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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-364

JUNE TERM, 2006

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Rutland Circuit
Garrick B. Johnson	}	
	}	DOCKET NO. 171-11-04 Rdcs

Trial Judge: M. Patricia Zimmerman

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

Defendant appeals from a district court judgment suspending his automobile operator=s license following a civil license suspension hearing. Defendant contends the court: (1) mischaracterized his claims; (2) misplaced the burden of proof; and (3) failed to make the requisite findings to support the judgment. We agree with defendant=s third contention, and therefore reverse and remand for further proceedings.

The material facts are not in dispute. On November 18, 2004, at approximately 11:40 p.m.,

defendant was operating a vehicle that struck a bridge in Poultney, Vermont. Defendant left the scene of the accident, but was later located by an investigating officer, who transported defendant to a police station for DUI processing. A breath test administered at 2:12 a.m. registered a BAC of .117 percent. At a subsequent civil suspension hearing the State submitted two affidavits from a State chemist, Darcy Richardson, one attesting to the reliability of the DataMaster unit used to determine defendant=s BAC and the other calculating defendant=s BAC at the time of operation by relating back from the DataMaster test result. In determining the BAC at the time of operation, Richardson factored-in defendant=s alcohol elimination rate, which Richardson assumed to be .015 per hour, and assumed that his last alcohol consumption was at least 30 minutes prior to operation. Richardson calculated that, at the time of operation, defendant=s BAC was .155 percent.

Defendant also submitted the affidavit of an expert chemist, Dr. Harvey Cohen, who based his calculations on information provided by defendant that he had consumed a number of shots of alcohol between 10:25 p.m. and 11:30 p.m.. Assuming that much of the alcohol later measured by the DataMaster test had not yet been absorbed at the time of the accident, and using a similar elimination rate of .015 per hour, Dr. Cohen concluded there was a reasonable likelihood that defendant=s BAC at the time of operation was less than 0.08 percent.

Defendant and a friend testified at the hearing to the specific number of shots that defendant had consumed and the time when he consumed then, and also produced the shot glass in question to show its size. Richardson then testified in rebuttal for the State. In light of defendant=s testimony and the drinking pattern that it revealed, Richardson revised her calculation to conclude that defendant=s BAC at the time of operation was .127 percent. On cross-examination, Richardson acknowledged that revising the amount of ounces per shot would yield a BAC of .099 percent; that revising the time when defendant had his last drink would yield a BAC of .089 percent; and that utilizing the lowest possible elimination rate of .010 per hour would yield a BAC of .076 percent. Richardson explained that while it was possible to have an elimination rate of .010 per hour, the average was between .018 and .022, and that .015 was a conservative average.

The court subsequently issued a written decision, finding in favor of the State. The court observed at the outset that the only contested issue was the relation back of the breath test, and that it was undisputed that

the statutory relation-back presumption did not apply because the test was administered more than two hours after the time of operation.[1] Under a caption for Afindings of fact,@ the court recited a number of findings which restated Richardson=s and Dr. Cohen=s various calculations of defendant=s BAC. Under its Aconclusions of law,@ the court noted that the only scenario in which the State=s expert calculated a BAC under .08 percent was utilizing an elimination rate of .010, and observed that .015 percent was a Aconservative average.@ The court then stated:

> The court cannot conclude that the defendant has challenged the foundation facts for the admissibility of the test result when related back based on a theoretical possibility that the defendant might have an elimination rate of .010%. Accordingly, the court finds that the defendant has not challenged the reliability of the test result when related back. . . . The state has met its burden of proof by a preponderance of the evidence.

Defendant subsequently moved for reconsideration, asserting that the court had mischaracterized his claims, misplaced the burden of proof on defendant, and failed to make the requisite findings to support the judgment. The court, in response, issued a brief entry order amending its conclusions to provide, Athe defendant did not have any burden of proof,@ and otherwise denied the motion. This appeal followed.

Citing the above-quoted language, defendant contends the court somehow misunderstood his claims to be a challenge to the admissibility or reliability of the DataMaster test results, or to require that he produce evidence to rebut the statutory relation-back presumption. We agree that the language is confusing and seemingly misplaced. Nevertheless, given the court=s clear initial recognition that the presumption does not apply and that the Aonly contested issue is the relation back of the breath test to the time of operation,@ we are not persuaded that the court applied an erroneous standard or burden of proof.

Defendant is correct, however, in asserting that the court did not make clear and specific findings that defendant=s BAC was 0.08 percent or more at the time of operation to support its ultimate conclusion that the

state had met its burden of proof. While the court explained in its conclusion that the BAC would be less than .08 percent only if processed at a lower than average rate of alcohol eliminationCa proposition rejected by the court as unfoundedCthe findings omit mention of any BAC, proven by a preponderance of evidence, of .08 percent or more at the time or operation. It is axiomatic that a judgment cannot stand if the district court=s Aconclusions are not supported by the findings.@ State v. Giard, 2005 VT 43, & 7 (mem.). Accordingly, we hold that the judgment must be reversed, and the matter remanded to the district court to amend its findings or for further proceedings consistent with the views expressed herein.

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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Brian L. Burgess, Associate Justice

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[1] 23 V.S.A. section 1205(n) provides:

> In a proceeding under this section, if there was at any time within two hours of operating, attempting to operate or being in actual physical control of a vehicle an alcohol concentration of 0.08 or more, it shall be a rebuttable presumption that the person=s alcohol concentration was 0.08 or more at the time of operating, attempting to operate or being in actual physical control.