Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NOS. 2018-024 & 2018-070

OCTOBER TERM, 2018

State of Vermont v. John Kipp*	}	APPEALED FROM:
	}	
	}	Superior Court, Franklin Unit,
	}	Criminal Division
	}	
	}	DOCKET NOS. 22-3-17 Frcr & 282-3-17 Frcr
		Trial Judge: A. Gregory Rainville

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

Defendant appeals the denial of his motion to suppress with respect to the civil suspension of his driver's license and his conviction for driving under the influence (DUI). We affirm.

The relevant facts, as found by the criminal division of the superior court, are as follows. Shortly after midnight on March 4, 2017, dispatch informed a St. Albans police officer that a driver had called to report that a Volvo was being driven erratically at a specified location. The identified caller supplied police with the Volvo's license plate number. After learning that the Volvo was registered to John Kipp, the officer proceeded to defendant's address. Shortly before turning onto defendant's road, the officer was flagged down by the caller, who informed the officer that defendant had just turned onto the road where the officer had learned defendant resided. After turning onto that road, the officer noticed taillights of a vehicle through the trees. The officer initially went down the wrong driveway but within minutes approached defendant's residence. Once there, the officer observed a Volvo with the reported license plate parked in the driveway.

The officer approached the house and knocked at the glass door of a three-season enclosed porch. After knocking at the porch door and not getting an immediate response, the officer proceeded through the unlocked porch door to knock at the inner door to the main residence. Through the inner door's glass panel, the officer could see a male and female inside the home. The male, later identified as defendant, answered the door. Upon questioning by the officer, defendant acknowledged that the Volvo was his car and that he had just driven home. At the officer's request, defendant stepped from the doorway into the porch area, where the officer explained that he had received a report that defendant was driving erratically. In response to the officer's questioning, defendant stated that he had drunk a couple of beers that evening at an establishment in St. Albans. When the officer asked defendant if he would mind performing some field sobriety tests, defendant obliged and indicated that he would prefer to perform the tests inside his residence. After defendant attempted to perform the tests, the officer asked if he would agree to submit to a preliminary breath test (PBT). Defendant declined, and the officer arrested him for DUI.

On the way to the police station, defendant stated for the first time that his friend, later identified as his roommate, was driving the car that evening. When later interviewed by police, the roommate denied driving the car, and the court explicitly found not credible defendant's claims that his roommate was driving. Defendant did not testify at the hearing on the motion to suppress, but his girlfriend testified that she had been driving the Volvo on the night in question.

At the police station, after speaking to an attorney, defendant consented to an evidentiary breath test which revealed a blood-alcohol content of .208 percent. Defendant was charged with DUI, first offense.

Following an evidentiary hearing, the superior court denied defendant's motion to suppress, concluding that: (1) no illegal seizure took place when the officer entered defendant's porch to knock on the inner door to his residence; (2) the officer did not coerce defendant into performing field dexterity exercises; (3) defendant's initial statements to the officer were not the result of a custodial interrogation and were not coerced; and (4) given that defendant's initial statements to the officer would not be excluded, the evidence was sufficient to establish the elements of the charge. Following the court's ruling, defendant entered a conditional plea of guilty to the DUI charge. He then filed notices of appeal of both the criminal conviction and the civil suspension of his license.

"In reviewing a motion to suppress, we apply a de novo standard to the trial court's legal conclusions and a clear-error standard to its factual findings." State v. Alexander, 2016 VT 19, ¶ 13, 201 Vt. 329 (quotation omitted). Thus, we will uphold the court's factual findings "unless, taking the evidence in the light most favorable to the prevailing party, and excluding the effect of modifying evidence, there is no reasonable or credible evidence to support them." State v. Koenig, 2016 VT 65, ¶ 7, 202 Vt. 243. On the other hand, "[w]hether the facts as found meet the proper standard justifying a particular police action is a question of law" that we review without deference to the trial court. Id.

Defendant first argues on appeal that the warrantless entry into his home compels exclusion of all subsequently obtained evidence. According to defendant, because the officer failed to obtain a search warrant before intruding into the curtilage of his home, the entry was illegal and all evidence should be suppressed as fruit of the illegal search. Defendant asserts that any consent he allegedly gave following the officer's illegal entry into his home was involuntary.

Article 11 of the Vermont Constitution protects against unreasonable governmental searches and seizures "only to areas where individuals have conveyed an expectation of privacy in such a way that a reasonable person would conclude that [they] sought to exclude the public." Koenig, 2016 VT 65, ¶ 15. This Court has recognized a heightened expectation of privacy in one's home and its curtilage, id. ¶ 13; however, "[a] knock-and-talk, where a police officer approaches a residence to knock on the door, or otherwise approaches the residence seeking to speak to the inhabitants, is . . . an exception to the protection against warrantless searches." Id. ¶ 16; see also State v. Pitts, 2009 VT 51, ¶ 7, 186 Vt. 71 (stating that police officer having reasonable suspicion that individual is or has been engaged in criminal activity "may briefly detain the individual to investigate the circumstances that gave rise to the suspicion"); State v. Ford, 2007 VT 107, ¶ 4, 182 Vt. 421 ("Under both the Vermont and the United States Constitutions, we have recognized that a brief detention, its scope reasonably related to the justification for the stop and inquiry, is permitted in order to investigate the circumstances that provoke suspicion." (quotation and alteration omitted)). Thus, "[i]t is well-established that police officers are entitled to enter residential property, including portions that would be considered part of the curtilage, to carry out legitimate police business." Koenig, 2016 VT 65, ¶ 16.

"In carrying out their duties during a knock-and-talk, the police are limited to the areas where the police are expected to go." Id. ¶ 16; see 1 W. LaFave, Search and Seizure: A Treatise on the Fourth

Amendment § 2.3(f) (5th ed. 2012) ("[W]hen the police come onto private property to conduct an investigation or for some other legitimate purpose and restrict their movements to places visitors could be expected to go (e.g. walkways, driveways, porches), observations made from such vantage points are not covered by the Fourth Amendment."). Here, the police officer knocked at the glass door of the three-season porch and then proceeded into the porch to knock at the door connecting the porch to the main residence. These facts are very similar to the conduct of the officer in State v. Elkins, which we concluded was lawful. 155 Vt. 9, 14 (1990). In that case, a deputy sheriff who had pursued the defendant to his home after observing traffic violations went through a screen door of a screened-in porch and knocked on the interior door of the residence. We concluded that, in doing so, the deputy acted within his authority to conduct an investigation. Id. We cited a case for the proposition that a front porch is part of a normal route of access for persons visiting the premises. Id.; see also Koenig, 2016 VT 65, ¶¶ 3, 21 (concluding that record evidence was sufficient to establish reasonable basis for state trooper to believe that entry inside attached structure was normal point of public access to residence). Similarly, we conclude here that it was objectively reasonable for the officer to determine, after initially knocking at the glass porch door, that entry through the porch to the inner door to the main residence was a normal point of public access to the residence.

We find unavailing defendant's contention that the superior court's analysis on this issue was unsound because it did not mention the fact that, once inside the porch and at the main door, the officer waved defendant over to talk to him. The video recording from the officer's body camera suggests some sort of arm movement by the officer, but defendant readily responded to the officer's knock at the door and it is not evident that defendant's response was due to the arm gesture rather than the knock, even assuming that made a difference with respect to our analysis.

Defendant's remaining arguments have little merit. We reject defendant's argument that he was coerced into doing the field dexterity tests. "[O]n the highway, pursuant to both the Fourth Amendment and Article 11, the police may administer field-sobriety tests when an officer has reasonable, articulable suspicion that an individual is driving under the influence of alcohol." State v. McGuigan, 2008 VT 111, ¶ 8, 184 Vt. 441. The video recording of the incident supports the court's finding that the officer asked defendant if he would mind performing the tests. As in McGuigan, defendant neither challenges the court's finding nor cites to any other evidence of coercion. Id. ¶ 19. The fact that defendant was within the curtilage of his home rather than on the highway when the officer asked him if he would mind performing the tests does not suggest that defendant was coerced into performing the tests.

We also reject defendant's argument that the statements he made to the officer must be suppressed because the officer did not first read him his Miranda rights—that he had a right to remain silent and to have an attorney present before engaging in any custodial interrogation. "Miranda warnings are required whenever a person is subjected to custodial interrogation, which means 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' " State v. Sole, 2009 VT 24, ¶ 16, 185 Vt. 504 (quoting Miranda v. Arizona, 384 U.S. 436, 444 (1966)). The relevant inquiry, viewed under the totality of the circumstances, "is whether a reasonable person would believe he or she were free to leave or to refuse to answer police questioning." Id. (quotation omitted). "However, officers are not required to provide Miranda warnings for suspects that are not in custody." State v. Sullivan, 2013 VT 71, ¶ 28, 194 Vt. 361. "Questioning that occurs during a routine traffic stop does not constitute 'custodial interrogation' for the purposes of the Miranda rule." Sole, 2009 VT 24, ¶ 16 (quotation omitted).

In this case, the officer was investigating a possible DUI during what was essentially a routine traffic stop, albeit at defendant's residence. Although the officer was plainly investigating a possible DUI based on the report of the identified caller—and in fact stated so to defendant—defendant was not in custody until his performance with the dexterity tests, coupled with other indicia of intoxication

observed by the officer, convinced the officer that there was probable cause to arrest him. Defendant was not interviewed at a police station or in a patrol car, but rather in his home under circumstances that did not create a police-dominated atmosphere. See Sullivan, 2013 VT 71, ¶ 30 (discussing factors for determining whether there was custodial interrogation sufficient to trigger Miranda warnings). When he declined the officer's suggestion that they go outside to conduct the field dexterity tests, the officer did not force him to do so. See id. ¶ 31. His movements were not restricted, and he was not isolated from his friends who were present in his home during the interaction. See id. ¶ 32. There were two uniformed officers present; while both were armed, they never displayed their weapons. The length of the questioning was limited. Id. ¶ 33. Although the officer told defendant the reasons he suspected him of driving under the influence, the officer did not repeatedly confront defendant with evidence of his guilt in a way that would suggest defendant was not free to end the encounter. See id. ¶ 34. Considering the totality of the circumstances, we reject defendant's argument that the officer was required to give defendant Miranda warnings before conducting an investigation based on the identified caller's report. Defendant's reliance on State v. Tran, 2012 VT 104, 193 Vt. 148, is misplaced. In that case, we determined that the defendant was in custody and entitled to Miranda warnings when he was taken from his mother's home and interrogated for an hour by two policemen in their car. Tran, 2012 VT 104, ¶¶ 17, 22. We found significant not only the close quarters in the police car but also the repeated accusatory questioning that created a coercive environment. Id. ¶¶ 15-16, 19. As discussed above, the same factors are not present in this case.

Defendant argues, however, that, even if he was not in police custody during the encounter at his residence, all of his statements to the officer were coerced by improper police conduct and thus involuntary. In support of this argument, defendant points to his inexperience with police confrontations and the fact that the officer engaged in coercive techniques by confronting him with evidence of his guilt, asking him to step outside, and asking him if he would mind providing a preliminary breath sample to see where they stood. Neither the examples proffered by defendant nor the video recording reveal any unduly coercive techniques by the investigating officer. Nor does defendant's inexperience with police encounters demonstrate that the statements he gave to police were involuntary.

Because of our rejection of defendant's other arguments, we find unavailing his argument that, absent the illegal seized evidence, there was insufficient evidence of the charged crime. Finally, we decline to address defendant's argument, raised for the first time in his reply brief, that the investigating officer's "stop" at defendant's home was not supported by reasonable suspicion. See State v. Lizotte, 2018 VT 92, ¶ 16 n.4 (declining to address state constitutional issues raised for first time in reply brief).

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice