



Department of
The Secretary of State
Bureau of Motor Vehicles

Charles E. Summers, Jr.
Secretary of State

Thomas Arnold
Deputy Secretary of State

Robert E O'Connell, Jr.
Dir. Legal Affairs, Adjudications and Hearings

DECISION IN THE MATTER OF: DOUGLAS [REDACTED]
DATE OF BIRTH: [REDACTED]

Hearings were held on October 14, 2011 and November 21, 2011 in Bangor, Maine at the request of Douglas [REDACTED] following a suspension issued to him by the Secretary of State under the provisions of 29-A MRSA § 2453 for operating or attempting to operate a motor vehicle while having an excessive alcohol level on May 1, 2011. The petitioner was represented by Attorney William Bly.

The issues under the statute are whether, by a preponderance of the evidence, there was probable cause to believe that Douglas [REDACTED] was the operator of a motor vehicle with an alcohol level of 0.08 grams or more of alcohol per 100 milliliters of blood or 210 liters of breath, whether the petitioner operated or attempted to operate a motor vehicle, and whether at the time of such operation Douglas [REDACTED] had an alcohol level of 0.08 grams or more of alcohol per 210 liters of breath.

Based on credible testimony from Officers Vanadestine and Avery, and the relevant portions of exhibit one, I find these facts:

Officer Vanadestine was on duty in the downtown area of Pittsfield approximately 7:30 P.M. on a Sunday, May 1, 2011 when a vehicle drove by him at a high rate of speed. This is a 25 mph zone with fairly heavy traffic and people walking in the area. The officer engaged his blue lights and siren to pull over the vehicle for speeding but the vehicle just kept speeding away. The officer was traveling at 70 mph and he could not catch up to the vehicle. From how the officer described it, it appeared that other vehicles kept their distance. After about two miles, the vehicle slowed down, drove into a field with all four tires leaving the pavement, and then reversed direction. At this point, the officer positioned his vehicle into the oncoming lane, and the vehicle finally stopped as it faced the officer's vehicle.

The operator exited his vehicle and headed toward the officer; he was upset, screaming, and crying that his son was dying. The officer told him to get back in his vehicle and calm down. The operator's actions appeared wild and unpredictable; he would not get back into his own vehicle and finally the officer told him he was under arrest for failing to stop for him. Officer Vanadestine requested that he put his hands behind his back but he would not follow the order. Officer Avery arrived and observed the operator and Officer Vanadestine in a physical confrontation. Officer Avery told the operator, later identified as Douglas [REDACTED] that he needed to put his hands behind his back or his hands on the cruiser. If [REDACTED] did not follow this direction, he would be tasered. (By his own admission Mr. [REDACTED] is 6'5", 300 lbs, and in

good athletic condition). It could be noted that each officer appears average in weight and height.

Mr. ██████ would not follow any orders and just kept wrestling with Officer Vanadestine. Officer Avery did use the taser on Mr. ██████ more than once. Even with the taser affect, Mr. ██████ planted his feet on the ground, would not put his arms in the position requested, and would not get in the cruiser. It appeared that the officers had to shove him in the cruiser. Mr. ██████ said he did not need medical attention but that his son was dying in New Hampshire. He wanted the Pittsfield officers to take him there.

While under arrest for the failing to stop for an officer, probable cause may continue to accrue for an alcohol offense. While conversation was going on, Officer Vanadestine could detect a strong odor of intoxicants coming from Mr. ██████ mouth area, and Mr. ██████ admitted to consuming three beers before he began driving his vehicle. Mr. ██████ eyes were bloodshot and his speech was slurred. He mentioned that he planned to drive 100 mph all the way to New Hampshire to see his son. Mr. ██████ would not listen to the officer and he was very unruly. Mr. ██████ gave the officer a phone number to call about his son but that number was not a working number.

I find that this is sufficient probable cause to believe that Douglas ██████ operated a motor vehicle with an alcohol level of 0.08 grams or more of alcohol per 100 milliliters of blood or 210 liters of breath.

Douglas ██████ admitted to being the operator of his vehicle.

I have carefully reviewed the testimony of the petitioner, Douglas ██████ and the expert opinion of a forensic criminologist with an expertise in the use of an intoxilyzer instrument, Jan Semenoff (exhibits six and seven) who testified via telephone in very specific detail about this rather unique factual scenario. Based on Mr. Semenoff's explanation and some credible testimony from Douglas ██████, I find these facts:

Douglas ██████ was in Belfast, Maine when his finance called him from New Hampshire in a panic letting him know his 6 month old child had a high fever and was shaking. Douglas ██████ had suffered a seizure from a high fever as a child, almost died, and jumped to a conclusion that his son was dying. His cell phone ceased working and he packed up quickly and planned on driving to Waterville where he had a motel room for the week because he is employed in Maine working on power lines. In the motel room, he had a charger; if the phone still was not working, he was driving to New Hampshire. Apparently Douglas ██████ did not know any relevant phone numbers by memory; all numbers related to his family were on the cell phone.

Douglas ██████ testified that he consumed 2 ½ beers prior to getting into his vehicle. I do not find this information credible. He mentioned that he planned to stay over in Belfast that night and it really is more likely than not that he consumed a greater amount of intoxicants than 2 ½ beers. Mr. ██████ testified that he uses chewing tobacco regularly; he dips a fine grade snuff, skoal in his mouth. Mr. ██████ is credible when he explained that he used it during his drive to Pittsfield, and that a wad of it was knocked out of his mouth during the scuffle with Officer Vanadestine. His use of chewing tobacco was confirmed by his dentist (exhibit 8). Mr. ██████ has a removable false tooth in the area where he chews tobacco and he removed that tooth at the hearing.

At the time of the intoxilyzer test, Mr. ██████ confirmed that Officer Vanadestine did look in his mouth and did wait the 15 minutes. However, Officer Vanadestine is credible when he

testified that he had no knowledge of the removable false tooth and the fact that Douglas [REDACTED] had chewing tobacco in his mouth approximately one hour before he blew in the instrument.

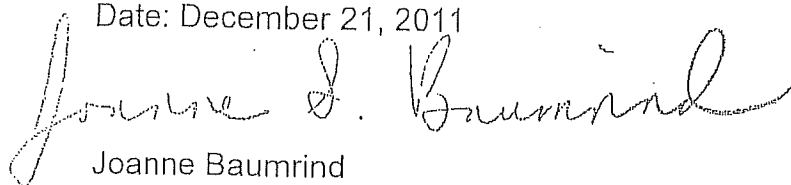
Officer Vanadestine did not see any remnants of tobacco but it is more likely than not that some tobacco remnants were in the mouth area, particularly caught under that removable false tooth. Remnants of tobacco do retain residual mouth alcohol that may not be picked up by the intoxilyzer instrument in an invalid sample.

In order for me to make a finding that Douglas [REDACTED] actually operated a motor vehicle with an alcohol level of 0.08 grams or more of alcohol per 210 liters of breath, that intoxilyzer test result, exhibit two must be a reliable document. I cannot rely on exhibit two because the petitioner was not afforded an opportunity to raise his mouth out with water in the event remnants of tobacco were present. Additionally, while removable dental plates etc. do not normally have to be removed as long as the minimum 15 minute waiting period is strictly observed, it is prudent to request the individual to remove such dental work if an individual has had chewing tobacco in his mouth in a recent time period before the intoxilyzer test.

As exhibit two is an unreliable document, I cannot find that Douglas [REDACTED] operated his motor vehicle with an alcohol level of 0.08 grams or more of alcohol per 210 liters of breath.

This petition is granted. The suspension of Douglas [REDACTED] operating privileges ordered by the secretary of state is rescinded.

Date: December 21, 2011



Joanne Baumrind
Hearing Officer
Legal Affairs, Adjudications & Hearings

Cc: Officer Vanadestine, Pittsfield PD
Deputy Don Avery, Somerset County Sheriff Dept.

JB/ kb