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

ENTRY ORDER

SUPREME COURT DOCKET NOS. 2009-189 & 2009-190

NOVEMBER TERM, 2009

State of Vermont	}	APPEALED FROM:
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Chittenden Circuit
	}	
Todd H. Galipeau	}	DOCKET NOS. 135-3-09 Cncs &
	}	4775-11-08 CnCr
		Trial Judge: Ben Joseph

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

The State appeals from the trial court's order granting defendant's motion to suppress and dismiss a charge of driving under the influence and granting judgment to defendant in the civil suspension proceeding. We reverse the court's decision.

The record indicates the following. In November 2008, defendant was stopped for a traffic violation at approximately 8:00 a.m. Defendant advised the officer that he did not have his license with him, but later admitted that his license was suspended in connection with a previous DUI. While speaking with defendant, the officer smelled a moderate odor of mouthwash and intoxicants on defendant's breath. He also observed an open can of beer on the center console, an open and empty bottle of wine on the floor behind defendant's seat, and four other alcohol containers in the vehicle. The officer asked defendant if he had been drinking, and defendant stated that he had stopped drinking at 2:00 a.m. that morning. He indicated that he had had twelve drinks. The officer asked defendant to exit the vehicle. Defendant performed satisfactorily on the field sobriety exercises, but his preliminary breath test (PBT) indicated that he was well over the legal limit. Defendant was arrested for suspicion of DUI, and civil suspension proceedings were initiated.

In April 2009, defendant provided notice of the issues he intended to raise at the civil suspension hearing, and he further moved to suppress the evidence against him. He argued in relevant part that his performance on the field sobriety exercises dispelled any reasonable suspicion that the officer may have had as to defendant's level of impairment. Following a hearing, the court granted the motion to suppress and dismiss the criminal charge, and it granted judgment for defendant in the civil suspension proceeding. The court indicated as a preliminary matter that the administration of a PBT was a search and that an investigating officer must have probable cause to take such a test from a suspect. In this case, the court recounted, the officer stopped defendant because of an expired registration certificate. Defendant told the officer that he had consumed about twelve drinks between midnight and 2 a.m. The officer smelled alcohol and mouthwash on defendant's breath. Based on these facts, the court found that the officer had

a reasonable suspicion of DUI that justified the exit order. Nonetheless, the court continued, the officer then saw only one clue of intoxication on the walk-and-turn test and no clues during on the one-leg stand. The court concluded that because the field sobriety tests did not indicate that defendant was driving under the influence, the officer did not have probable cause to administer the PBT and the results of that test must be suppressed. As a result, the court found that the subsequent DataMaster test must also be suppressed because the officer lacked probable cause to arrest and process defendant for DUI. The State appealed from this decision.

The State argues, and defendant concedes, that the court applied an erroneous legal standard in reaching its conclusion. Under 23 V.S.A. § 1203(f), the State explains, an officer does not need probable cause for administering a PBT; he or she need only have "reason to believe" that the driver is operating under the influence. The State maintains that under the totality of the circumstances here, there was a sufficient basis to believe that defendant was driving under the influence despite his performance of the field sobriety exercises.

We agree. We have explained that "[in] the DUI context, a brief investigative detention is justified if a police officer has a reasonable and articulable suspicion of criminal activity, and may include a preliminary breath test if the officer has reason to believe that a person is driving under the influence." State v. Mara, 2009 VT 96A, ¶ 6 (quotations and citations omitted); accord 23 V.S.A. § 1203(f) ("When a law enforcement officer has reason to believe that a person may be violating or has violated section 1201 of this title, the officer may request the person to provide a sample of breath for a preliminary screening test . . . ."). Here, based on the trial court's findings, the officer had reason to believe that defendant was driving under the influence. See id. (in reviewing a ruling on a motion to suppress, we will uphold findings of fact unless clearly erroneous and review the legal conclusions de novo).

This case is very similar to our recent decision in State v. Mara. In Mara, the defendant was stopped for a traffic violation, and the officer observed signs that the driver was intoxicated. The driver had watery bloodshot eyes, and he smelled of alcohol. The defendant's speech was normal, however, and he successfully completed two of three field sobriety exercises. Following a PBT test, the defendant was processed for DUI. As in this case, the defendant argued that even if the officer was justified in ordering him out of the car, his performance of the field sobriety exercises dissipated any "reason to believe" that he was driving under the influence. Id. ¶ 4. The trial court agreed, and it granted the motion to suppress. We reversed. Given the indicia of intoxication noted above, we rejected the notion that the trooper's suspicion of DUI became unreasonable simply because the defendant passed field sobriety tests. We emphasized that "external manifestations of drunkenness are not required for an officer to have a reasonable suspicion of DUI and to administer a PBT." Id. ¶ 8. To hold otherwise, we continued, "would be to reward the experienced drinker who consumes excessive amounts of intoxicants without obvious physical impairment." Id. (quotation omitted). We concluded that "[a]dministering a PBT to a driver who has already performed three other field-sobriety tests and who is already out of his vehicle is a very slight intrusion, especially when weighted against the public's compelling interest in having drunk drivers off the roads." Id. ¶ 11.

The facts support a similar conclusion here. In this case, the court found that the officer had reason to suspect that defendant was driving under the influence when the officer asked defendant to exit the vehicle. Thus, he was justified in administering a PBT at that point. As we

observed in Mara, it "would create a very uncertain landscape for officers in the field" if we were to hold that while a PBT was justified at the time of the exit order, it was not allowed minutes later simply because defendant performed satisfactorily on the field sobriety exercises. Id. ¶ 9. Even if defendant's performance on the field sobriety tests alone might not have supported a reasonable suspicion of DUI, "it also did not as a matter of law compel the trooper to cease his roadside investigation." Id. ¶ 10. As stated above, the officer here observed numerous alcohol containers in defendant's vehicle, including an open beer can on the console. The officer knew that defendant's license was suspended based on a previous DUI. Defendant smelled of alcohol, and he admitted consuming twelve drinks earlier that morning. Under the totality of the circumstances, and the facts as found by the court, the officer plainly had a reasonable suspicion that defendant was driving under the influence, and the officer was justified in administering the minimally intrusive PBT. See id. ¶ 11 (reaching similar conclusion). The court erred in granting the motion to suppress, and we therefore reverse its decision. The case is remanded for entry of judgment in favor of the State in the civil suspension proceeding and for further proceedings consistent with this opinion in the criminal proceeding.

Reversed and remanded.

BY THE COURT:

Paul L. Reiber, Chief Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice