

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 NO. 2018-360

JULY TERM, 2019

State of Vermont* v. Michael J. Rowe	}	APPEALED FROM:
	}	
	}	Superior Court, Windham Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 39-4-16 Wmcs
		Trial Judge: Michael R. Kainen

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

The State appeals the court's order declining to suspend defendant's driver's license following a civil license-suspension hearing. We reverse and remand for entry of a civil-suspension order.

The State filed a civil-suspension proceeding against defendant after he was arrested for driving under the influence and a blood-alcohol test revealed a blood-alcohol concentration (BAC) of .175 at the time of arrest. 23 V.S.A. § 1205. After a hearing, the court made the following findings. After a day of skiing and a visit to a pub, defendant did a couple of donuts in the parking lot. The police were notified and stopped defendant's vehicle. The arresting officer smelled alcohol on defendant's breath. Defendant reported that he had consumed two beers. The officer asked him to perform field-sobriety exercises. The officer had special training in DUI detection and how to conduct field-sobriety exercises, including the Horizontal Gaze Nystagmus. The officer observed five clues. The officer indicated that defendant's eyes were not bloodshot or watery, his speech was normal, and he was walking steadily. Defendant passed one field-sobriety test and had two clues on the walk and turn. The officer remembered defendant coughing and believed that he coughed during the fifteen-minute waiting period before taking the evidentiary breath test.

In addition to the above findings, the trial court considered the following additional evidence. The court admitted portions of video from the officer's body camera and cruiser camera, and a police detective sergeant testified that the arresting officer conducted the exercises almost in conformance with the standards.

Defendant presented testimony from a forensic chemist. The chemist testified that it is important to have a fifteen-minute observation period before administering the breath test because if a person burps, belches, or vomits during that period, alcohol from the stomach can offset the reading on the Datamaster. The chemist testified that a cough would not impact the Datamaster reading. The State also presented testimony from the chemist. The chemist explained that a person could be intoxicated and not exhibit signs of impairment if the person had a strong tolerance for

alcohol. He stated that if defendant's BAC was .175 at the time of the test, he would have had a BAC of .195 at the of operation if he did not consume additional alcohol. The court questioned the chemist about what BAC would result if a 225-pound male consumed different types of drinks. The chemist testified that a hypothetical 225-pound male consuming a strong twelve-ounce beer of eight percent alcohol would, on average, result in a maximum BAC of .034.

Defendant's girlfriend testified that defendant had been sick a week earlier and still had a bad cough. She stated that she and defendant had the same number of drinks but she was not with defendant during all the time he was skiing. She testified that she drank cider and defendant drank beer. She remembered that she had four drinks. She stated that defendant had a beer at noon, another after that, and a third and fourth at a bar after skiing. She did not remember the size or alcohol content of defendant's drinks. The court found that defendant's girlfriend was very credible.

Defendant testified that he started drinking around noon with three sample pours and had a beer at the bar at the end of the day. He stated that he did not drink alcohol while skiing and not with his girlfriend. He did not know the alcohol content of the beer he consumed. He stated that he weighed 225 pounds.

The statute contains a rebuttable presumption that a person has a BAC above .08 at the time of operation if there is a test result of .08 or higher within two hours of operation. The trial court concluded that the statutory presumption was burst in this case by defendant's testimony regarding how much he had consumed combined with the chemist's testimony of what defendant's BAC would have been at the time of operation assuming that level of consumption. The court found based on defendant's presentation in the video and the results of the field-sobriety tests that defendant did not appear intoxicated and the test result of .175 was not accurate.¹ The court credited defendant's account of his drinking and concluded that the State had not met its burden of showing that defendant had a BAC above .08. The State appeals.

Civil-suspension proceedings use presumptions to achieve the goal of having a summary procedure for removing impaired drivers from the road. State v. Burnett, 2013 VT 113, ¶ 23, 195 Vt. 277. First, the statute states, "Evidence that the test was taken and evaluated in compliance with rules adopted by the Department of Public Safety shall be prima facie evidence that the testing methods used were valid and reliable and that the test results are accurate and were accurately evaluated." 23 V.S.A. § 1205(h)(1)(D). We have explained that this provision creates a presumption that the test results were accurate, shifting to defendant the burden of going forward with evidence challenging the test result. Burnett, 2013 VT 113, ¶ 23. To rebut the presumption, a defendant must present "evidence to show that the reliability and validity of the testing methods and the accuracy of the test results is not true in defendant's particular case." Id. (quotation omitted).

