NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 KA 2226

STATE OF LOUISIANA

VERSUS

ANTHONY T. DONACHRICHA

On Appeal from the 21st Judicial District Court
Parish of Livingston, Louisiana
Docket No. 18611, Division "G"
Honorable Ernest G. Drake, Judge Presiding

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Defendant-Appellant
Anthony T. Donachricha

BEFORE: PARRO, KUHN, AND DOWNING, JJ.

Downing, J. dissents.

Judgment rendered May 2, 2008

PARRO, J.

The defendant, Anthony T. Donachricha, was charged by bill of information with operating a vehicle while intoxicated (third offense DWI) in violation of LSA-R.S. 14:98. The defendant entered a plea of not guilty. Subsequently, the defendant filed a motion to suppress, which was denied by the trial court. The defendant withdrew his former plea and entered a plea of guilty as charged, reserving his right to appeal the ruling on the motion to suppress pursuant to **State v. Crosby**, 338 So.2d 584 (La. 1976).

The defendant was sentenced to five years of imprisonment at hard labor. The trial court suspended all but thirty days of the sentence and placed the defendant on active, supervised probation for a period of five years, upon release from custody. The trial court further imposed a fine of two thousand dollars and ordered that the defendant undergo substance abuse evaluation and recommended treatment, attend an inpatient treatment program from four to six weeks, submit to outpatient substance abuse treatment for a period not to exceed twelve months, and serve supervised home incarceration for the time remaining on the suspended sentence. The trial court also noted that the defendant is prohibited from operating any vehicle that is not equipped with an ignition interlock device. The defendant was ordered to pay costs associated with conditions of probation, to complete a driver improvement program, to perform community service, to attend victim impact programs and Alcoholics Anonymous meetings, to maintain full-time and/or gainful employment, to remain conviction, alcohol, and drug free, and to submit to random drug and alcohol testing.

The defendant now appeals, arguing that the trial court erred in admitting the result of the breath test during the hearing on the motion to suppress and in denying the motion to suppress. For the following reasons, we affirm the conviction and sentence.

FACTS

In accordance with the bill of information and the factual basis for the guilty plea entered, the facts of the instant offense are as follows. On or about November 23, 2003, the defendant operated a vehicle after leaving a bar. While at the bar, the defendant consumed one mug of beer, consisting of what he estimated as twenty-four

ounces of beer.[1] The defendant was stopped while en route to his residence. The defendant's breath-alcohol test result was 0.139.

ASSIGNMENTS OF ERROR NUMBERS ONE AND TWO

In a combined argument, the defendant contends that the trial court erred when it admitted the result of the breath-alcohol testing during the hearing on the defendant's motion to suppress, because the state did not lay the proper foundation. The defendant specifically argues that the state did not introduce the machine operator's certification, the operational checklist, evidence that the defendant was properly informed of the consequences of submitting to the chemical test, the machine certification, or the maintenance technician's certification. The defendant further notes that the arresting officer was allowed, over repeated defense objections, to testify as to the result of the breath-alcohol test. The defendant complains that, as a result of the admission of this evidence at the suppression hearing, the trial court was made aware of the test result and that the presumption of intoxication attached, relieving the state of further proof of intoxication. The defendant contends that the fact that it was a motion to suppress hearing rather than a trial on the merits is of no consequence and cannot be used to deny the defendant his statutory and constitutional guarantees.

During the hearing on the motion to suppress, Louisiana State Police Trooper Jessie Shelton testified, in pertinent part, that the defendant was advised of his **Miranda** rights and was given field sobriety testing. The defendant was then transported to the Denham Springs Police Department. Trooper Shelton testified that he was recently recertified for the operation of the intoxilyzer machine. During the fifteen-minute period before testing, Trooper Shelton advised the defendant of his rights relating to the chemical test for intoxication. The defendant indicated that he understood his rights and signed the form. Trooper Shelton testified regarding the routine internal check automatically triggered by the machine's start button. When the state questioned Trooper Shelton regarding the result of the test, the defense attorney

[1] During the hearing on the motion to suppress, Trooper Jessie Shelton of the Louisiana State Police, Troop A, testified that the defendant stated that he had consumed two mugs of beer.

objected to the introduction of the intoxilyzer test result without a proper foundation. The defense attorney specifically stated, "I think there are some stepping points that the state has to go through in order to get that in. Objection based on lack of foundation." The defense attorney added that the rights form was being challenged, noting that the form had not yet been introduced.

After presenting the actual rights form to Trooper Shelton for identification, the state again questioned Trooper Shelton regarding the result of the test, and the defense attorney again objected on the grounds of the lack of a proper foundation. In overruling the objection, the trial court acknowledged the state's comment that the evidence was being admitted during the hearing on the motion to suppress, as opposed to a trial on the charge. During cross-examination, the defense attorney questioned Trooper Shelton regarding the content of the rights form and whether the defendant was informed of his right to refuse the test. The defense questioning of the other witness at the hearing, Louisiana State Police Sergeant Terry D. Chutz,[2] and subsequent argument focused on the right of refusal language, or lack thereof, contained in the rights form executed before the test was performed. The defendant's argument was made pursuant to LSA-R.S. 32:661(C), et seq. The defense attorney further cited jurisprudence for the principle that, before an individual may be tested, he must be informed that he has a right to refuse the test.

The defendant argues that the test results should not have been admitted during the hearing on the motion to suppress due to the lack of a proper foundation. Pursuant to LSA-C.Cr.P. art. 3, **State v. Tanner**, 457 So.2d 1172, 1175 (La. 1984), held that a motion to suppress is available to question the admissibility of chemical test results that can result in the legal presumption of intoxication. Thus, **Tanner** allows a pretrial determination of whether evidence is admissible *at trial*. **Tanner** does not address whether such evidence is properly introduced during the hearing on the motion to suppress. Further, rules of evidence normally applicable in criminal jury trials do not operate with full force at hearings before the judge to determine the admissibility of

[2] Sergeant Chutz was the supervisor of breath-testing, training for breath testing, and standardized field sobriety testing.

evidence. See **State v. Smith**, 392 So.2d 454, 458 n.6 (La. 1980), citing, in part, **United States v. Matlock**, 415 U.S. 164, 172-73, 94 S.Ct. 988, 994, 39 L.Ed.2d 242 (1974). We do not find that the defendant's statutory or constitutional rights were violated by the admission of the test result during the hearing. Thus, the trial court did not err in allowing the evidence to be introduced at the hearing.

As to the trial court's ultimate denial of the defendant's motion to suppress the evidence for purposes of a trial, we note as follows. On appeal the defendant specifically notes that the state did not introduce the machine operator's certification, the operational checklist, evidence that the defendant was properly informed of the consequences of submitting to the chemical test, the machine certification, or the maintenance technician's certification.[3] The grounds set forth in the defendant's written motion to suppress were general and all-inclusive. In addition to generally raising the issue of compliance with the requirements for administering the chemical test for intoxication, the motion lists such issues as the legality of a stop, detention, arrest, and/or search and seizure, and the requirements for administering a field sobriety test as grounds for the suppression of the evidence. At the motion to suppress hearing, the only specific issue raised and argued by defense counsel was the adequacy of the rights form. The other issues were not articulated by the defendant or addressed by the state during the hearing. Accordingly, by orally articulating a specific ground for suppressing the test result, defense counsel limited the defendant's written motion to suppress to that specific ground. See **State v. Schaub**, 563 So.2d 974, 975 n.3 (La. App. 1st Cir. 1990).[4] The state is entitled to adequate notice so that it will have an opportunity to present evidence and address the issue. A new basis or ground for the motion to suppress cannot be articulated for the first time on appeal. This is prohibited under the provisions of LSA-C.Cr.P. art. 841 since the trial court would not be afforded an opportunity to consider the merits of the particular claim. See **State v. Cressy**, 440

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[3] With respect to the admissibility of a certification, defense counsel stated at the beginning of the hearing that such evidence could be introduced by "bringing in the technician at the day of trial." Defense counsel noted he just put the district attorney's office on notice that he would object to the introduction of a certification without the technician being present at the trial.

[4] As indicated by the trial court, this would not relieve the state of its burden of showing compliance with each regulation in order for the state to avail itself at trial of the statutory presumption of the defendant's intoxication.

So.2d 141, 142-43 (La. 1983). Under these circumstances, we conclude the motion to suppress was limited to the defendant's attack on the adequacy of the rights form.

During the hearing, the defense argued that the arrestee's rights form relating to the chemical test for intoxication used by the police officers in this case did not contain specific "right to refuse" language due to a printer error.[5] The trial court denied the motion to suppress, finding that due diligence was used in including required language in the form and that the form was still in compliance with Louisiana law in the absence of the omitted language. This court agrees with the trial court's assessment.

In all cases other than those in LSA-R.S. 32:666(A)(1), a person under arrest for a violation of LSA-R.S. 14:98, LSA-R.S. 14:98.1, or other law or ordinance that prohibits operating a vehicle while intoxicated may refuse to submit to such a chemical test, after being advised of the consequences of such refusal as provided for in LSA-R.S. 32:661(C). LSA-R.S. 32:666(A)(2). The choice of a person under arrest for operating a vehicle while intoxicated to refuse to submit to a chemical test is not a constitutionally protected right. Rather, this refusal right is a matter of grace that the Louisiana Legislature has bestowed. See **South Dakota v. Neville**, 459 U.S. 553, 565, 103 S.Ct. 916, 923, 74 L.Ed.2d 748 (1983) (holding that the right to refuse a chemical test for intoxication is not one of constitutional dimension such as **Miranda**[6] and evidence of refusal under the South Dakota statute may be presented in a criminal proceeding); **State v. Edwards**, 525 So.2d 308, 313 (La. App. 1st Cir. 1988). The form signed by the defendant lists not only the consequences of submitting to the test, but the consequences of refusal to submit. Thus, the defendant's right to refuse the test is implicit within the form. **State v. Doucette**, 04-1539 (La. App. 3rd Cir. 4/6/05), 899 So.2d 159, 164, writ denied, 05-1210 (La. 12/16/05), 917 So.2d 1106. We find no error in the trial court's denial of the motion to suppress. Assignments of error numbers one and two lack merit.

CONVICTION AND SENTENCE AFFIRMED.

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[5] The language that was inadvertently omitted was: "You have the right to refuse the chemical test if you were not involved in a crash where a fatality or serious bodily injury occurred."

[6] **Miranda v. Arizona**, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).