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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-146

NOVEMBER TERM, 2005

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Washington Circuit
Patrick Gibbons	}	
	}	DOCKET NO. 23-2-05 Wncs

Trial Judge: Geoffrey W. Crawford

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

Defendant appeals the district court=s order upholding the civil suspension of his driver=s license. We affirm.

At approximately nine o=clock on the evening of January 27, 2005, defendant=s vehicle broke down at a convenience store in Warren, Vermont. In response to a call from a store clerk, state troopers arrived at the store to investigate whether defendant or his friend had been operating a motor vehicle while intoxicated. When the troopers arrived at approximately ten o=clock, the clerk informed them that the men had left but would return shortly to deal with defendant=s disabled vehicle. Thirty minutes later, defendant and his friend returned. One of the troopers observed defendant walk around the side of his vehicle and yell out to his friend that he was Aall set@ and Aready to go.@ The vehicle had been started, and the engine was idling. At that point, the trooper engaged defendant in a conversation. After observing indicia of intoxication, the trooper asked defendant to provide a preliminary breath sample. Defendant complied. When the sample indicated a blood alcohol content (BAC) of .191%, the trooper asked defendant to perform field dexterity tests. Defendant agreed to do so, but had difficulty with the tests. After a second preliminary breath sample registered a BAC of .166%, defendant was arrested and processed for driving while intoxicated. Shortly after midnight, at the state police barracks, he provided a breath sample revealing a BAC of .153%.

At the final suspension hearing, a state chemist estimated that defendant=s BAC was .170% at half past ten on the evening in question. Following the hearing, the district court upheld the civil suspension of defendant=s driver=s license, concluding that defendant had operated his vehicle at ten-thirty on the night in question by running the engine with the intent to drive away. Further, the court concluded that even if defendant had only intended to push the vehicle away from the pumps, as he claimed, he would still have been Aoperating@ a vehicle as defined in the motor vehicle statute.

In defendant=s view, the district court=s conclusion that he operated his vehicle at ten-thirty that evening cannot stand because it is based on the court=s unsupported finding that he told the state trooper that his truck had broken down, but was now running, so he would be on his way. According to defendant, the trooper testified only that he had yelled out that he was all set and ready to go, which was consistent with his claim that he meant only for his friend to help him push his vehicle out of the way. In making this argument, defendant overlooks the trooper=s affidavit, which was admitted as an exhibit at the hearing. See 23 V.S.A. ' 1205(j) (affidavits of law enforcement officers shall be admissible evidence). In that affidavit, the trooper states that after he heard defendant yell that he was all set, defendant told him Athat his truck had broken down and that he was going to be on his way.@ In concluding that defendant was Aoperating@ his vehicle, the court relied on this evidence and the fact that defendant had his vehicle=s engine running.

The court did not find credible defendant=s claim that, by yelling he was all set and ready to go, he meant only that he wanted help pushing the vehicle away from the pumps. Plainly, the trooper=s affidavit supported the disputed finding, which, in turn, supported the district court=s conclusion that defendant operated a motor vehicle at ten-thirty on the evening in question. See State v. Tongue, 170 Vt. 409, 412 (2000) (trial court=s findings of fact will be upheld unless they are unsupported by evidence or clearly erroneous, and its conclusions of law will be upheld if supported by findings).

Nevertheless, defendant argues that the district court could not suspend his license because (1) the issue at a civil suspension hearing is whether the arresting officer had reasonable grounds to believe that the defendant was operating a motor vehicle while intoxicated, and (2) in this case, the trooper wrote nine o=clock as the time of operation in his affidavit and testified at the hearing that he did not believe that defendant was operating a vehicle at ten-thirty that evening. We find no merit to this argument. The trooper testified that he noted nine o= clock as the time of operation based on his conversation with the store clerk and the videotape from the store security camera. Although the trooper answered Ano@ when asked whether he believed that defendant had operated his vehicle after that time, he also testified that at approximately ten-thirty, he observed defendant walk around the side of his vehicle after starting the engine. Irrespective of the trooper=s understanding of the legal term Aoperation,@ the evidence unequivocally supported the court=s conclusion that defendant operated the vehicle at ten-thirty. See 23 V.S.A. ' 4(24) (in determining whether motor vehicle was Aoperated,@ term Ashall be construed to cover all matters and things connected with the presence and use of motor vehicles on the highway, whether they be in motion or at rest@); State v. Emmons, 173 Vt. 492, 493 (2001) (mem.) (defendant=s admission that he started vehicle=s engine demonstrated that he Aoperated@ vehicle within broad definition contained in 23 V.S.A. ' 4(24)); State v. Storrs, 105 Vt. 180, 183-84 (1933) (turning of ignition switch, whether it had any effect on engine or not, was Aoperation@ of motor vehicle under statute). Therefore, regardless of his subjective beliefs, the trooper had objectively reasonable grounds to believe that defendant was operating a vehicle while intoxicated, and the court was not precluded from suspending defendant=s license.

Defendant argues, however, that the district court erred in holding that he failed to meet his burden of proving the affirmative defense he raised under 23 V.S.A. ' 1201(f), which provides that a person can prove the absence of Aoperation@ by demonstrating that he A(1) had no intention of placing the vehicle in motion; and (2) had not placed the vehicle in motion while under the influence.@ According to defendant, pushing a disabled vehicle into a field is not Aoperating@ a motor vehicle even under the broad definition of the term in ' 4(24). Putting aside that defendant did not include this issue in his notice of issues provided to the State, see 23 V.S.A. ' 1205(h)(5) (no less than seven days before final hearing, defendant shall provide State with list of issues to be raised; defendant shall not be permitted to present evidence on any issue not included in required list of issues), we find this argument unavailing. Even assuming that steering and pushing an inoperable vehicle is not Aoperation@ of a motor vehicle under the statute, but see State v. Lansing, 108 Vt. 218, 225 (1936) (steering inoperable car downhill is Aoperation@ of motor vehicle within meaning of statute); State v. Tacey, 102 Vt. 439, 442-43 (1930) (steering inoperable car while it was being towed is Aoperating@ motor vehicle under statute), the evidence supports the district court=s finding that defendant ran his vehicle=s engine in anticipation of driving the vehicle.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice