

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-473

JUNE TERM, 2006

State of Vermont } APPEALED FROM:

}

v. } District Court of Vermont,

}

Unit No. 2, Chittenden Circuit

James C. Emery }

}

DOCKET NO. 323-8-05 CnCs

Trial Judge: Dean B. Pineles

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

Defendant James C. Emery appeals from the trial court=s order granting judgment to the State in this civil suspension proceeding. He argues that the trial court erred in reaching its decision because his breath sample was not collected in compliance with Department of Health regulations. We affirm.

In August 2005, defendant was charged with driving under the influence of intoxicating liquor, second offense, and civil license suspension proceedings were instituted. The only issue defendant raised at the civil suspension hearing was whether police had observed him for fifteen minutes before administering the breath test, and if not, whether his breath test results were admissible. The court found the breath test results admissible and reliable, and it granted judgment to the State.

In reaching its conclusion, the court made the following findings. A police officer observed defendant for fifteen minutes before administering the first breath test. Defendant stated that he had not burped, belched, or vomited during the observation period. The first test produced an invalid sample. A second test, administered four minutes later, also produced an invalid sample. Shortly thereafter, the officer administered a third test, which showed defendant=s BAC at .329. A fourth test, administered four minutes later, showed a .322 BAC.

Defendant argued that the two invalid samples were caused by mouth alcohol resulting from a burp or belch, and that the officer should have observed defendant for an additional fifteen-minute period following the second invalid sample to ensure that any mouth alcohol was dissipated. The court rejected this argument. Given defendant=s statement that he had not burped before the first test, the court explained, it was persuaded by the State=s argument that the invalid samples resulted from defendant not blowing hard enough into the machine, rather than mouth-alcohol contamination. In any event, the court noted, regardless of the cause of the invalid samples, the Datamaster machine determined that the third and fourth samples were valid, and there was no evidence to suggest that the machine was not working properly. Indeed, the court explained, defendant=s argument assumed that the Datamaster was working properly when it invalidated the first two samples.

Based on expert testimony presented by the State, the court found that the Datamaster could detect potentially interfering compounds, such as mouth alcohol, in a breath sample, and that in such a case, it would determine that the sample was invalid. The machine could also detect an inadequate sample of breath, and in such circumstances, it would also produce an invalid result. Thus, if defendant had burped, belched, vomited, or produced an inadequate sample of breath, the machine would have rejected the third and fourth samples. It did not. The court thus concluded that, although defendant was not observed for fifteen minutes between the second invalid sample and the two valid samples, the latter samples were nonetheless accurate. The court therefore entered judgment for the State. Defendant appealed.

On appeal, defendant argues that the trial court erred in admitting his breath test results because, absent a fifteen-minute waiting period after an invalid sample, the subsequent sample could not be collected consistent

with Department of Health regulations. Defendant attempts to draw a distinction between the officer=s compliance with the fifteen minute observation period, which he acknowledges goes to the weight of the evidence rather than its admissibility, and the performance of the instrument itself. He asserts that, with respect to the instrument, Athere is a separate and distinct fifteen minute rule that is a foundational requirement to admissibility.@ Assuming the test results were properly admitted, defendant argues, the trial court erred in placing any weight on the results because they were not collected according to Department of Health standards.

These arguments are without merit. As defendant recognizes, Awe have consistently refused to suppress breath tests based on claims that the processing officer failed to follow the adopted procedures for administering the tests.@ State v. McQuillan, 2003 VT 25, ¶ 8, 175 Vt. 173. AAs 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 . . .@ Id., ¶ 7. Putting aside the murky distinction that defendant attempts to draw, he challenges the reliability of the instrument for the first time on appeal. He did not present any evidence to this effect at the hearing, and indeed, as the trial court found, his argument below assumed that the machine was working properly. Defendant waived his argument by failing to raise it below, and we therefore do not address it. See Bull v. Pinkham Eng=g Assocs., 170 Vt. 450, 459 (2000) (AContentions not raised or fairly presented to the trial court are not preserved for appeal.). Absent evidence to challenge the Datamaster=s reliability, defendant=s arguments Ago only to the weight that the jury could give to the test results and not to admissibility.@ McQuillan, 2003 VT 25, ¶ 9 (quotations omitted). The court did not err in admitting the breath test results.

We similarly reject defendant=s unsupported assertion that the trial court could not place any weight on the test results. As noted above, the State presented expert testimony that the Datamaster would detect mouth alcohol, and would not produce a reading if mouth alcohol were present in the sample. Additionally, defendant stated at the time of the first test that he had not burped during the observation period. The trial court found the State=s evidence persuasive, and we will not disturb its assessment of the evidence on appeal. See Kanaan v. Kanaan, 163 Vt. 402, 405 (1995) (trial court=s findings entitled to wide deference on review because it is in unique position to assess the credibility of witnesses and weigh the evidence presented). We

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find no error.

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Brian L. Burgess, Associate Justice