

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

ENTRY ORDER

SUPREME COURT DOCKET NOS. 2006-433 & 2006-434

FEBRUARY TERM, 2007

State of Vermont	}	APPEALED FROM:
	}	
v.	}	District Court of Vermont,
	}	Unit No. 1, Windsor Circuit
Matthew Springer	}	
	}	DOCKET NOS. 366-3-06 WrCr & 78-3-06 WrCs

Trial Judge: Theresa DiMauro

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

Defendant Matthew Springer appeals from his conditional guilty plea to driving under the influence, and the trial court=s order granting judgment to the State in civil suspension proceedings. Defendant argues that his breath test results should have been excluded because they were unreliable, and that the court should not have granted judgment to the State in the civil suspension case because the State failed to sustain its burden of proof. We affirm.

Defendant was arrested on suspicion of DUI in March 2006, and he provided two breath samples to police. The first, taken at 10:15 p.m., indicated that defendant=s breath alcohol level was .159. The second

test, taken at 10:19 p.m., returned a reading of .129. Criminal and civil suspension proceedings were instituted, and shortly thereafter, defendant filed a notice of contested issues in the civil case, challenging almost all of the issues allowed by 23 V.S.A. ' 1205(h).

In April 2006, defendant filed a motion to exclude his breath test results in both cases, asserting that the test results failed to conform to performance standards adopted by the Vermont Department of Health, and therefore the State could not establish the necessary foundation for admission. Defendant cited Department of Health Rule (C)(1)(4), which requires in relevant part that a DataMaster Abe capable of determining the breath alcohol concentration of the person sampled with an accuracy of plus or minus 10%.@ Defendant maintained that this rule implicitly required that if two breath samples were obtained, the results must be within ten percent of one another to be admissible. Defendant attached an unsworn statement from his expert to support this assertion. The State opposed the motion, arguing that defendant misinterpreted the relevant performance standard, and that the accuracy of the DataMaster was not gauged by comparing two breath samples (both Aunknown@ values), but rather by assessing the quality of the breath analysis against two known valuesCan internal standard and an external standard. The State attached to its motion an affidavit from its chemist who averred, among other things, that the DataMaster met and exceeded the minimum accuracy requirement of plus or minus ten percent, and that the external and internal standards in this case indicated that the machine was working properly.

The court held an evidentiary hearing in August 2006. The State explained at the outset that the parties had limited the issues in both proceedings to the Atwo test issue,@ that it assumed that the other issues were waived, and that the State and defendant would introduce affidavits. Defendant indicated that he had no objection to the affidavit and the breath ticket being admitted pending the court=s decision on the suppression issue.* Defendant also stipulated for purposes of both proceedings that the arresting officer conducted the DataMaster test in accordance with his training.

Defendant then presented his expert witness who testified that the Department of Health regulations implicitly required that if two breath tests were given, they must be within ten percent of one another to satisfy

the relevant performance standards. The expert acknowledged that the rules did not require more than one test, but asserted that if two test results did exist, then this provided one way to determine if the DataMaster complied with the regulations. Defense counsel questioned his expert about the affidavit prepared by the State's chemist. The expert also testified about the purpose of the external and internal standard readings reflected on defendant's breath ticket. In their closing arguments, the parties approached the issue before the court somewhat differently. The State argued that defendant failed to discredit the test results; defendant maintained that because the samples failed to satisfy the performance standards, the State must proceed under V.R.E. 702 if it wanted to admit the test results.

In a written order, the court denied defendant's motion to exclude and it granted judgment to the State in the civil suspension proceedings. The court found, as the parties stipulated, that the arresting officer administered the breath tests in accordance with his training and certification. It also found that the DataMaster was functioning properly, noting that the external standard reading on both tests was essentially the same. The court explained that defendant's argument depended wholly on his expert's assertion that the Department of Health regulations implicitly required that two individual test results must be within +/- 10% from one another. The court found no such requirement in the plain language of the regulation, which instead required only that the *instrumentation* shall be capable of determining the breath alcohol concentration of the person sampled with an accuracy of +/- 10%. The court explained that while a national committee may have recommended that two breath tests not vary more than 10% from each other, as defendant's expert testified, the Vermont Department of Health had not adopted this recommendation. Indeed, the court noted, Vermont was a one test state, and case law established that the absence of a second test did not require the exclusion of a single valid test.

The court rejected defendant's assertion that the two test results proved that the DataMaster was incapable of producing accurate results. It found that the DataMaster had not evaluated two similar breath samples differently, but rather it had measured two separate samples of breath at two separate times. Thus, while the evidence of the second sample could support an inference that defendant's breath alcohol content was only .129 and not .159, it did not demonstrate that the test results were inaccurate and must be excluded.

Even if the regulation were interpreted to require that two test results, read together, were accurate within plus or minus ten percent, the court concluded that the test results here fell within that standard. It explained that, assuming *arguendo* that the two tests measured identical samples, the Atrue@ reading may have been the mean of the two test results, or .144. Using this analysis, the two results were within ten percent of the mean. The court thus concluded that the record did not support defendant=s argument for exclusion of the DataMaster test results. It consequently denied the motion to exclude, and directed the clerk to enter judgment for the State in the civil suspension proceedings.

Defendant filed a motion to reconsider, arguing that the court erred in reaching its conclusion because the State failed to present any evidence to rebut the testimony of its expert as to the unreliability of the test results. Defendant also argued that: there was insufficient evidence to support the court=s finding that the DataMaster was functioning properly; the court should not have cited the external standards as evidence that the machine was capable of measuring his breath accurately; and the court erred in concluding that the results were within ten percent of a mean value. Defendant also moved to set aside the judgment in the civil suspension proceeding, arguing that the State failed to establish the reliability and accuracy of the breath test results, and therefore failed to sustain its burden of proof.

The court denied both motions. It explained that the sole basis of defendant=s motion to exclude was that the test results failed to meet the performance standards promulgated by the Department of Health in its regulations. Those standards were attached to the motion and formed the basis of the expert=s opinion attached to the motion. The court rejected defendant=s attempt to expand the scope of his motion either during, or subsequent to, the hearing. The court reiterated that it had rejected the expert=s construction of the regulation because it was at odds with the regulation=s plain language, and stated that it needed no expert testimony to arrive at that conclusion. As to the civil case, the court explained that defendant had stipulated that the only contested issue would be compliance with the regulations as presented through his expert and defendant agreed that the State=s exhibits could be admitted, including a stipulation that the officer administered the test in accordance with his training. The court thus denied the motion. This appeal followed.

We first address defendant=s challenge to the court=s denial of his motion to suppress. Defendant

argues that the test results should have been excluded because the two tests differed by more than ten percent and they therefore violated the relevant performance standard. He maintains that the trial court's findings are not supported by the record, and the court erred in concluding that the State was not required to present expert evidence at the hearing.

We find no error in the trial court's decision. See State v. Simoneau, 2003 VT 83, & 14, 176 Vt. 15 (when reviewing trial court's ruling on motion to suppress, Supreme Court accepts trial court's findings of fact unless clearly erroneous, and reviews de novo whether the facts as found meet proper legal standard). The plain language of the regulation does not require that if two tests are administered, the results must be within ten percent of one another to comply with the performance standard, and thus, be admissible. Rather, the performance standard requires only that the DataMaster be capable of determining the breath alcohol concentration of the person sampled with an accuracy of plus or minus ten percent. See Vermont Department of Health Breath and Blood Alcohol Analysis (C)(1)(3), (4), 4 Code of Vermont Rules 13 140 003. The evidence before the trial court, which included the chemist's affidavit, see V.R.Cr.P. 47(b)(1), shows that the DataMaster complied with this requirement. The breath test results were therefore admissible. See State v. McQuillan, 2003 VT 25, & 7, 175 Vt. 173 (explaining that when State shows that challenged sample was analyzed using a/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.) (emphasis omitted) (citing State v. Rolfe, 166 Vt. 1, 13 (1996)). The State was not required to present expert testimony to rebut defendant's interpretation of the relevant performance standard.

We note, moreover, that defendant's expert also testified that the internal and external standards reflected the DataMaster's measurement of two known values, as opposed to its measurement of an unknown value, i.e., an individual's breath alcohol level. The expert stated that the purpose of the internal standard was to ensure that the calibration of the estimate did not vary by more than plus or minus ten percent of the value that the DataMaster measured when it was calibrated, and the external standard measured the vapor provided by the simulator. Both breath tickets were entered into evidence. The internal standard was verified in both

tests and the external standard readings varied by only .001. These readings indicate that the DataMaster was functioning properly and that it was capable of determining defendant's breath alcohol level with an accuracy of plus or minus ten percent.

We need not decide if the court erred in discussing the mean value of the tests, as defendant argues, because we conclude that the performance standard does not require that the two tests be compared at all. We similarly need not address defendant's assertion that the court erred in finding that the two tests measured two different breath samples, nor his argument that admitting his breath test results undermine the very scientific reliability of breath testing. These arguments go to the weight of the evidence, not its admissibility. Because defendant's motion to exclude rested solely on his interpretation of the relevant performance standard, and because his interpretation is without merit, the motion was properly denied.

We turn next to defendant's challenge to the trial court's order granting judgment to the State in the civil suspension proceeding. Defendant maintains that the State failed to meet its burden of proof because it failed to present sworn testimony or affidavits regarding the breath test. Specifically, defendant argues that there was no evidence as to the reliability and accuracy of the test results, as required by 23 V.S.A. ' 1205(b)(1)(D).

Crediting this argument would allow defendant to take unfair advantage of the way in which this case was presented to the trial court. By agreement of the parties, the sole issue for the court's determination in both cases was whether the breath test results were inadmissible because they violated a certain performance standard. This presumably superseded defendant's earlier-filed notice of contested issues. The court rejected defendant's argument, and thus, the breath test results and the arresting officer's affidavit were admissible. In light of the limited issue presented to the court, the State met its burden of proof. See State v. Lowe, 169 Vt. 575, 576 (1999) (mem.) (in civil suspension proceeding, State must prove by preponderance of evidence that officer had reasonable grounds to believe that person was operating vehicle in violation of 23 V.S.A. ' 1201, that person submitted to a test, and that the test result indicated a BAC of .08 or more at the time of operation).

The record shows that defendant challenged the initial admissibility of the breath test results, not their

validity and accuracy once admitted. Cf. 23 V.S.A. ' 1205(h)(1) (D) (at final civil suspension hearing, a defendant may raise issue of whether testing methods used were valid and reliable and whether test results were accurate and accurately evaluated). Once the court found that the breath test results were admissible, defendant necessarily conceded that the court could find the results reliable and accurate. See Rolfe, 166 Vt. at 13-14 (breath test results admissible where State shows analysis performed by an instrument that meets the performance standards contained in rules of Department of Health, and instrument met those performance standards while employed to analyze sample). As noted above, defendant=s breath test included the readings of the internal and external standards, which indicate that the DataMaster was working properly. We also conclude that the court could consider the State chemist=s affidavit in reaching its decision, given the way in which the case was presented to the court as well as defendant=s awareness of this evidence, including his discussion of it at the hearing. See Miller v. Superior Court, 124 Cal. Rptr. 2d 591, 602 (Ct. App. 2002) (AWhere documents are not formally introduced, but it is apparent that the court and the offering party understood that they were in evidence, they must be so considered.@) (quotation and citation omitted).

We note that the Legislature intended that a determination that a breath test is admissible because the machine complied with the Department of Health rules also meets the State=s burden in a civil suspension hearing. Upon admission of the test results, the State is entitled to a presumption that the breath test results were valid, reliable, and accurate. See 23 V.S.A. ' 1205(h)(1)(D) (evidence that test was taken and evaluated in compliance with rules adopted by department of health is prima facie evidence that testing methods used were valid and reliable and that test results are accurate and were accurately evaluated); see also Rolfe, 166 Vt. at 14 (presumption arises only after test result is admitted). Defendant did not present any evidence to rebut this presumption because his arguments below were addressed solely to the initial admissibility of the breath tests. See Rolfe, 166 Vt. at 14 (discussing burden shifting in civil suspension proceedings); see also Lowe, 169 Vt. at 350 (same). In any event, the record supports a finding that the tests were valid, reliable, and accurate, and the evidence here was plainly sufficient to warrant judgment in the State=s favor. We note, moreover, that both breath tests were well above the legal limit.

The cases cited by defendant do not convince us otherwise. They largely involve procedural

requirements not present here or situations where evidence was created and submitted after judgment was rendered and the case was on appeal. See, e.g., Henning v. Dir. of Revenue, 790 S.W.2d 513, 514 (Mo. Ct. App. 1990) (where appellant was required to provide court of appeals with legal file containing all evidence necessary for determining question presented and failed to do so, appeals court would not consider document attached to appellant=s brief as part of record on appeal, nor would it consider an affidavit created nearly three weeks after trial); Smith v. Diamond Milk Prods., 198 N.E.2d 72, 73 (Ohio 1964) (under Ohio procedure, evidence must be included in a Bill of exceptions, @ certified by the trial court, to be considered part of record on appeal, and thus in this context, court stated that depositions or affidavits relating to facts in the case do not become a part of the record on appeal simply because they are filed in the court below@); see also Suydam v. Williamson, 61 U.S. 427, 433-38 (1857) (describing method applied in 1800=s for bringing claims of error before court of appeals). We find the reasoning of Miller, 124 Cal. Rptr. 2d at 602, more persuasive, and given the procedural posture of this case, we find no error in the trial court=s decision.

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice

* Defense counsel was presumably referring to the arresting officer=s affidavit, which was conditionally admitted at the hearing.