

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-507

AUGUST TERM, 2003

	}	APPEALED FROM:
	}	
State of Vermont	}	District Court of Vermont, Unit No. 3,
	}	Franklin Circuit
v.	}	
	}	
Adam Rheume	}	DOCKET NO. 57-6-02 Frcs
	}	
	}	Trial Judge: Michael S. Kupersmith
	}	

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

Defendant appeals from a district court order of civil license suspension based on a refusal to submit to a blood alcohol test, contending that the court erred because the officer lacked authority to request a blood rather than a breath sample. We affirm.

Following an automobile accident, defendant was transported to the Northwest Medical Center in St. Albans, where " after being treated for a lacerated tongue and lip " he was met and interviewed by a state trooper. The trooper' s affidavit indicates that he asked defendant for a sample of his blood, and that defendant refused. Defendant testified that he recalled the officer reading him his rights, but could not recall the officer asking for a blood sample. Defendant' s father testified that he met the officer at the hospital, and that the officer indicated defendant had refused a blood test.

Defendant moved to exclude the evidence of his refusal, arguing that: (1) the officer' s entry into a private hospital area was invalid absent evidence of consent; and (2) defendant was in custody and had not validly waived his rights to counsel and to remain silent. The motion also stated that the State must prove defendant was incapable of providing a breath sample, but did not allege that he was willing and able to do so. At the hearing on the motion, defendant argued briefly that the evidence did not show that defendant was capable of decision, and otherwise submitted the matter on the basis of his written arguments. Following the hearing, defendant submitted proposed findings, arguing that the request for a blood sample and subsequent refusal were invalid because the officer had not validly entered defendant' s room; the evidence showed that defendant was incapable of decision or unconscious; defendant was not afforded the statutory thirty-minutes to make a decision about submitting to an evidentiary test; and the officer lacked reasonable grounds to believe that defendant was under the influence.

The court subsequently issued a written decision, denying the motion and entering judgment in favor of the State. This appeal followed.

Defendant contends the officer lacked authority to request a blood sample under 23 V.S.A. § 1202(a)(2), which provides:

If breath testing equipment is not reasonably available or if the officer has reason to believe that the person is unable to give a sufficient sample of breath for testing or if the law enforcement officer has reasonable grounds to believe that the person is under the influence of a drug other than alcohol, the person is deemed to have given consent to the taking of an evidentiary sample of blood. If in the officer' s opinion the person is incapable of decision or unconscious or dead, it is deemed that the person' s consent is given and a sample of blood

shall be taken.

Defendant argues that the blood sample request was invalid because there was no evidence showing that he was unable to provide a breath sample. We note that defendant did not argue below that he was willing and able to provide a breath sample, and the court did not specifically address the issue. See State v. Hatcher, 167 Vt. 338, 348 (1997) (issues not raised below not preserved for review on appeal). Nevertheless, the record evidence shows that defendant had received stitches for lacerations to his tongue and lip just before speaking with the officer, which would support a finding that the officer had "reason to believe" defendant was unable to provide a breath sample. Defendant relies on State v. Ratliff, 169 Vt. 599, 600 (1999) (mem.) and Miner v. District Court, 136 Vt. 426, 430 (1978), for the proposition that the statute requires objective evidence of the person's actual inability to give a breath sample, not merely the officer's subjective belief. The statute at the time of these decisions provided that a blood sample could be obtained "if the person is unable to give a sufficient sample of breath for testing." Ratliff, 169 Vt. at 599 (emphasis added). The provision was subsequently amended to its current form, which now provides that a blood sample may be taken where, as here, the officer "has reason to believe" that the person is unable to provide a breath sample. 23 V.S.A. §1202(a)(2). Accordingly, the pre-amendment decisions do not undermine the evidentiary basis for the officer's decision in this case.

Defendant also asserts that there was no evidence indicating that breathalyzer equipment was unavailable. Apart from the fact that this argument was not raised below, it is immaterial in light of our holding that the record evidence supplied ample reason to believe that defendant was unable to provide a breath sample. Accordingly, we discern no basis to disturb the judgment.

Affirmed.

BY THE COURT:

Jeffrey L. Amestoy, Chief Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice