

Office of Adjudications

IN THE MATTER OF

***: SUSPENSION OF SAFE BOATING
CERTIFICATE
DEEP # 15-003***

MICHAEL GRESS

: JULY 31, 2015

FINAL DECISION

A hearing was held on July 28, 2015 at DEEP Marine District Headquarters in Old Lyme regarding the suspension of the Safe Boating Certificate of Michael Gress. General Statutes §15-140q. Present were: Mr. Gress' Attorney Mark Sherman; Sgt. Eric Lundin of the Department's Division of Environmental Conservation Police (EnCon) and Timothy Delgado of the DEEP Boating Division. Testimony was offered by Sgt. Lundin. The following exhibits were entered into the record:

DEEP-1 – Incident Report prepared by Sgt. Lundin with attachments including the 24 Hour License Certificate and Notice of Rights, Pictures and information provided by the United States Coast Guard.

PROCEDURAL HISTORY

On June 6, 2015, Mr. Gress' vessel "Next Chapter" was stopped on Long Island Sound by the United States Coast Guard (USCG). Sgt. Lundin and EnCon Officer William Logiodice responded to a call for assistance. Mr. Gress was subsequently arrested for boating while intoxicated. §15-140q. A Notice of Suspension was mailed to Mr. Gress on June 10, 2015, advising him of the effective date of the suspension of his Safe Boating Certificate and his right to a hearing prior to that date to determine probable cause for said suspension. §15-140q(g). A hearing was requested on June 16, 2015. A continuance was granted on June 18, 2015 and a hearing was scheduled for July 15, 2015. Counsel for Mr. Gress was required to be in court on that day and the hearing was rescheduled for July 28, 2015.

FINDINGS OF FACT

After a probable cause hearing limited to those factors set forth in General Statutes § 15-140q, I find the following facts:

1. Mr. Gress was stopped by the USCG while operating the "Next Chapter," a forty foot powerboat, in Long Island sound approximately three nautical miles south/southwest of Duck Island in Westbrook. Mr. Gress was the only person onboard the vessel. The Coast Guard had received reports that the vessel was traveling erratically, in circles, and came within ten feet of colliding with the "Lucky Lady," a charter fishing boat in the area. (Ex. DEEP-1; test. E. Lundin, 7/28/15.)
2. Before the USCG arrived on the scene, a salvage vessel, operated by Matt Lynch, initially responded to a radio call from the Lucky Lady. Mr. Lynch picked up Paulius Zabulis, a mate on the Lucky Lady,

and assisted him in boarding the Next Chapter. Mr. Zabulis was able to stop the Next Chapter, but the salvage vessel was unable to tow the vessel because Mr. Gress failed to follow instructions. Mr. Zabulis told Sgt. Lundin that Mr. Gress was “unresponsive” when Mr. Zabulis boarded the vessel, and that Mr. Gress was “slumped over in his chair like he was trying to take a nap.” Mr. Zabulis further described Mr. Gress as “real confused” and slurring his speech and indicated he observed an empty bottle of Smirnoff vodka at the helm. (Ex. DEEP-1; test. E. Lundin, 7/28/15.)

3. USCG vessel CG45678 observed the salvage vessel attempt to tow the Next Chapter and, when that attempt failed, repeatedly advised Mr. Gress to put his vessel in neutral using a ship-to-ship hailing system. Mr. Gress did not comply with the USCG’s order. When the Next Chapter was eventually placed in neutral, the USCG dispatched a boarding team onto that vessel. USCG Petty Officers Carlson, Sinclair and Firmin reported to Sgt. Lundin that Mr. Gress appeared intoxicated, that Mr. Gress’ eyes were distinctly glossed over and that he had a strong odor of alcohol on his person. Petty Officer Carlson also reported that a bottle of vodka was found near the helm of the vessel. Petty Officers Sinclair and Firmin, who boarded the Next Chapter, reported that Mr. Gress had admitted consuming the vodka found on that vessel. Upon boarding the Next Chapter, Sgt. Lundin observed an empty 375 ml plastic bottle of vodka. (Ex. DEEP-1; test. E. Lundin, 7/28/15.)
4. Petty Officer Sinclair conducted field sobriety testing on Mr. Gress while Petty Officer Cerasale documented the test. Sixty-five “clues” to indicate that Mr. Gress failed the field sobriety test were observed and documented on a report entitled “Field Sobriety Test Performance Report.” Results of these tests were reported to Sgt. Lundin. (Ex. DEEP-1; test. E. Lundin, 7/28/15.)
5. Officer Lundin transported Mr. Gress to Pilot’s Point Marina in Westbrook and the USCG towed the Next Chapter to the marina. Sgt. Lundin conducted field sobriety tests while Mr. Gress was seated on a bench at the marina. Mr. Gress could not satisfactorily perform the Horizontal Gaze Nystagmus test; despite indicating that he understood he was to follow a pen with only his eyes, but each time Mr. Gress was asked to follow the pen he responded “yes” but “looked straight ahead with a blank glossy look.” Sgt. Lundin next conducted the Palm Pat test. Mr. Gress again failed to satisfactorily complete the test, failing to follow directions, beginning his count too early and performing the required movements out of sequence. Sgt. Lundin then demonstrated the Hand Coordination test to Mr. Gress, who again failed to satisfactorily complete the test. For all three tests, Mr. Gress either failed to perform the test properly or failed to comprehend the instructions given. Sgt. Lundin did not administer the nose to finger test because Mr. Gress had already performed field sobriety tests for the USGC. He characterized skipping this test as “allowable” under the Department’s procedure and not unusual. (Ex. DEEP-1; test. E. Lundin, 7/28/15.)
6. Sgt. Lundin then notified Mr. Gress that he was under arrest. Mr. Gress was handcuffed, placed in a vehicle and transported to the State Police Troop F barracks. Mr. Gress was advised of his Miranda rights and the Implied Consent Advisory was read to Mr. Gress from the BUI report form. Mr. Gress was asked if he would like to contact an attorney, to which he replied in the negative. Mr. Gress refused a breath test twice, the second time witnessed by Officer Logiodice. Mr. Gress signed the BUI 24 Hour License Revocation and a Notice of Rights Form (although he did not comply with

instructions to initial each section of that form). Mr. Gress did not have his Connecticut Safe Boating Certificate so it could not be seized or defaced. Mr. Gress was released on a promise to appear. (Ex. DEEP-1; test. E. Lundin, 7/28/15.)

CONCLUSIONS AND ORDER

To suspend Mr. Gress' safe boating certificate pursuant to General Statutes § 15-140q, I must determine: (1) whether the officer had probable cause to arrest Mr. Gress 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. Gress was placed under arrest; (3) whether Mr. Gress (A) refused to submit to a blood, breath, or urine test or analysis at the request of the peace officer, or (B) submitted to such test or analysis, and the results of such test or analysis indicated that at the time of the alleged offense there was an elevated blood alcohol content; and (4) whether Mr. Gress was operating the vessel. If I find in the affirmative on each of these four questions, I must suspend Mr. Gress' certificate.

It is not disputed that Mr. Gress was placed under arrest. Attorney Sherman also admits that Mr. Gress was operating the vessel Next Chapter, as he was the only person onboard the vessel. It is also not disputed that Mr. Gress refused to submit to a breath test. The only issue in dispute is whether probable cause existed to arrest Mr. Gress.

Counsel for Mr. Gress essentially argues that the initial stop of his vehicle was merely pretext, that he was not operating the Next Chapter illegally and therefore should not have been stopped. Mr. Gress' counsel further argues that the inability to satisfactorily complete the field sobriety tests does not provide probable cause because Mr. Gress may have misunderstood the instructions. Counsel for Mr. Gress further argues that no probable cause exists because there is no evidence of bloodshot eyes or a flushed face. However, the "probable cause to arrest" element in §15-140q does not prescribe the *initial* investigative stop of the vessel. The statutory language of §15-140q narrowly limits the license suspension hearing to the following issues I have previously enumerated: 1) whether the officer had *probable cause to arrest* the operator; 2) whether he was placed under arrest; 3) whether he submitted to a blood alcohol test that showed an elevated blood alcohol content; and 4) he was operating the vessel. The question of whether there were legal grounds for the initial stop is not part of this determination. See *Fishbein v. Kozlowski*, 252 Conn. 38, 48 (1999) (questions as to compliance with procedures by the police do not preclude the suspension of a license when the elements for an administrative decision regarding the suspension of that license have been demonstrated).

The primary purpose of this administrative proceeding, the suspension of a boating certificate, is to promote public safety by removing those operators who have demonstrated disregard for the safety of others. This is distinguished from a criminal proceeding, the primary purpose of which is punishment. Therefore, the subject of such an administrative hearing is not entitled to all of the procedural protections that would be available in a criminal proceeding. *Id.* See also *State v. Hickam*, 235 Conn. 614, 624 (1995), cert. denied, 517 U.S. 1221 (1996) (principal purpose of the statute providing for the suspension of drivers' licenses is to protect the public by removing potentially dangerous drivers from the state's roadways).

The basis of my decision is therefore, whether, subsequent to the stop of the vessel being operated by Mr. Gress, probable cause existed to arrest him for operating that vessel while under the influence of intoxicating liquor or drugs, or both. Probable cause is an objective standard, and comprises such facts as would reasonably persuade an impartial and reasonable mind not merely to suspect or conjecture, but to believe an activity actually occurred. See, e.g., *State v. Spencer*, 268 Conn. 575 (2004).

By the time he was arrested, Mr. Gress had failed to comply with USCG orders to help secure his vessel which had been travelling erratically, had admitted to consuming alcohol, had breath which smelled of alcoholic beverage, and had failed to satisfactorily complete field sobriety tests administered by both the USCG and Sgt. Lundin. These circumstances constitute such facts as would reasonably persuade an impartial and reasonable mind that Mr. Gress was illegally operating his vessel under the influence of alcohol. Therefore, the arresting officer had probable cause to arrest Mr. Gress.

Counsel for Mr. Gress argues that Mr. Gress may have failed to comprehend the instructions given for the field sobriety tests, causing him to be unable to satisfactorily complete the tests. However, Mr. Gress was unable to satisfactorily perform even one of the tests administered even after indicating that he understood the instructions. Had Mr. Gress successfully performed some of the tests, and failed others, it is possible to assign this failure to a simple misunderstanding. This is not the case here. If it is true that Mr. Gress did not understand any of the instructions for any of the tests administered, even when the proper procedure was demonstrated to him, it is reasonable to conclude that Mr. Gress was in an impaired state. My determination need not rest on the failed field sobriety tests alone, but instead must take into consideration the circumstances as a whole. Mr. Gress repeatedly failed to comply with instructions given by the USCG and Sgt. Lundin. Several credible witnesses described an odor of alcohol emanating from Mr. Gress. The Next Chapter's course was dangerously erratic. An empty bottle of vodka was found near where Mr. Gress was seated when operating the vessel. These facts, along with Mr. Gress failure to satisfactorily complete any field sobriety tests, form the basis for a finding of probable cause.

Mr. Gress was operating the vessel in question. He was arrested and there was probable cause for his arrest. Once arrested, he refused an alcohol breath test. Therefore, there is probable cause to suspend the Connecticut Safe Boating Certificate of Michael Gress and it is hereby ORDERED suspended for a period of not more than *six (6) months, effective July 31, 2015 through January 31, 2016*. If it is still in his possession, **Mr. Gress is hereby ordered to surrender his safe boating certificate**, by personal delivery or first class mail, to the Division of Boating, Department of Environmental Protection, 333 Ferry Road, Old Lyme, CT 06371-0280, *within 2 days of receipt of this decision*.

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



Brendan Schain, Hearing Officer

PARTY LIST

Final Decision in the matter of Michael Gress, Ref. #15-003
(Suspension of Safe Boating Certificate)

PARTY

REPRESENTED BY

Michael Gress
2 Stoneridge Rd.
Brewster, NY

Mark Sherman, Esq.
Law Offices of Mark Sherman, LLC
29 Fifth St.
Stamford, CT 06905
mSherman@markshermanlaw.com
(via electronic mail)

Department of Environmental Protection
Division of ENCON Police
333 Ferry Road
Old Lyme, CT 06371
(via electronic mail)

Sgt. Eric Lundin
eric.lundin@ct.gov

DEP Boating Division
333 Ferry Road
Old Lyme, CT 06371
(Via electronic mail)

Timothy Delgado
timothy.delgado@ct.gov