

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-491

MAY TERM, 2005

State of Vermont	}	APPEALED FROM:
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Chittenden Circuit
Thomas Little	}	
	}	DOCKET NO. 2719-6-04 CnCr
		Trial Judge: James R. Crucitti

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

Defendant Thomas Little appeals from his conditional guilty plea to driving while intoxicated.* He argues that the trial court erred in denying his motion to suppress and dismiss. We affirm.

Defendant was charged with operating a motor vehicle in violation of 23 V.S.A. § 1201(a)(2). He filed a motion to suppress and dismiss, asserting that he had been denied the opportunity to obtain an independent blood test as authorized by 23 V.S.A. § 1203a(a) because the arresting officer had neglected to read him section eight on the DWI processing affidavit. After a hearing, the trial court denied defendant's motion, finding that the officer had complied with the requirements of 23 V.S.A. § 1203a. The court explained that during processing, the arresting officer had read defendant section seven of the processing affidavit, which provides:

If you submit to an evidentiary test, you have the right to have additional tests administered at your own expense, by an individual of your own choosing. The results will be sent only to you or your lawyer. At this time I am also providing you with a list of facilities in this area that are available to you for drawing an additional sample of your blood.

Defendant indicated that he understood what the officer had told him. The officer provided defendant with a list of testing facilities. Defendant then submitted to an evidentiary test. Before releasing him, the officer forgot to read defendant section eight of the processing form, which would have informed defendant that because he was being released, he would need to make his own arrangements if he wished to have an additional test taken. Section eight also prompts the officer to provide a standard blood test kit if the individual indicates that he wants an additional test; defendant was not provided with a test kit.

Based on these facts, the court concluded that the officer had complied with the requirements of 23 V.S.A. § 1203a because he had informed defendant of his right to have additional tests taken and he had provided defendant with a list of testing facilities. As the court explained, the statute did not require that defendant receive the information contained in section eight, which was designed to facilitate the independent testing process. The court found no evidence that the officer's failure to provide defendant with a test kit prevented defendant from having a sample of his blood drawn for further testing. The court therefore denied defendant's motion to suppress and dismiss. Defendant filed a conditional guilty plea, and this appeal followed.

Defendant asserts that the trial court erred in denying his motion to suppress. He states that section eight of the processing affidavit informs him that it is his responsibility to make arrangements for an independent blood test, and it

makes him aware that a test kit is available. Defendant maintains that neither of these rights is enunciated in section seven of the affidavit, and they cannot be deemed to have been waived because the information was not relayed to him. According to defendant, the arresting officer effectively prevented him from obtaining an independent blood test because he failed to provide the information contained in section eight.

We find no error in the trial court's denial of defendant's motion to suppress and dismiss. See State v. Simoneau, 2003 VT 83, ¶ 14, 176 Vt. 15 (when reviewing trial court's ruling on motion to suppress, this Court accepts trial court's findings of fact unless clearly erroneous, and reviews de novo whether the facts as found meet proper legal standard). A defendant has the right to have someone of his own choosing administer a chemical test, at his own expense, in addition to any test administered by police. 23 V.S.A. § 1203a(a). The failure or inability to obtain an additional test, however, does not preclude the admission of the police-administered test "unless the additional test was prevented or denied by the enforcement officer." Id. There is no support for defendant's assertion that the arresting officer prevented him from obtaining an additional test or denied him this right by failing to read section eight of the affidavit. As the trial court found, the officer read defendant section seven of the processing affidavit and provided defendant with a list of testing facilities. This information was sufficient to inform defendant of his statutory right to an independent blood test.

Defendant relies on State v. Normandy, 143 Vt. 383 (1983) and State v. Karmen, 150 Vt. 547 (1988) to support his assertion that the officer violated his right to obtain an independent blood test. Defendant's reliance is misplaced. In both Normandy and Karmen, the defendants were detained in police custody after submitting to an evidentiary test. We held that the evidentiary test results should be suppressed because police had failed to inform the defendants that police could arrange for an independent blood test should defendants wish to exercise this right. Normandy, 143 Vt. at 387; Karmen, 150 Vt. at 549. In Normandy, police neglected to read the following information to the defendant: "Since I am taking you to jail, you must tell me at this time if you want a blood test so I can make arrangements." 143 Vt. at 385. As we explained in Normandy, a defendant could not be expected to possess independent knowledge that he had such a right, and because police had detained the defendant, they were "required to read the appropriate paragraph on the implied consent form, which explicitly tells a defendant that assertion of the right to an independent sample is a prerequisite to the existence of that right." 143 Vt. at 387.

In this case, unlike those discussed above, defendant was not detained in police custody, and he was explicitly informed of his right to obtain an independent breath test. The officer's failure to read him section eight on the implied consent form, or provide him with a test kit, did not deny defendant his right to an independent test nor did it prevent him from obtaining such a test. We find no error in the court's denial of defendant's motion to suppress and dismiss.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

* The State notes that the written plea agreement in this case does not indicate that defendant entered a conditional plea. In light of our disposition of this appeal, we need not resolve this issue.

