

STATE OF VERMONT

SUPERIOR COURT  
Chittenden Unit

VERMONT SUPERIOR COURT  
FILED

CRIMINAL DIVISION  
Docket No. 374-10-16 Cncs  
Docket No. 3757-10-16 Cncr

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<p>State of Vermont</p> <p>v.</p> <p>Michael Gagnon, Defendant</p>	<p>JAN 10 2017</p> <p>CHITTENDEN UNIT FINDINGS AND ORDER</p>
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These actions, in which Defendant Michael Gagnon is criminally charged with DUI #1, and in which he has challenged the notice of civil license suspension, came before the court for hearing on his motion to suppress and dismiss, and alternatively final hearing in the license suspension case, on December 7, 2016. Based upon the evidence and testimony presented, the court makes the following findings of fact, and reaches the following conclusions of law.

On September 30, 2016, at approximately 9 pm, an on-duty officer of the Richmond Police Department was operating stationary radar from his cruiser parked at the Lucky Spot convenience store on Vermont Route 117 (River Road) in Richmond. He observed a vehicle that had just passed the Lucky Spot, headed northwest towards Essex, which his radar device informed him was travelling around 57 mph, well in excess of the posted speed limit of 40 mph at that location. There was no erratic operation or other traffic violation. The officer pulled out, activated his blue flashing lights, and stopped the vehicle (a 2007 BMW 525) about a ¼ mile past the Lucky Spot. The vehicle pulled over immediately, and safely to the side of the road.

Upon approach to the driver's side of the vehicle, the operator's window was still all the way up. The officer knocked on the window and asked the driver to lower the window. The operator complied in part, and lowered it just a little. The officer immediately smelled the odor of intoxicants (i.e., the by-product smell of human alcohol consumption). The operator was the only occupant in the vehicle. The officer asked the driver to lower the window a little more, so they could converse while he explained that he would be writing him up – i.e., would give him a traffic violation citation – for speeding. When the operator did so, the smell of alcohol consumption was more intense, and emanating from the driver's person. The officer asked for and was given his driver's license and insurance documents; the operator – then identified as Defendant Michael Gagnon (DOB: 3/18/1958) – had no trouble finding his documents or answering the officer's initial questions. Defendant told the officer that he was coming back from a golf outing.<sup>1</sup> At that time the officer did not inform Defendant of, or ask him any questions about his initial observation of the smell of alcohol.

The officer went back to his cruiser to write up the traffic ticket. The officer had already concluded that he was going to extend the stop, and commence an investigation for possible

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<sup>1</sup> On 9/30/16, sunset would have been at 5:35 pm EDT, some 3 and ½ hours before the traffic stop.

DUI, based only on the smell of alcohol. While in the cruiser he radioed Richmond dispatch and asked for a second officer to come and assist him. After partially filling out the traffic ticket for speeding, the officer exited his cruiser and walked back to Defendant's car. The smell of alcohol coming from the car, and from Defendant was still "strong." The officer asked Defendant if he had consumed any alcohol; Defendant said he did have a couple of beers about 1 and ½ hours earlier, with food (some crab cakes). Defendant's speech was "normal," and he did not mumble and was not confused; Defendant was cooperative at all times. The officer did not make any observation of Defendant's eyes while Defendant was still in his vehicle. Again, based only on the smell of alcohol, the officer asked Defendant to exit his vehicle to perform the standard roadside dexterity exercises. Defendant was again compliant and cooperative.

To prolong and extend the stop for a traffic ticket into an investigation of possible DUI, and to justify the request that Defendant exit the vehicle, the Richmond officer needed to have a "reasonable and articulable suspicion" that Defendant had committed the offense of DUI. *Sprague, et al.* Alcohol consumption alone is not the statutory offense; it is driving while under the influence of alcohol such that there is some impairment of the ability to operate the vehicle, however slight that impairment might be. Here the Richmond officer had no other indicators of likely impairment besides the smell of alcohol and Defendant's concession that he had consumed some alcohol, with food, earlier that day. While certainly the officer is not required to simply accept the Defendant's story as to alcohol consumption and attendant circumstances, still there must be some objective indication that the operator was likely impaired at the time of vehicle operation, and the officer must have that additional information already in hand to continue the DUI investigation and make the exit request.

Here the smell of alcohol consumption alone was inadequate to form a reasonable belief that Defendant was impaired and had operated his vehicle while impaired. On this record the Richmond officer had an insufficient basis, without any other objective indicators of impairment, to continue the DUI investigation and ask Defendant to get out of his vehicle. Defendant should just have been given the speeding ticket and allowed to leave (although perhaps with a warning, either formal or informal). The additional information, and other potential DUI indicators developed after the Defendant exited his car must be, and are suppressed. The court need not, and does not address any other issues raised by Defendant.

#### FINAL ORDER

Defendant's motion to suppress and dismiss is **granted**. The Information, and charge of DUI # 1 under Dkt. # 37357-10-16 Cncr is dismissed. Judgment must also be entered in favor of the Defendant, and against the State in the civil license suspension case, Dkt. # 374-10-16 Cncs.

IT IS SO ORDERED, at Burlington, Vermont.

Electronically signed on January 09, 2017, pursuant to V.R.E.F. 7(d).



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Dennis R. Pearson, Superior Judge