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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-339

MARCH TERM, 2008

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 1, Orange Circuit
	}	
Franklin Driscoll	}	DOCKET NO. 513-12-06 Oecr
		Trial Judge: M. Patricia Zimmerman

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

Defendant appeals from a conditional guilty plea to driving under the influence (DUI) in violation of 23 V.S.A. § 1201(b) for refusing to consent to a blood alcohol test. On appeal, defendant contends that the trial court erred in denying his motion to suppress, arguing that he was not required to provide a blood sample because breath-testing equipment was reasonably available. We affirm.

The court found the following facts. On December 15, 2006, defendant was involved in a single-car crash on Route 110 in Chelsea. A Vermont state trooper arrived about thirty minutes after the accident. Defendant was in an ambulance, preparing to be transported to the hospital. The trooper spoke with defendant at the scene. The trooper smelled an odor of alcohol and also observed that defendant had bloodshot and watery eyes. Defendant admitted he was the driver of the car and that he had consumed alcohol. Thirty minutes later, after conducting a crash investigation, the trooper went to the hospital where defendant was being evaluated. The trooper asked medical personnel how long defendant would be in the hospital for continuous treatment and was told that defendant would probably remain at the hospital for a couple more hours. The trooper conducted field sobriety tests and defendant submitted to a preliminary breath test. Based on the results of these tests, the trooper asked defendant to provide a sample of blood for an evidentiary test. There was no breath-testing instrument in the hospital or in the trooper's police cruiser, but there was a DataMaster breath testing apparatus at the police barracks approximately a mile away. The trooper did not ask defendant if he would be willing to leave the hospital and go to the barracks for an evidentiary breath test. Defendant refused to provide a blood sample. Defendant was charged with DUI refusal to consent to an evidentiary test. 23 V.S.A. § 1201(b).

Defendant filed a motion to suppress the evidence of his refusal and to dismiss his case on the grounds that breath-testing equipment was reasonably available and therefore there was no basis

for law enforcement to ask him to provide a blood sample. Following a hearing, the district court denied the motion. Defendant entered a conditional plea and appealed.

A motion to suppress is a mixed question of law and fact and we will defer to the trial court's findings of fact unless they are clearly erroneous. State v. Pratt, 2007 VT 68, ¶ 4, __ Vt. ___ (mem.). We review the court's ultimate legal conclusions de novo. State v. Lawrence, 2003 VT 68, ¶ 9, 175 Vt. 600 (mem.).

Under 23 V.S.A. § 1202(a)(2), "[i]f breath testing equipment is not reasonably available . . . [a driver] is deemed to have given consent to the taking of an evidentiary sample of blood." In interpreting this section, we have explained that the Legislature "has expressed its preference for breath testing over blood testing," and therefore "[i]t is only when breath testing equipment is not reasonably available" that a person is deemed to give consent to taking a blood sample. State v. Yudichak, 147 Vt. 418, 419 (1986) (per curiam) (quotation omitted). Refusal to submit to an evidentiary test "may be introduced as evidence in a criminal proceeding." 23 V.S.A. § 1202(b).

On appeal, defendant argues that the State failed to prove that breath-testing equipment was not reasonably available. Defendant's main argument is that the trooper was required to provide defendant with the opportunity to leave the hospital and go to the police station to give a breath sample before the officer could determine that breath-testing equipment was not available. In support, defendant cites State v. Ratliff, 169 Vt. 599 (1999) (mem.), for the proposition that it is defendant's choice whether he was well enough to leave the hospital to give a breath sample. In Ratliff, the defendant was being treated in the hospital following a car accident for a chin injury that required stitches. The attending physician advised the investigating officer that the stitches would possibly open if defendant attempted to blow into the breath-testing equipment. Based on this information, the officer requested that the defendant provide a blood sample. The trial court found that breath testing equipment was reasonably available and the sole issue was whether defendant was able to give a sufficient sample of breath. Id. at 599. On appeal, we explained that the question of "[w]hether a person is able to give a sufficient sample of his or her breath for testing is an objective, factual inquiry, not a matter of the officer's subjective belief." Id. at 600. We concluded that the officer erroneously relied on the doctor's equivocal statement that the defendant's stitches might "possibly" open up to determine that the defendant was unable to provide a breath sample. Id. (emphasis omitted). We explained that "[t]he better practice, in this instance, would have been for the officer to have actually permitted defendant to attempt to provide a breath sample to determine whether or not he was able to give a sufficient sample." Id.

Defendant argues that the trooper in this case made a similar "subjective" decision that breath-testing equipment was not available based on the doctor's statement that defendant would probably be in the hospital for another two hours. Instead, defendant urges, the officer should have personally assessed defendant's physical ability to provide a breath sample and, presumably, to travel to the barracks to do so. We disagree. Extent and duration of medical treatment are not the kinds of assessments we normally rely upon police officers to make. Rather than relying on his own evaluation of defendant's injuries, the officer properly relied on the information from the emergency room doctor that defendant would probably be there for two hours more.

The circumstances presented here are distinguishable from Ratliff. The situation in Ratliff suggests, although it cannot be determined with certainty, that treatment for the defendant's injured chin was essentially completed when the subjective decision was made that the defendant could not

provide a sufficient sample of breath due to defendant's fresh stitches. We know in this case, however, so far as this officer was advised by the doctor, that defendant's treatment was not over when the officer decided the testing equipment was not available because defendant was not available to travel. The officer's only option was to personally assume medical responsibility for the defendant in transporting him to the barracks for a breath test—one of several sound policy reasons not to require police to present an individual ostensibly under hospital care with the choice of leaving the hospital to supply a breath sample. Such an option may interrupt treatment or interfere with the medico-patient relationship, or both. Furthermore, if a suspect elects to leave the hospital prior to discharge, or against medical advice, the officer may be confronted with unresolved medical issues.

The statute does not require law enforcement to make every effort possible to take a breath sample before requesting a blood sample; rather, the statute states that a person is deemed to give consent to a blood test when the breath-testing equipment is not reasonably available. 23 V.S.A. § 1202(a)(2). Although defendant contends he was physically able to leave the hospital and was released shortly after the trooper left the hospital, the trooper did not know in advance that defendant would be released so quickly. It was reasonable for the trooper to base his decision on the information he received from medical personnel.

Defendant argues that his case is like Yudichak, wherein we held that law enforcement was not authorized to take a blood test because there was no evidence "to indicate that breath testing equipment was not reasonably available or that defendant was unable to take a breath test." 147 Vt. at 420-21. Again, we disagree. There was evidence that breath testing equipment was only minutes away, but that defendant would not be discharged for another two hours. Thus, in practical terms, based on what the trooper was told, the equipment was not reasonably available since defendant was not available to use it. It is not reasonable to require officers to postpone other work for two hours. Nor is it reasonable to expect police to challenge or explore the exactitude of hospital staff pronouncements, or to seek out contrary patient opinions, while tracking emergency admissions resulting from traffic accidents. We understand, now, that defendant would have been available to take the test soon after the officer left the hospital. Perfect hindsight, however, does not make the trooper's request for a blood sample, under the circumstances presented to him, inconsistent with the statutory command to seek a breath test first when the equipment is reasonably available.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Brian L. Burgess, Associate Justice