

Office of Adjudications

IN THE MATTER OF : ***SUSPENSION OF
SAFE BOATING CERTIFICATE
DEEP BUI # 22-003***

CONNOR EMERY : ***AUGUST 1, 2022***

FINAL DECISION

Connor Emery was arrested for boating while intoxicated on June 10, 2022. General Statutes §15-140q. A Notice of Suspension was mailed to him on June 21, 2022; a timely request for hearing followed.

A probable cause hearing was held on July 12 and 19, 2022 regarding the suspension of the Safe Boating Certificate of Connor Emery. The first hearing session took place at Marine District Headquarters in Old Lyme, and was continued via Zoom. Participating on behalf of the operator were Connor and Todd Emery and, on behalf of DEEP staff, Timothy Delgado of the DEEP Boating Division. Sergeant Jeffrey Foss-Rugan of the Rocky Hill Police Department appeared as a witness for DEEP.

Sgt. Foss-Rugan, the arresting officer, provided testimony. Connor Emery provided testimony and his father Todd made remarks on his son's behalf. DEEP submitted one exhibit (DEEP-1), the Case/Incident Report ("Arrest Report"), which included the Notice of Rights form and the results of the breath analyses. Connor Emery also offered two exhibits on July 12, which were admitted. The first was Rocky Hill Police body cam video footage that included the field sobriety testing and video footage of the booking process at the Rocky Hill Police Station. A second exhibit, an ophthalmology report for Connor Emery from a Dr. Matthew Bushley, was also admitted. At the continued hearing on July 19, Connor Emery offered the Instructor Guide for the NHTSA "DWI Detection and Standardized Field Sobriety Testing Refresher," October 2015. The preface and section 3, pages 27-33 were admitted.

FACTUAL FINDINGS AND CONCLUSIONS

As provided in General Statutes § 15-140q(g), I must affirm all four of the following factors relevant to this hearing to suspend this boating certificate: 1) whether Sgt. Foss-Rugan had probable cause to arrest Mr. Emery for operating a vessel while under the influence of intoxicating liquor or drugs, or both, or while having an elevated blood alcohol content; (2) whether Mr. Emery was placed under arrest; (3) whether Mr. Emery refused to submit to a blood, breath, or urine test or analysis at the request of Sgt. Foss-Rugan; and (4) whether Mr. Emery was operating the vessel.

For the reasons that follow, I find that DEEP did not prove all four factors. I therefore DENY the intended action of the DEEP to suspend the boating certificate of Connor Emery.

Only two factors are at issue in this case: 1) whether Sgt. Foss-Rugan had probable cause to arrest Connor Emery (“Connor”) for operating his vessel under the influence of alcohol, drugs, or both; and 2) whether Connor’s inability to produce a urine sample constituted a refusal to submit to that test.

First, despite Connor’s efforts to produce a urine sample, he was not able to do so after being given an hour for this test. It is reasonable to conclude that Sgt Foss-Rugan decided to end the testing based on his experience and the need to conclude what had been a long effort by Connor. One hour of time, aided by the provision of inducements to urinate by the police, was a reasonable length of time. Although it is understandable that Connor believes the stressful situation was the reason for his failure and is frustrated by his inability to submit a sample, Sgt Foss-Rugan made a rational decision to end the testing after one hour and determine that Connor’s inability to produce a urine sample was a “refusal by conduct.”¹

The question is therefore whether I can affirm the existence of probable cause to support this suspension. An arrest is valid as long as it is based on probable cause, even if the arrested person is later deemed to be innocent. See generally *Illinois v. Gates*, 462 US 213 (1983). “[T]he relevant inquiry is not whether particular conduct is innocent or guilty, but the degree of suspicion that attaches to particular types of noncriminal acts.” *State v. Sawyer*, 335 Conn. 29, 37, (2020). However, even if there was probable cause for Sgt Foss-Rugan to place Connor under arrest at the scene and continue the investigation at the police station, based on the evidence in the record, there was not sufficient evidence presented to determine that probable cause existed to arrest Connor after the full investigation was completed.

When Sgt Foss-Rugan boarded the boat Connor was operating, he saw an open can of beer in the holder on the driver’s side. He asked Connor if he had been drinking. Twenty-year-old Connor initially denied that he had consumed alcohol, but quickly admitted to drinking one half of the can. He consistently denied any drug use throughout this process. Connor was able to recite the alphabet from “c” to “t” as instructed, but Sgt. Foss-Rugan could smell the odor of an alcoholic beverage on Connor’s breath and observed Connor’s eyes to be reddened, glossy and watery. Foss-Rugan checked for nystagmus while on the boat and observed what he believed to be signs of impairment. Foss-Rugan determined Connor needed to be brought to Ferry Park to further investigate whether he was under the influence.

After a 15-minute observation period on shore, Connor agreed to perform the Standardized Field Sobriety Tests (FST). Foss-Rugan explained all FST prior to starting each and Connor indicated he understood. The footage of the testing shows that Connor was not unsteady on his feet. He did not need to extend his arms for balance when standing or walking and showed no other outward signs of inebriation. He listened to the instructions for testing calmly and, other than a few sighs and other signs of nerves, was cooperative.

¹ It is not reasonable to believe an investigating officer can wait several hours for an individual to produce a sample nor is it clear as to the impact of this delay on any possible samples. Connor argues that he asked to be given a blood test to overcome his problem with providing a urine sample to confirm that he was not intoxicated. However, §15-140q does not give the person being tested for intoxication the right to request a certain test and, as Sgt Foss- Rugan explained, he was not qualified to draw blood for a test. See §15-140r(a)(3).

As confirmed by the footage, of the three tests administered, Connor performed the One Leg Stand to standard. He failed to perform the Walk and Turn to standard by walking for twelve steps rather than nine as instructed, and failing to start to count his steps until reminded to do so. When he was informed by Sgt Foss-Rugan that he had taken twelve steps, Connor knew he had been instructed to take only nine. Connor testified that he was being careful to do the test to standard and took more steps to make sure he was performing the test correctly and that he forgot to begin counting his steps as he was nervous and anxious. Based on his testimony and the evidence of the video footage, this explanation is persuasive. The footage shows that Connor did not appear to be trying to overcome a lack of balance; he kept his arms down at his sides and stayed in the lines or in the area where he was directed to be.

When Connor was given the Horizontal Gaze Nystagmus (HGN) test, results showed a lack smooth pursuit and distinct and sustained nystagmus at maximum deviation in both eyes. Officer Caires, who was with Sgt Foss-Rugan, also performed the HGN test with the same results. Both confirmed Connor's failure to pass this test.

However, the existence of probable cause is impacted by several facts. There is no audible sound of the administration of these tests, but Connor later testified that he informed Foss-Rugan that he had a lazy eye and later, as shown in the booking footage, informed the officers at least twice that he had a lazy eye. Connor also asked whether his condition had anything to do with a nystagmus during the booking process and was told by Sgt Foss-Rugan it had nothing to do with that. Contrary to this statement, at the hearing Sgt Foss-Rugan testified that he would change HGN test methods if he knew of a lazy eye. The letter from Connor's doctor following an examination on June 20, indicated that that Connor was unable to move his right eye fully to his right and his left eye fully to his left as a result of esotropia and history of strabismus surgery. Given all these factors, the evidence does not fully support the reliability of the eye tests performed on Connor.

When Connor was arrested and transported to the Rocky Hill Police Department, he asked reasonable and coherent questions about what was happening in the patrol car while being transported to the police station without rancor or anger, and engaged Foss-Rugan in some polite "small talk." He showed no overt sign of being intoxicated.

"Probable cause to arrest" as a factor in §15-140q necessarily means more than the initial probable cause to arrest a person and transport to a police station. If it applied to just this stage of the process, a person could lose his boating certificate just based on what has occurred prior to further investigation at a police station. Seems to me to be a violation of due process that requires a full and fair investigation.

The rest of this proceeding raises significant doubt as to the existence of probable cause. The footage of Connor during this process shows that he was alert, polite and cooperative. When he was at the station, he answered numerous questions from the officers involved in the booking process such as his name, address, and social security number promptly and accurately. He asked logical and reasonable questions about the process, and spoke with the officers about where he was going to school, his year in college, his major, and made other conversation that was clear and complete. He stood and spoke quietly and calmly, his speech was not slurred, and he showed no outward signs of agitation. He did not slump or lay down when on the bench

in the holding cell and did as he was told without any argument or sign that his balance or sense of direction was impaired.

During the booking process, Connor was asked several times if the one-half can of beer he had admitted to drinking was all he had consumed. Later, when asked yet again, he replied that was thinking out loud about any possible drinks, including those at home, but was immediately challenged by Sgt Foss-Rugan as to whether his contemplation did in fact indicate prior drinking. Connor responded that he was just being thorough in response to the question. This was the only time, throughout this process, that Connor displayed any sign of annoyance, but he continued to be polite. In fact, the footage shows, in comments made by the police², that they were highly suspicious of Connor. While I do not challenge the experience or investigative methods of the police, I note this as a possible factor in any subjective assessments involved in this process and in evaluating Connor's behaviors in response to the officers.

Connor was given a breath test, which indicated a blood alcohol content (BAC) of 0.0000. Sgt Foss-Rugan believed Connor's performance on the FST was indicative of a higher BAC or some type of influence. Accordingly, Sgt Foss-Rugan asked Connor to submit to a urine test and Connor agreed. CGS § 15-140q(b)(2).³ Connor expressed some concern and asked questions about consequences of not being able to supply a urine sample, which were addressed (i.e., could be a refusal), but he agreed to attempt to produce a sample. Following numerous attempts, aided by drinks of water and other methods to encourage urination, Connor did not produce a urine sample after trying for one hour. Sgt Foss-Rugan discontinued the test and considered Connor's inability to urinate as a refusal to submit to the test.

Although Connor failed the urine test, I believe the circumstances surrounding that "failure" and the fact that his breath test was "all zeroes," which Sgt Foss-Rugan stated was very accurate in response to a question from Connor, further put into doubt the existence of probable cause.

My scrutiny of all these facts and circumstances leave me unable to conclude that there was probable cause to arrest Connor Emery and suspend his boating certificate.

The primary purpose of this administrative proceeding on this suspension of a boating certificate is to promote public safety by removing those operators who have demonstrated disregard for the safety of others by operating their vessel while intoxicated. E.g. *State v. Hickam*, 235 Conn. 614 (1995), cert. denied, 517 U.S. 1221 (1996). Section 15-140q of the General Statutes implements this intent by establishing standards under which a boater operating a vessel under the influence can be removed from the waters by suspending a boating certificate for periods of time set out in that statute. The actions of the police and the DEEP are pursued in an effort to fulfill their obligation to promote public safety and I commend them for their work.

² At one point, Officer Caires is heard to say that Connor "must have had something at home." And "I know he had more than one beer."

³ Section 15-140q(b)(2) provides that "if the person submits to a breath test and the peace officer, for reasonable cause, requests an additional chemical test of a different type to detect the presence of a drug or drugs other than or in addition to alcohol, the peace officer may administer such test...."

Connor Emery now knows the extent to which his alleged actions are taken seriously by the police and DEEP. He has experienced the consequences of being arrested for operating a vessel while intoxicated. He knows his boating certificate will be suspended if he is ever stopped, arrested and confirmed to be operating while intoxicated from drinking or drugs. Finally, this denial of suspension of this license does not change the fact that Connor still must appear in Superior Court due to his actions. Connor's conduct throughout this proceeding has demonstrated that this experience, both the arrest and administrative hearing, has instilled in him the importance that is given by the DEEP to removing intoxicated boating operators by suspending a boating certificate to promote public safety.

ORDER

It is hereby ORDERED that the Connecticut Safe Boating Certificate of Connor Emery is not suspended. Any temporary suspension of his Safe Boating Certificate is hereby rescinded and the DEEP Boating Division is directed to advise Mr. Emery of any administrative matters required to fully reinstate his Certificate.

Entered as a final order of the Commissioner of Energy and Environmental Protection by:

Janice B. Deshais, Esq.

Janice B. Deshais, Esq., Hearing Officer

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