THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2005-0044, State of New Hampshire v. Seth O'Donnell, the court on December 14, 2005, issued the following order:

Having considered the briefs and the record submitted on appeal, we conclude that oral argument is unnecessary for the disposition of this appeal. The defendant, Seth O'Donnell, appeals the trial court's findings that he was guilty of driving while intoxicated, first offense, and of speeding. We affirm.

The defendant first argues that the trial court erroneously denied his motion in limine to exclude evidence of his performance on the field sobriety tests because the tests were conducted before he was arrested and, he asserts, his consent to them was not implied pursuant to RSA 265:84 (2004).

In matters of statutory interpretation, we are the final arbiter of legislative intent as expressed in the words of the statute considered as a whole. State v. MacMillan, 152 N.H. 67, 70 (2005). "We ascribe to statutory words and phrases their usual and common meaning unless the statute itself suggests otherwise." State v. Armstrong, 151 N.H. 686, 687 (2005).

RSA 265:84 provides, in pertinent part:

> Any person who drives a vehicle upon the ways of this state shall be deemed to have given consent to physical tests and examinations for the purpose of determining whether such person is under the influence of intoxicating liquor or controlled drugs, and to a chemical, infrared molecular absorption or gas chromatograph test or tests of any or all of any combination of the following: blood, urine, or breath, for the purpose of determining the controlled drug content of such person's blood or alcohol concentration if arrested for any offense arising out of acts alleged to have been committed while the person was driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or controlled drugs or while having an alcohol concentration of 0.08 or more, or in the case of a person under the age of 21, 0.02 or more.

Pursuant to the plain language of this statute, any person who drives on the "ways of this state" is deemed to have impliedly consented to tests to determine whether he or she is "under the influence." To consent to tests to determine

whether one is under the influence, one need not be arrested. By contrast, under the plain meaning of the statute, only those who are arrested are deemed to have consented to tests to determine the "controlled drug content" or alcohol concentration of the person's blood.

Because we hold that the trial court correctly construed RSA 265:84, we uphold its denial of the defendant's motion in limine to exclude the results of the field sobriety tests. We observe that, regardless of whether the defendant's consent was implied pursuant to RSA 265:84, the evidence at trial supported a finding that he expressly consented to the administration of the field sobriety tests.

The defendant next asserts that the results of the horizontal gaze nystagmus (HGN) test were inadmissible because the State failed to establish that the test was properly administered. We accord the trial court considerable deference in determining the admissibility of evidence, and we will not disturb its decision absent an unsustainable exercise of discretion. See State v. Jordan, 148 N.H. 115, 117, (2002). To demonstrate that the trial court exercised unsustainable discretion, the defendant must show that the ruling was clearly untenable or unreasonable to the prejudice of his case. Id.

In State v. Dahood, 148 N.H. 723, 735 (2002), we held that the police officer who administers the HGN test and evaluates its results may testify about them provided that a proper foundation is laid. We observed that a proper foundation is laid by evidence that the officer is trained in the HGN test procedure and the test was properly administered at the time. Dahood, 148 N.H. at 735.

Here, the testing officer's supervisor testified that it was his recollection that the testing officer "performed the test the way he was instructed to do." The supervisor and testing officer both testified that the testing officer made at least two passes for each eye. Based upon this evidence, the trial court reasonably could have found that the HGN test was properly administered.

Although the testing officer admitted that he did not stop moving his pen once he noted signs of jerking before 45 degrees, the trial court was not bound to find that the test was improperly administered. While, at the request of the

defense, the testing officer read from a manual that advises an HGN test administrator to stop moving the stimulus upon seeing the test subject's eye jerk, the testing officer testified that he had never seen the manual before.

The defendant next contends that the trial court improperly permitted the arresting officer to opine that the defendant was intoxicated. He contends that, before the officer could give his opinion, the State had to qualify him as an expert. To the contrary, "a lay person is qualified to identify intoxication and a lay person's opinion on intoxication is admissible at trial." State v. Gowen, 150 N.H. 286, 289 (2003) (citations omitted); see State v. Arsenault, 115 N.H. 109, 111-12 (1975).

The defendant next argues that the evidence was insufficient to support a finding that he was guilty of driving while intoxicated. When challenging the sufficiency of the evidence, the defendant must prove that no rational trier of fact, viewing the evidence in the light most favorable to the State, could have found guilt beyond a reasonable doubt. State v. Sweeney, 151 N.H. 666, 673 (2005). We examine each evidentiary item in the context of all of the evidence, not in isolation. Id. When the evidence is solely circumstantial, it must exclude all rational conclusions except guilt. State v. Evans, 150 N.H. 416, 424 (2003). Under this standard, however, we still consider the evidence in the light most favorable to the State and examine each evidentiary item in context, not in isolation. Id.

Considering the evidence and all inferences to be drawn from it in the light most favorable to the State, we hold that a rational trier of fact could have found the defendant guilty beyond a reasonable doubt of driving while intoxicated. This evidence included one police officer's testimony that the defendant was speeding, he smelled of alcohol, and he admitted to having had two beers approximately one-half hour before driving. This evidence also included another officer's testimony that the defendant lacked "smooth pursuit in both eyes," had "distinct nystagmus prior to 45 degrees," had "onset of nystagmus prior to 45 degrees," and had "distinct nystagmus at maximum deviation." This officer further testified that the defendant refused to take a breathalyzer test, requesting, instead, that he be given a blood test. See RSA 265:88-a (2004); see also Jordan v. State, 132 N.H. 35, 36 (1989) (driver's entire conduct indicates whether he refused test; where driver initially refused test and then requested to take it one hour later, his conduct constituted a refusal). Based upon the approximately two hours the officer spent with the

defendant on the night of his arrest, the officer opined that the defendant was intoxicated. Viewing this evidence and the inferences to be drawn from it in the light most favorable to the State, we conclude that it was sufficient for a rational fact finder to find the defendant guilty, beyond a reasonable doubt, of driving while intoxicated.

The defendant next asserts that the evidence was insufficient to support the trial court's finding that he was guilty of speeding. We disagree. The police officer testified that he estimated that the defendant was driving ten miles over the speed limit. Additionally, he testified that the defendant admitted that he had been driving too fast. Based upon this evidence, viewed in the light most favorable to the State, we hold that a rational trier of fact could have found beyond a reasonable doubt that the defendant speeded.

Finally, the defendant contends that the trial court erroneously denied his motion to dismiss the driving while intoxicated charge on the ground that the police, in bad faith, prevented him from obtaining an independent blood alcohol test. "DWI defendants enjoy only a limited statutory right to an independent test." State v. Winslow, 140 N.H. 319, 321 (1995); see RSA 265:86, :87 (2004). That limited statutory right, however, is conditioned upon the defendant's consent to a test conducted at the direction of law enforcement. See RSA 265:86, :87; see also State v. Shutt, 116 N.H. 495, 497 (1976) (police may select type of test to be administered in first instance). Where, as here, the defendant does not consent to the test at the direction of law enforcement, he has no statutory right to an independent test. See RSA 265:86, :87.

Affirmed.

Broderick, C.J., and Nadeau, Dalianis, Duggan and Galway, JJ., concurred.

Eileen Fox,
Clerk

Distribution:
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Honorable Brackett L. Scheffy
Honorable Michael F. Sullivan

In Case No. 2005-0044, State of New Hampshire v. Seth O'Donnell, the court on December 14, 2005, issued the following order:

Distribution continued:
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