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ENTRY ORDER

SUPREME COURT DOCKET NOS. 2004-451 & 2004-554

APRIL TERM, 2005

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Chittenden Circuit
Mary Ann Ebersole-Leblanc	}	
	}	DOCKET NOS. 405-8-04 Cncs & 4513-8-04 Cncr
		Trial Judge: Michael S. Kupersmith

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

Defendant appeals the suspension of her drivers license and her conviction for drunken driving, arguing for reversal of the trial court's decision to admit the results of a breath test she took. We affirm.

On August 21, 2004, a Colchester police officer stopped defendant for suspicion of driving under the influence (DUI). After administering field sobriety tests, the officer took defendant into custody to process her for DUI. Defendant had agreed to submit to a breath test, which the officer administered at the police station. Because of the way defendant blew into the machine, the first test resulted in an "invalid sample" reading. The officer told defendant that her failure to blow hard enough a second time would be considered a refusal to take the test. Defendant agreed to a second test, which revealed a blood alcohol level (BAC) of .173.

Defendant moved to suppress the results of the breath test in the subsequent civil suspension and criminal proceedings. At the hearing on defendant's motion, the arresting officer and a State chemist testified. Through the chemist's testimony, defendant sought to prove that the results of the second test were invalid. Defendant argued that the arresting officer violated Department of Health procedures for gathering a breath sample by not waiting fifteen minutes after the first test to administer the second one.

The court rejected defendant's theory and denied the motion to suppress. There was no dispute that the machine used to analyze the breath sample was functioning properly at the time defendant submitted to the test. According to the court's findings, defendant's first test failed because she interfered with the airflow necessary for the machine to register a valid sample. The court concluded that, under the circumstances, it was unnecessary for the officer to wait fifteen minutes after the first test to administer the second test. The result showing a BAC of .173 was, therefore, admissible against defendant in the civil and criminal proceedings. After the court denied defendant's motion, it entered judgment for the State in the civil suspension proceeding. Subsequently, defendant entered a conditional nolo contendere plea to the DUI charge subject to her appeal of the suppression issue.

On appeal, defendant claims the court should have suppressed the breath test results because the State did not prove that the officer administered the test in accordance with Department of Health regulations. She argues that a fifteen minute waiting period between breath tests—a standard recommended by the Vermont Criminal Justice Training Council—is necessary before the court may admit the test results into evidence. Defendant's argument has no merit

under our precedents. Results of a breath test are admissible "if the State shows that the analysis [of the test] was performed by an instrument that meets the performance standards contained in the rules of the Department of Health, and the instrument met those performance standards while employed to analyze the sample." State v. Rolfe, 166 Vt. 1, 13 (1996). The procedures established by the Vermont Criminal Justice Training Council "do not affect the foundational requirements for admissibility." State v. Massey, 169 Vt. 180, 187 (1999). The defendant may, however, challenge the reliability of the results if the test is taken without following the Council's recommended procedures. Id. As the Court explained in State v. McQuillan,

> As long as the State demonstrates that the analysis of the challenged sample was performed by an instrument that meets the Department's performance standards, the defendant may not otherwise challenge the admissibility of the test result; rather, the defendant can only contest the foundation facts or urge the factfinder to give little or no weight to the test.

2003 VT 25, ¶ 7, 175 Vt. 173. In this case, there was no dispute that the instrument used to administer and analyze the test was functioning properly and in accordance with the relevant regulations. Thus, the trial court properly denied defendant's motion to suppress because the test results were admissible.

Defendant argues in the alternative that even if the question is one of weight and not admissibility, the trial court still erred. She claims the court should not have placed any weight on the results of her breath test because the State chemist testified that the results were unreliable. The trial court found otherwise. Thus, unless defendant demonstrates that the court's finding has no evidentiary support, we will not disturb it on appeal. State v. Zaccaro, 154 Vt. 83, 86 (1990).

Defendant has not met her burden. The State chemist did not testify that the test results were unreliable as defendant asserts. The chemist explained that the arresting officer's failure to wait fifteen minutes between the first and second tests meant that he did not follow the established procedures for sample gathering. The concern behind the waiting period was to allow for the dissipation of mouth alcohol if that was the cause of the "invalid sample" reading. Thus, the chemist testified that the reliability of the results from a test preceded by an "invalid sample" reading must be determined on a case by case basis. She acknowledged that the instrument used in this case will give an "invalid sample" reading when the machine does not detect sufficient airflow over a certain period of time. On the basis of this evidence, and the testimony of the arresting officer, the court found that the "invalid sample" reading during the first test was caused by a lack of airflow because defendant's tongue intermittently blocked the mouthpiece and not because of the presence of mouth alcohol. On this record, the court could find that the test results were both admissible and reliable.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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Frederic W. Allen, Chief Justice (Ret.),
Specially Assigned

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