Second, the statute provides that if a person has an alcohol concentration above the legal limit within two hours of operation, "it shall be a rebuttable presumption that the person's alcohol

¹ We note that the sole issue in the civil-suspension proceeding was whether defendant was above the legal limit at the time of operation. 23 V.S.A. §§ 1205(h)(1)(D), 1201(a)(1). The State was not required to prove that defendant was impaired. Therefore, evidence that defendant did not appear impaired in the video or act drunk was of little relevance.

concentration was above the applicable limit at the time of operating, attempting to operate, or being in actual physical control.” 23 V.S.A. § 1205(n). The purpose of the presumption is to eliminate “the necessity for the State to introduce evidence that relates a breath test result back to the time of operation.” State v. Pluta, 157 Vt. 451, 455 (1991). To rebut this presumption, a defendant must produce evidence sufficient to support a finding that his BAC was under .08 at the time of operation. Id. at 454. “Once the presumption disappear[s], the State retain[s] the burden to produce evidence showing defendant was intoxicated at the time he operated his vehicle.” State v. Giard, 2005 VT 43, ¶ 12, 178 Vt. 544 (mem.).²

On appeal, the State argues that the court’s findings and conclusions are not supported by the evidence. This Court will reverse if the “court’s factual findings are not supported by the evidence, or if its conclusions are not supported by the findings.” Id. ¶ 7. The State contends that the court improperly rejected its actual BAC test results based on testimony that a hypothetical 225-pound male consuming a single twelve-ounce, eight-percent beer at noon would attain no greater than .034 BAC. The State submits that there was no evidence that in this particular case that was the timing, size, or alcohol content of the drinks consumed by defendant, so the hypothetical BAC of .034 is not anchored to any evidence in this case. The State maintains that it provided evidence that the test was taken and evaluated in compliance with the rules adopted by the Department of Public Safety, that this evidence was prima facie evidence of the accuracy, validity, and reliability of the test result, and that the court’s finding that the defendant did not have a BAC of at least .08 was not supported by the evidence.

The testimony regarding defendant’s alcohol consumption was as follows. Defendant testified that he had three sample drinks at noon and an additional drink around 4:00 or 4:30. Defendant’s girlfriend testified that defendant had a beer at noon, another after that, and a third and fourth at a bar after skiing. Neither defendant nor his girlfriend could remember the size or alcohol content of defendant’s drinks. In response to a question from the court, the state chemist testified that if a 225-pound man had consumed a twelve-ounce microbrew of eight percent alcohol at 12:30, his BAC “could theoretically be as high as a .034” at the time of operation.

Defendant’s evidence was insufficient to defeat the presumption that the BAC test results were accurate and accurately evaluated (as well as the presumption that the results reflected defendant’s BAC at the time of operation) because defendant did not provide specific evidence that the testing methods were not reliable or valid, Burnett, 2013 VT 113, ¶ 23, or “to show that the presumed fact was not true in the particular case, given its actual underlying facts and circumstances.” Pluta, 157 Vt. at 454. The hypothetical to which the state chemist responded did not coincide with the actual underlying facts as testified to by defendant and his girlfriend. The court credited the testimony of both defendant and his girlfriend regarding the amount of alcohol that defendant consumed, but their testimony was not entirely consistent. Defendant claimed that after the three sample pours at noon, he consumed only one more beer later in the day. Defendant’s girlfriend testified that defendant had four drinks throughout the day, including two after skiing. In any event, the hypothetical to which the state chemist responded did not coincide with either factual scenario. The record includes no evidence concerning the likely BAC level of a 225-pound male who consumes the amounts to which defendant or his girlfriend testified. Given the absence

² Because this case turns on the validity of the BAC test result, rather than the soundness of the presumption relating that BAC to the time of operation, the first statutory presumption, in § 1205(h)(1)(D), is the one most critical to this case.

of any evidence that defendant's BAC was below .08 at the time of operation under defendant's stated facts, the presumptions in 23 V.S.A. § 1205(h)(1)(D) and § 1205(n) remained intact.

Because the statutory presumptions were not defeated, the evidence as presented supported suspension of defendant's license. Therefore, we reverse and remand.

Reversed and remanded.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice