basis to believe that defendant may have been operating a vehicle while under the influence, and therefore subject to alco-sensor screening under ' 1203(f). Rather, we believe that viewed in their totality, the undisputed facts B including the strong odor of alcohol emanating from both the car and defendant= s person, defendant= s extremely bloodshot and watery eyes, the open presence of beer containers in the car, and defendant= s admission that he had been drinking the night before B support a reasonable basis to believe that defendant may have been operating the vehicle while driving under the influence. See, e.g., State v. Benoit, 173 Vt. 583, 585 (2002) (mem.) (officer= s observation of defendant= s bloodshot and watery eyes, odor of alcohol, and denial that he was driving support reasonable suspicion of DUI). Accordingly, we conclude that the officer had a reasonable basis to administer the alco-sensor tests under ' 1203(f), and that the results of those tests provided ample grounds to administer the subsequent breath test. The trial court= s order and judgment in favor of defendant must, therefore, be reversed.

Reversed.

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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Marilyn S. Skoglund, Associate Justice