

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-497

APRIL TERM, 2002

State of Vermont

v.

Scott Hartigan

}	APPEALED FROM:
}	
}	District Court of Vermont, Unit No. 3,
}	Lamoille Circuit
}	
}	DOCKET NO. 81-8-01 LecS
}	
}	Trial Judge: Howard E. VanBenthuyzen
}	

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

Defendant appeals from a civil suspension of his driver's license for DUI. He contends the court erred in finding that his statutory right to counsel had not been violated. We affirm.

On the evening of August 23, 2001, defendant was stopped by an officer with the Stowe Police Department who observed defendant driving erratically. After noting an odor of alcohol and administering several field sobriety tests, the officer transported defendant to the police station for processing for suspected DUI. The processing was videotaped, and the initial audio portion is reasonably clear. The tape shows that defendant was secured to a chair in a small interview room and advised of his Miranda and implied-consent rights. Defendant indicated to the officer that he wished to speak with a lawyer before deciding whether to take the breath test. The officer, while seated at a desk next to defendant's chair, then placed a telephone call to the public defender, spoke briefly with the lawyer, and handed the telephone to defendant. The officer then rose, turned on a "white noise" function that suppressed the audio portion of the videotape so that none of the conversation between defendant and the public defender could be heard, and left the room, closing the door behind him.

The tape then shows defendant speaking on the telephone with the public defender for almost three minutes, although none of the conversation is audible. Defendant then moves the telephone away from his mouth, turns his head toward the door, and appears to speak. The officer, apparently in response, opens the door slightly, talks briefly with defendant, and leaves. Defendant thereupon resumes his telephone conversation with the public defender, but almost immediately turns and appears to speak toward the door again, at which point the officer reenters. The officer resumes his seat at the desk while defendant talks with the public defender for about 20 to 30 seconds, then turns to speak with the officer, prompting him to leave the room again and close the door. Within seconds, however, defendant places the telephone on the desk, the officer reenters, picks up the telephone, and speaks with the public defender for about thirty seconds. The officer then hands the telephone back to defendant, who speaks with the public defender for about another minute while the officer is present. Defendant then hands the telephone to the officer, who hangs up. Following this conversation, defendant provided a sample of his breath, which revealed a blood alcohol concentration of .242%.

At the civil suspension hearing, defendant moved to dismiss the charges, arguing that the officer's actions violated his statutory right to counsel under 23 V.S.A. 1202(c), by denying him a meaningful opportunity to consult with an attorney in private. Apart from the videotape, the only evidence adduced in support of the motion was defendant's brief

testimony, in which he stated that, as a result of the officer's actions, defendant had "felt confined in what I could speak to [the attorney] about. I didn't really feel comfortable about discussing my case with him or what procedure I should take" Defendant also denied that he had invited the officer into the room, although he acknowledged that the public defender had asked at one point to speak with the officer.

The court denied the motion to dismiss, noting that defendant had three minutes of uninterrupted private conversation with the public defender at the beginning of the call, which the court concluded was ample time to consult in a relatively uncomplicated DUI case. The court also found that the conversation was broken only when defendant himself invited the officer into the room on several occasions, and even appeared to invite the officer to speak with his attorney. Although the officer was present during a brief portion of defendant's conversation with counsel, the court found - in light of defendant's actions - that this was not a deliberate attempt to invade the privacy of the call, and that it was not sufficient to find a violation of defendant's statutory rights. The court then proceeded to review the evidence, found that all of the statutory elements for a civil suspension had been met, and entered judgment in favor of the State. This appeal followed.

Defendant renews his contention on appeal that the officer violated his statutory right to consult with counsel. He contends the trial court's findings that defendant invited the officer to enter, that the initial portion of the conversation was sufficient to provide a meaningful consultation, and that the latter portion when the officer was present did not violate this right, were all unwarranted assumptions based on a silent videotape that was contradicted by defendant's testimony. The seminal decision on the statutory right to counsel under 23 V.S.A. 1202(c) is State v. West, 151 Vt. 140, 144 (1988), in which we held unequivocally that "[a] defendant's right to a meaningful conversation with counsel contemplates a reasonable degree of privacy." We also explained that the test to be applied in determining whether the defendant's right has been violated is an objective one:

In considering this issue, however, we apply an objective test which focuses on whether, under the totality of the circumstances, reasonable efforts were made to afford defendant an opportunity to communicate privately with counsel. Neither the subjective beliefs of the defendant nor those of the police are determinative; rather, the test focuses on the nature of the physical setting within which the events take place and, in order to avoid reliance on after-the-fact, self-serving declarations of either the police or defendant, how a reasonable person in the defendant's position would have understood his situation.

Id. at 145.

Viewed in this light, the circumstances do not support defendant's claim. The videotape indisputably reveals that defendant was afforded complete privacy to consult with counsel. The officer placed the telephone call, turned off the audio recording, left the room and closed the door. Defendant then spoke without interruption for several minutes in private until he signaled for the police. Although defendant testified to the contrary, the videotape amply supports the court's inference that defendant himself called for the police. See State v. Thompson, 162 Vt. 532, 535 (1994) (we will not overturn factual findings of trial court if supported by credible evidence and not clearly erroneous). Furthermore, as noted, the test of whether a defendant is afforded a meaningful opportunity to consult with counsel is an objective one. Here, we agree with the trial court that, viewed objectively, the circumstances show that defendant was afforded amply opportunity to consult with counsel in private until he voluntarily interrupted the conversation. Having signaled for the officer to enter, a reasonable person would not have felt inhibited or constrained by the relatively brief period in which the officer was present at the end of the conversation. Although defendant testified that he did feel "confined" by the police presence, such "after-the-fact, self-serving declarations," West, 151 Vt. at 145, are not the test of whether the statutory right has been infringed. Accordingly, we conclude the trial court correctly rejected defendant's claim that his statutory right to consult with counsel was violated, and properly denied the motion to dismiss.

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

James L. Morse, Associate Justice

Denise R. Johnson, Associate Justice