VERMONT SUPREME COURT
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Case No. 25-AP-336

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

NOVEMBER TERM, 2026

State of Vermont v. Andrew White* } APPEALED FROM:
} Superior Court, Windham Unit,
} Criminal Division
} CASE NO. 22-CR-02521
Trial Judge: Rachel M. Malone

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

Defendant appeals from his conviction of criminal refusal following a jury trial. We affirm.

Defendant was charged with driving under the influence (DUI), second offense; criminal refusal; and negligent operation, based on a March 2022 incident. At trial, the State presented the following evidence. A state trooper testified that on the evening in question, she was dispatched to the scene of a motor-vehicle accident. She observed a broken utility pole with defendant's pickup truck nearby. She spoke with defendant, who identified himself as the operator of the truck. Defendant told her he had lost control of his truck while braking and hit the utility pole. He did not initially respond to the trooper's question about whether he had consumed any alcohol. Instead, he broke off eye contact and turned his body away from her. The trooper observed signs of impairment, including a strong odor of alcohol, slow and mumbled speech, and evasiveness and apprehensiveness. The trooper again asked defendant if he had consumed any alcohol, and he replied that he had consumed one beer. Defendant said that he had not consumed any alcohol since the crash. The trooper asked defendant to engage in standardized field-sobriety tests, and she observed two impairment clues.

Another trooper arrived on the scene. He asked defendant for a third time about his consumption of alcohol and defendant said he had consumed two beers. Video from the troopers' interactions with defendant was entered into evidence. Based on the totality of her observations, the first trooper concluded that defendant was impaired by alcohol to a slight degree. Defendant was arrested and transported the police barracks.

At the barracks, defendant said he had consumed two high-alcohol beers, and that he had consumed "half of an exploded beer" within thirty minutes before the accident. When asked if he was under the influence of alcohol while driving, defendant responded "slightly." He answered the same way when the trooper asked if he was now under the influence of alcohol. The trooper asked defendant if he would submit an evidentiary breath sample and he refused. Video of defendant's DUI processing was also admitted into evidence. The State additionally presented testimony from an individual who worked in the toxicology section at the Vermont Forensic Laboratory. He testified, among other things, about how alcohol affects a person's ability to operate a motor vehicle.

The jury was instructed that to convict defendant of criminal refusal, the State needed to prove that the trooper had reasonable grounds to believe defendant was operating under the influence and that the request was reasonable under the circumstances. See 23 V.S.A. § 1201(b) (providing that "person who has previously been convicted of [DUI] shall not operate, attempt to operate, or be in actual physical control of any vehicle on a highway and refuse a law enforcement officer's reasonable request under the circumstances for an evidentiary test where the officer had reasonable grounds to believe the person was [driving under the influence] in violation of [23 V.S.A. § 1210(a)]"). The question of whether defendant had previously been convicted of DUI was bifurcated. No party objected to the jury instructions. The jury convicted defendant of criminal refusal and acquitted him of the remaining charges. The court subsequently found that defendant had been convicted of a prior DUI. The court imposed a fine and a suspended sentence with one year of probation. This appeal followed.

Defendant argues for the first time on appeal that it is unconstitutional for him to be criminally punished for (and presumably charged with) violating 23 V.S.A. § 1201(b). He maintains that he has a constitutional right to refuse the officer's request for a breath test and he cannot be punished for that refusal, contrary to the language of § 1201(b) and § 1202(d)(6). Defendant reasons that "[a]n evidentiary breath test is a search triggering the protections of Article 11 of the Vermont Constitution," State v. Williams, 2020 VT 91, ¶ 8, 213 Vt. 334; he revoked his implied consent to providing a breath sample apparently because the officer lacked probable cause to believe he was operating under the influence or because a person can argue that their consent was not given voluntarily; because he can revoke his consent, he cannot be punished for his refusal unless the State was authorized to conduct a warrantless search; and there were no exigent circumstances here that made obtaining a warrant impracticable.

Our review is for plain error only, which presents a "very high bar." State v. Herrick, 2011 VT 94, ¶ 18, 190 Vt. 292. "Plain error exists only in exceptional circumstances where a failure to recognize error would result in a miscarriage of justice, or where there is glaring error so grave and serious that it strikes at the very heart of the defendant's constitutional rights." State v. Kuhlmann, 2021 VT 52, ¶ 26, 215 Vt. 290 (quotation omitted). A defendant must show "that there is an error, the error is obvious, and the error affects substantial rights and results in prejudice to defendant." Id.

Defendant cannot satisfy this standard here. Putting aside other infirmities, he advances a novel constitutional argument that is at odds with the plain language of 23 V.S.A. § 1201(b). As we have explained, "[a] novel constitutional argument does not rise to the level of plain error because it is not an 'obvious' error for a trial court to fail to extend the meaning of the constitution on its own motion." State v. Nash, 2019 VT 73, ¶ 17 n.3, 211 Vt. 160; State v.

Schmitt, 150 Vt. 503, 505 (1988) (holding that novel, unpreserved constitutional arguments are "far from obvious, and could not rise to the level of plain error"). Contrary to defendant's assertion, nothing in State v. Edelman, 2018 VT 100, 208 Vt. 372, suggests that it is unconstitutional to punish a refusal to provide a breath sample as set forth in 23 V.S.A. § 1201(b). Indeed, we have expressly recognized that "by exercising the privilege to drive on Vermont roads under circumstances which gave rise to probable cause to believe they were intoxicated, defendants voluntarily accept[] the imposition of the choice between consenting to a warrantless breath test and incurring certain legal consequences for refusal." Williams, 2020 VT 91, ¶ 17. "And we have repeatedly upheld the statute against challenges to its legitimacy." Id. (citing cases). We are equally unpersuaded by defendant's assertion that it was obvious that he could not be punished for his refusal because the "law regarding exceptions to the warrant requirement of Article 11 is well-established." Defendant fails to show that the court committed plain error by failing to sua sponte vacate his conviction.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Nancy J. Waples, Associate Justice

Christina E. Nolan, Associate Justice