

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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2002-531

DECEMBER TERM, 2003

	}	APPEALED FROM:
	}	
State of Vermont	}	
	}	
v.	}	District Court of Vermont, Unit No. 3,
	}	Washington Circuit
Giselle Roberts	}	
	}	
	}	DOCKET NO 75-5-02 WnCs
	}	
	}	Trial Judge: Edward J. Cashman

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

Defendant appeals from an order and judgment of the Washington District Court denying her motion to suppress evidence and suspending her driver's license. Defendant claims on appeal that she was unable to provide an adequate breath sample due to a medical condition and that the State was therefore obliged to administer a blood test, which it failed to do. We affirm.

Defendant challenges the district court's application of 23 V.S.A. § 1202(a)(2) to the facts of her case. Section 1202(a)(2) provides that in cases involving driving while intoxicated (DUI), if an " officer has reason to believe that the person is unable to give a sufficient sample of breath for testing . . . the person is deemed to have given consent to the taking of an evidentiary sample of blood." 23 V.S.A. §1202(a)(2). Whether a person can provide an adequate breath sample depends on an objective view of the facts and not on the investigating officer's subjective belief. State v. Ratliff, 169 Vt. 599, 600 (1999) (mem.). The district court in this case found that defendant was able to give a sufficient breath sample, but that she refused to do so. Defendant contends that finding is erroneous because it is based on the officer's subjective belief. Defendant therefore seeks reversal of her license suspension and suppression of her refusal to submit to the breath test.

The district court accurately noted that this case " presents a factual rather than a legal issue." The court concluded that the evidence supports a finding that defendant did not provide an adequate breath sample to permit a valid test and that she did so " purposely rather than as a result of any medical condition." We will overturn the court's findings only upon a showing that they are clearly erroneous or unsupported by the evidence. State v. Zaccaro, 154 Vt. 83, 86 (1990). We view the evidence in the light most favorable to the prevailing party and exclude the effects of modifying evidence. Gilbert v. Davis, 144 Vt. 459, 461 (1984). Even if substantial evidence to the contrary exists or there are inconsistencies in the evidence, we will let the trial court's findings stand if credible evidence supports them. Id.

When viewed in the light most favorable to the State, the evidence supports the court's finding that defendant refused to provide a sufficient breath sample. The State charged defendant with leaving the scene of an accident and refusing to submit to a breath test after defendant hit a utility pole in Barre. The investigating officer determined that the car involved in the collision belonged to defendant's husband. The officer went to defendant's home to investigate. While speaking to defendant at her home, the officer noted that her eyes were red and watery, that she moved unsteadily, and that she spoke indistinctly. She told the officer that she had been driving the car when it hit the pole and that she consumed a beer prior to the accident, but not afterwards. After refusing a preliminary breath test, defendant agreed to go the Barre Police Department so that the officer could process her for DUI. At the police station, the officer tried to administer a breath test, but was unable to get a sample after three attempts. Defendant refused any further testing, claiming that she had a medical condition that prevented her from providing an adequate breath sample. The officer

asked defendant if she wanted an independent test and defendant declined.

Defendant's medical records were entered into evidence and showed that although she has complained of chest pain, she has not complained of difficulty with breathing or with expelling air from her lungs. Her physical therapist testified and was unable to say whether defendant's chest pain affects her respiratory ability. The State's expert witness testified that the breath testing machine will accept a breath sample without requiring the subject to blow "terribly hard" into it.

Given the evidence and the trial court's role as sole arbiter of credibility and evidentiary weight, we find no basis to overturn the court's finding that defendant refused to give a breath sample for reasons other than her medical condition. Thus, the State was not obligated under § 1202(a)(2) to obtain a blood test, and the court's judgment and order must be affirmed.

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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John A. Dooley, Associate Justice

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Paul L. Reiber, Associate Justice