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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-479

NOVEMBER TERM, 2006

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Orleans Circuit
Jeffrey Whitcomb	}	
	}	DOCKET NO. 525-9-04 OsCr

Trial Judge:

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

Defendant appeals his conviction following a jury trial for driving while intoxicated, third offense, and driving with a suspended license. We affirm.

Defendant first argues that the district court erred in denying his motion to suppress, which was based on the contention that defendant=s rights under the Public Defender Act, 13 V.S.A. " 5201-5277, were violated when the police officer who detained him prevented defendant from obtaining an independent blood test. We

review the district court=s decision on a motion to suppress de novo. State v. Rheaume, 2004 VT 35, & 8. The relevant facts are undisputed. Defendant requested an independent blood test after he was stopped on suspicion of DUI. The police officer allowed defendant to call the nearest hospital to arrange for a test, and further offered defendant transportation to the hospital. After speaking to the hospital, however, defendant refused the police officer=s offer of transportation, stating repeatedly that he could not afford the test. Defendant argues that the police officer denied his right to an independent test by not transporting defendant to the hospital despite his objections.

We addressed a similar scenario in State v. Benoir, 174 Vt. 632 (2002)(mem.). There, the defendant argued that he had a right to an independent blood test at state expense and that this right was violated when the hospital where he sought the test refused to administer it in the absence of up-front payment, which the defendant could not afford. In rejecting this claim, we first held that AVermont=s statutory scheme does not provide a DUI suspect with the right to an independent blood test at the state=s expense.@ Id. at 632-33. Rather, the DUI statute gives an individual the right to obtain an independent blood test, while the Public Defender Act gives a facility providing such a test the right to seek reimbursement from the defender general in the event that the individual cannot pay. Id. (citing 23 V.S.A. ' 1203a(a) & 23 V.S.A. ' 1203a(e)). Furthermore, the DUI statute explicitly states that Afailure or inability [to obtain an independent test] shall not preclude the admission in evidence of the test taken at the direction of an enforcement officer unless the additional test was prevented or denied by the enforcement officer.@ Id. at 633 (quoting 23 V.S.A. ' 1203a(a)).

Defendant attempts to distinguish the instant case on the basis that the defendant in Benoir was present at the hospital when he was denied the test by the hospital due to inability to pay, whereas here, any denial took place over the telephone, and the exact content of that conversation was unknown to the police officer. Whether the hospital told defendant he would be required to pay for the test in person at the hospital, as in Benoir, or over the telephone, as here, is irrelevant to the analysis. The police officer did not deny defendant his right to an independent blood test; to the contrary, the police officer attempted to facilitate an independent blood test by arranging the phone call to the hospital and offering transportation. See Benoir, 174 Vt. at 633

(AThere has been no state interference here with defendant=s statutory right and therefore suppression is unwarranted.@). It was defendant who chose not to obtain the test.

Ultimately, our case law is clear that there simply is no right to an independent blood test at the state=s expense. Benoir, 174 Vt. at 632-33. To the extent defendant=s argument for suppression rests on such an alleged right, it necessarily fails. The police officer was not required to advise defendant of a right that did not exist.

Defendant also argues that it was error for the district court to allow his public defender to withdraw without securing a valid waiver of the right to counsel from defendant. In addition to a showing of competency, a valid waiver of counsel requires that a defendant make the waiver Aknowingly, with full awareness of the consequences of the waiver.@ State v. Pollard, 163 Vt. 199, 206 (1995) (citation omitted). As part of this determination, Athe trial court should first >conduct sufficient inquiry into the defendant=s experience, motives, and understanding of what he is undertaking.=@ Id. at 207 (citation omitted). Here, a review of the transcripts of the relevant hearing reveals that these standards do not apply, as defendant never expressed an intention or desire to waive the right to counsel. Rather, what defendant requestedCand was grantedCwas a series of continuances to find private counsel. When he was unable to, the court promptly assigned another public defender upon defendant=s request.

At the October 28, 2005 hearing, defendant stated that he was in the process of securing private counsel. The district court allowed the public defender to withdraw, and gave defendant two weeks to secure private counsel, accept appointed counsel, or decided to represent himself. Defendant made no indication that he desired to represent himself. At the November 23, 2004 hearing, another defense attorneyCapparently not officially assigned to defendantCand a new judge tried to determine what was happening in the case. The court clerk reported to the judge that defendant had sought to waive counsel at the prior proceeding; similarly, the prosecuting attorney stated that there had already been a waiver of counsel. But the prosecuting attorney subsequently realized that this was error, and defendant stated clearly that he continued in negotiations with private counsel and did not wish to represent himself. The court continued the matter for 30 days, at which

time defendant would be required to have a private attorney enter his or her appearance, re-apply for public defender services, or decide to represent himself. On December 21, 2004, defendant submitted an application for public defender services, and on December 28, 2004, a public defender was assigned.

Because defendant at no point sought to waive his right to counsel, as defendant concedes, the district court was not required to inquire into the basis and sufficiency of a waiver. Indeed, it is illogical to ask whether defendant completed a knowing, voluntary and intelligent waiver of his right to counsel when there is no indication that he was seeking to waive his right to counsel. Similarly, it is inaccurate to say that defendant was forced to proceed without representation during this time period when the only proceedings that took place were status conferences to determine whether defendant had been able to secure representation. There was no denial of the right to counsel.

Affirmed.

BY THE COURT:

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Brian L. Burgess, Associate Justice